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SECOND SERIES

22 Cal.2d 752

PEOPLE v. BROWN.

Cr. 4486.

Supreme Court of California.

Sept. 15, 1943.

1. Homicide ⇐289

In murder prosecution, where the evidence would support conclusion that homicide within meaning of statute had been perpetrated in an attempt to commit rape, the giving of an instruction defining rape was not error, even though there was no evidence that rape had been committed. Pen.Code, § 189.

2. Criminal law ⇐703

In murder prosecution, where the evidence would support conclusion that the homicide had been perpetrated in an attempt to commit rape, district attorney's reference to a "sex motive" in his opening statement was not error, even though there was no evidence that rape had been committed. Pen.Code, § 189.

3. Criminal law ⇐823(1)

In murder prosecution, giving of an instruction defining rape was not error, where, in another instruction, jury was properly admonished to disregard the rape instruction if it concluded that the homicide was not perpetrated in an attempt to commit rape. Pen.Code, § 189.

4. Criminal law ⇐782(1), 785(1)

An instruction as to the rule in determining weight and credibility of the testimony of witnesses should be stated in general terms, and the jury should be left without suggestion of its application to any particular witness.

5. Criminal law ⇐823(12)

Instruction to consider defendant's position and interest in the case in determining the weight and credibility of his testimony was not reversible error, where the court gave a general instruction applicable to any witness and directed jury to consider defendant's testimony as they would consider that of any other witness.

6. Criminal law ⇐1186(4)

An instruction to consider defendant's interest and position in the case in determining weight and credibility of his testimony was not reversible error, where the court gave a similar instruction applicable to all other witnesses. Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Placer County; A. L. Pierovich, Judge Assigned.

Glennard Brown was convicted of murder and an appeal was automatically taken under Penal Code, § 1239.

Affirmed.

Charles A. Tuttle, of Auburn, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was accused by information of murdering Ada B. Turner in Placer County on September 27, 1942. He entered pleas of not guilty and not guilty by reason of insanity. A jury found against him on both pleas. The verdict on the general issue determined the homicide to be of the first degree and carried no recommendation. This is an automatic appeal from the judgment imposing the death sentence.

The evidence as summarized in defendant's opening brief adequately reveals the circumstances surrounding the homicide.

On September 27, 1942, Mrs. Ada Turner, a widow seventy-eight years of age, was living alone at her home in Colfax, Placer County, California. She was seen that day in her yard by neighbors. She was seen in the rear yard of her home with defendant

on the same day, and defendant was carrying a gun.

The body of Mrs. Turner was discovered in the basement of her home the following morning, and shortly thereafter, county and state peace officers were at the scene. The basement where the killing occurred showed blood on the floor, walls and furniture. There were large smears of blood on the floor indicating that the body of Mrs. Turner had been dragged about. Mrs. Turner's body was practically nude.

Dr. Smith made a post-mortem examination of the body and examined all wounds as well as the vaginal tract. Eight knife wounds were found; also one wound on the face made by a blunt instrument. The blow producing this last wound was of sufficient force to fracture the jaw bone. The cause of death was hemorrhage due to multiple lacerations. There was no evidence of trauma in the vaginal tract; the vagina was dry and there was no evidence of rape.

On October 1, 1942, defendant made a statement to the district attorney and peace officers. In this statement defendant admitted the killing and asserted repeatedly that he did not know why he had done it. The rifle and knife used by defendant in the killing were found by officers at places designated by defendant.

Defendant testified that he drank large quantities of intoxicating liquors the day of the killing; that he was "rumdum" as a result of such drinking; and that he was eighteen years of age at the time of the killing.

There are other circumstances tending to connect defendant with the commission of the homicide but we need not specify them in view of his admission that he committed the crime. Defendant does not challenge the sufficiency of the evidence to support the judgment but contends that two instructions given to the jury were prejudicially erroneous. He first urges that the trial court erred in giving the following instruction: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, where she resists, but her resistance is overcome by force or violence, or where she is prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution. You are further instructed that rape and attempt to commit rape are felonies."

[1, 2] In light of the testimony of the autopsy surgeon, referred to above, that his examination of the aged victim disclosed the vaginal tract to be free of trauma or other evidence of rape, defendant contends that the giving of the foregoing instruction constituted prejudicial error particularly when coupled with the district attorney's opening statement to the jury that in killing the deceased defendant was "actuated by a sex motive." Defendant inquires, "Why should the court give a 'rape' instruction, unless rape is involved in this murder case * * *?" He concludes that "with the giving of that instruction the defendant was thereby deprived of any chance of the jury fixing his sentence at imprisonment for life."

Section 189 of the Penal Code declares that: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; * * *." There is evidence in the record from which the jury reasonably might have inferred for one or more of the reasons designated in the statute that the homicide was of the first degree. We shall, however, confine our discussion to the evidence tending to support the propriety of the instruction here challenged. The battered and lacerated condition of the seventy-eight year old victim, coupled with the evidence of the practically nude state of her body, would support a conclusion that the homicide, within the meaning of the statute, had been perpetrated in an attempt to commit rape, which attempt was frustrated either by the struggle of the victim or other extraneous and deterring circumstance. The absence from the vaginal tract of trauma or other evidence of rape, stressed by defendant, indicates only that a rape was not actually perpetrated. It does not establish that rape was not intended or attempted. Under the entire evidence, the jury reasonably could have concluded that such an attempt had been made. It was not improper, and certainly not prejudicial, therefore, for the district attorney to refer in his opening statement to a "sex motive" or for the court to give the above challenged instruction.

[3] Moreover, the court further charged the jury that: "If any instruction

given you is applicable only in the event a particular situation or state of facts exists, and you should find that no such situation or state of facts exists, then you should disregard such instruction in your deliberations, nor will you consider the giving of any instruction as an indication from the court that an offense may or may not have been committed." By this instruction the jury was properly admonished to disregard the rape instruction if in its deliberation upon the evidence it concluded that the homicide was not perpetrated in an attempt to commit rape.

[4, 5] Defendant's second and final contention is directed at the following instruction: "The defendant has been examined as a witness on his own behalf. This it is his right to be, and the jury will consider his testimony as they will consider that of any other witness examined before you. It is proper, however, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very great interest he must feel in it, and it is proper for the jury to consider whether his position and interest may not affect his credibility and color his testimony, but you are to weigh it fairly and give it such credit as you think it ought to receive."

Defendant cites People v. Maughs, 149 Cal. 253, 262, 263, 86 P. 187, 191, to support his claim that prejudicial error resulted from the giving of this instruction. The instruction involved in the Maughs case differed materially from the one here given. The instruction in the cited case directed the jury's attention to the defendant's interest in the outcome of the trial by stressing "the consequences, inducements and temptations which would ordinarily influence a person in his situation." Nowhere did the Maughs instruction inform the jury, as did the instruction here given, to "consider his [defendant's] testimony as they will consider that of any other witness examined before you" and "to weigh it fairly and give it such credit as you think it ought to receive." In the later case of People v. Ryan, 152 Cal. 364, 369, 92 P. 853, 855, it is declared that an instruction containing language equivalent to that just above quoted from the instruction in this case "is not so objectionable" as the instruction condemned in the Maughs case, adding that "It states to the jury a rule regarding the consideration of the defendant's testimony, which every intelligent man upon the panel would doubtless keep in mind, without being reminded of it by the court, and, aside from the fact that it directs attention particularly to a single witness who is a party to the action, it would be covered by the rule laid down in People v. Wardrip, 141 Cal. [229] 231, 74 P. 744," and other cited cases to the effect that an instruction on a commonplace matter within the general knowledge of the jurors is not reversible error.

In People v. Bartol, 24 Cal.App. 659, 665, 142 P. 510, 513, an instruction was given which, as here, informed the jury that it was proper "to consider whether the *position and interest* of such defendant may not affect her credibility and color her testimony." (Italics ours.) In declining to reverse the judgment because of such instruction, the court there declared that "As sensible men, the jurors would take that circumstance into consideration in weighing the testimony of defendant, and they needed no such admonition from the court. And it is perfectly apparent that they had a legal and moral right to consider 'the position and interest of the defendant' in determining her credibility. That is one of the tests that must be applied to all witnesses. And, of course, without any intimation from the court, the jury understood the 'position' of defendant and knew her 'interest' in the outcome of the case. The vice of the instruction is, though manifestly, in calling particular attention to the testimony of the defendant. The danger of such practice lies in the possibility that the jury may infer that the judge of the court intends to discredit the testimony of the defendant. The principle covered by the instruction should be given in general terms, and the jury should be left entirely without suggestion of its application to any particular witness. * * * It is to be observed that the instruction here is much less objectionable than the one considered in the Maughs case. There the court referred to the 'inducements, consequences, and temptations' of the defendant. Here it is more nearly a mere commonplace, the 'position and interest' of the defendant." This court denied a hearing in the Bartol case. See, also, People v. Will, 79 Cal.App. 101, 116, 248 P. 1078.

The vice of the instruction here given is in calling particular attention to the testimony of the defendant. The rule covered by the instruction should be stated in general terms and the jury should be left without suggestion of its application to any particular witness. People v. Bartol, supra, 24 Cal.App. 665, 142 P. 510; see also, Nichols v. Pacific Electric R. Co., 178 Cal. 630, 632, 174 P. 319; Juchert v. Tenent, 126 Cal.App. 216, 217, 14 P.2d 617; Houghton v. Pickwick Stages, 87 Cal.App. 669, 674–677, 262 P. 770. In the present case the trial court did give such a general instruction, charging the jury that: "In determining the credibility of any witness * * * you may also consider * * * their interest or absence of interest in connection with the results of the issues before you; * * *."

[6] The Bartol case further distinguishes the Maughs case, relied on by defendant, by pointing out that it was decided prior to the adoption of section 4½ of article VI of the Constitution. Under this section "No judgment shall be set aside * * * on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." We cannot say that a miscarriage of justice resulted in this case from that portion of the challenged instruction which singled out defendant's testimony. The record contains substantial evidence tending to connect defendant with the homicide. As stated above, on the day of the homicide the deceased was seen in the rear yard of her home with defendant, who was carrying a rifle. Upon his subsequent arrest defendant directed officers to the places where he had concealed the rifle and knife used in the homicidal assault. Defendant admitted that he had perpetrated the crime and it is not claimed the confession was improperly obtained. In addition to the instruction now under consideration the trial court correctly directed the jury on the principle announced in the challenged instruction. The jury also was instructed that it was the exclusive trier of the facts. Under the evidence and the charge as a whole, prejudicial error did not result from the improper reference in a single instruction to defendant's "position and interest" in the case.

The judgment is affirmed.

60 Cal.App.2d 546

McCARTHY v. CITY OF OAKLAND et al.

Civ. 12480.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1943.

Hearing Denied Nov. 22, 1943.

1. Constitutional law ⇐70(3)

Though public policy is sometimes declared by judicial decisions, specific provisions relative to pension rights enacted by a legislative body having jurisdiction over such rights establishes the "public policy" with respect thereto, so that courts may not interfere.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Constitutional law ⇐102(2)

Though a pension law may be repealed or modified, when one becomes eligible to be and is in fact placed on a pension roll, a vested right accrues of which pensioner may not be deprived.

3. Officers ⇐94

The vested right of a pensioner who is eligible to be and has been placed on a pension roll is not to a specific sum, but pension may be increased or decreased in accordance with rank of pensioner at time of retirement.

4. Constitutional law ⇐190

An amendment to a pension law may be retroactive if the intent that it should so operate is clear.

5. Municipal corporations ⇐176(3)

Amendment of city charter so as to provide for forfeiture of right to police pension upon being convicted of a felony was not retroactive so as to affect pension rights of previously deceased police officer's widow whose name had already been placed on pension roll. St.1911, p. 1610, § 96(3).

6. Municipal corporations ⇐176(3)

Deceased police officer's widow whose name was placed on pension roll when city charter provided for forfeiture of pension rights only by a member of police department receiving a pension upon being convicted of a felony, could not be deprived of pension on account of subsequent conviction of a felony and amendment of city charter so as to provide for forfeiture by

any person receiving a pension upon such conviction. St.1911, p. 1610, § 96(3).

7. Pensions ⇐1

Pension laws should be liberally construed in favor of pensioner.

8. Mandamus ⇐15

Though "clean hands" doctrine may be invoked in a mandamus proceeding, it is not applicable unless the alleged wrongdoing of the party seeking relief is connected with the matter before the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

9. Mandamus ⇐15

Where commission of felonies of which pensioner was convicted had no connection with previous award of police pension when the right thereto accrued, "clean hands" doctrine was not applicable to defeat pensioner's suit for writ of mandate to compel resumption of pension payments which were discontinued because of such felony convictions. St.1911, p. 1610, § 96(3).

10. Equity ⇐65(2)

"Clean hands" doctrine has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the person seeking relief and does not warrant denial of relief because of general iniquitous conduct of complainant.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit by Juanita McCarthy against the City of Oakland, a municipal corporation, and others for a writ of mandate commanding the Board of Trustees of the Police Relief and Pension Fund of the city to resume payment of a pension to plaintiff and continue such payment during plaintiff's natural life. Judgment for plaintiff, and defendants appeal.

Judgment affirmed.

F. B. Fernhoff, City Atty., and John W. Collier, Ass't City Atty., both of Oakland, for appellants.

Joseph A. Brown, Alexander Mooslin, and A. E. Cross, all of San Francisco, for respondent.

WARD, Justice.

The plaintiff, Juanita McCarthy, brought this suit against the City of Oakland and the Board of Trustees of the Police Relief and Pension Fund of that city, seeking the issuance of a writ of mandate commanding and requiring the board to resume payment to her of a pension which theretofore had been paid for a certain period but had been discontinued, and directing its payment during her natural life. The trial court gave judgment in her favor, and the defendants have appealed.

One J. F. McCarthy, a member of the police department of the City of Oakland for some years, was killed in the performance of his duty, whereupon Juanita McCarthy, his widow, in accordance with the provisions of the Oakland charter, was granted a pension of $75 a month, one-half of the salary attached to decedent's rank, to be paid her as long as she remained a widow. It is admitted that she has not remarried. A subsequent increase in the salary of patrolman raised the pension to the sum of $100 a month. At the time of the death of respondent's husband and for some time prior thereto he had been assessed or had contributed to the pension fund.

On January 12, 1940, plaintiff was convicted of three felonies, viz., conspiracy to commit burglary and theft, burglary of the first degree and burglary of the second degree, and sentenced to imprisonment. Upon appeal the conviction was upheld. People v. McCarthy, 45 Cal.App.2d 278, 114 P.2d 24.

Prior to the filing of this action consent was obtained therefor. Penal Code, sec. 2600. At the time of her conviction, and also when this action was commenced, namely, on June 25, 1940, the city charter contained a provision to the effect that "Any member of the police department receiving a pension from the police relief and pension fund, who shall become convicted of a felony * * * shall forfeit all right to said pension." Stats.1911, p. 1610. Subsequent to plaintiff's conviction the board, on December 22, 1940, passed a resolution reciting the conviction and striking Juanita McCarthy's name from the pension roll, since which time accordingly no further payments have been made to her. In 1941 the section of the charter containing the above-quoted provision was amended by substituting the words "Any person" for "Any member of the police department." Stats.1941, p. 3399; sec. 96, subd. (3) of the charter.

The appellants in their attack upon the judgment make two contentions, namely, that the payment of a pension to respondent in the present situation would be contrary to public policy; and, second, that the respondent, seeking the equitable relief of a writ of mandate, has not come into court with clean hands.

Against these contentions the respondent urges (1) that her right to a pension is predicated upon contract and that such right has become vested; (2) that the requirement of equity that a petitioner for relief must come into court with clean hands has no application to this case since the criminal acts set up by the appellants as a bar to granting the relief sought had no connection with the facts and circumstances which constitute the foundation of her right to be paid the pension.

The payment of pensions to "those dependent and near and dear to police officers, is intended to provide a reward for long, courageous, and faithful performance of duty." Mott v. Scanlan, 19 Cal.App. 250, 125 P. 762, 763. Had petitioner, a felon in a state penitentiary, been a member of the police department, the courts must, under the present charter provision, have held that she had forfeited her right to a reward for the faithful performance of duty and denied her right to a pension. As to a widow the charter provisions must also prevail.

[1] Public policy is sometimes declared by judicial decision, but where a legislative body having jurisdiction over pension rights has enacted specific provisions on the subject, the public policy on that subject is established thereby. Even in such a case as the present, if the controlling rule operates unjustly the remedy lies with such legislative authority. Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973. Whatever the courts may think about the matter from the standpoint of policy they are powerless to interfere.

[2-4] A pension law may be repealed, changed or modified. All jurisdictions are in accord with this rule, but California with a small minority adheres definitely to the doctrine that when one becomes eligible to be, and is in fact, placed on a pension roll, a vested right accrues of which the pensioner may not be deprived. Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 249 P. 46. In later cases the happening of "the contingency" which causes the vesting is emphasized, and it has been determined that the vested right is not to a specific sum but that the pension may be increased or decreased in accordance with the rank of the pensioner at the time of retirement. Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956; Carr v. Fire Commission, 30 Cal.App.2d 208, 85 P.2d 959; Jordan v. Retirement Board, supra; Murphy v. City of Piedmont, 17 Cal.App.2d 569, 62 P.2d 614, 64 P.2d 399; Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237. In Whitehead v. Davie, 189 Cal. 715, 209 P. 1008, it was held that an amendment to a pension law may be retroactive if the intent to this effect be clear. The Whitehead case was approved in Sweesy v. Los Angeles, etc., Retirement Bd., 17 Cal.2d 356, 110 P.2d 37.

Many of the pension laws in this state are based primarily upon the rule that rewards will be given for the faithful performance of future services, but pensions are granted also for duties already performed. That they are in the nature of a gratuity is recognized in Lamb v. Board of County Peace Officers, etc., 29 Cal.App.2d 348, 84 P.2d 183. However, in the Sweesy case, supra, 17 Cal.2d at page 363, 110 P.2d at page 40, in referring to the Lamb case, the court said: "In that case there was no applicable pension system in existence at the time the officer was retired for disability resulting from performance of duty. The answer to the question whether a pensionable status may be created retroactively to include persons who had already been retired may not afford a guide in resolving the question whether an amendment to the pension law may afford additional benefits by way of a widow's pension to members who already had acquired a retired pensionable status under the law. It does not follow that because the pension would be a gratuity in the one case, it also is in the other."

If the majority rule in other jurisdictions —that a pension is a gratuity—could be followed under the facts herein, some color would be given appellants' contention that a continuation of the pension payments to respondent is against public policy. At least it could be held that the amendment to the charter, providing that a pension cease whenever "any person" receiving the benefit thereof is convicted of a felony, was operative from the date of the approval of the amendment. In Gibbs v. Minneapolis Fire Dept. Relief Ass'n, 125 Minn. 174, 145

N.W. 1075, Ann.Cas.1915C, 749, a case approved almost universally in other jurisdictions, the pension law was amended in effect so as to exclude a widow who had deserted her husband, etc. In that case the widow was not dependent on the husband during the latter part of his life but conducted a house of ill fame. Approving the rule that a pension is a gratuity, the court there held that a pension payment already accrued can not be taken away but that, as against the state, there is no vested right accruing from month to month in the future. The Gibbs case, however, was specifically disapproved in Klench v. Board of Pension Fund Com'rs, supra, 79 Cal.App. at page 184, 249 P. at page 50. Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 59 P.2d 104.

[5, 6] In the present case, the charter provision, Stats.1911, p. 1610, directing that a pension right be forfeited if a "member" of the department shall become convicted of a felony, prevails. The language used in the amendment of 1941, Stats.1941, p. 3399, providing that "any person" receiving a pension, who shall become convicted of a felony, shall forfeit all rights to such pension, is not retroactive (Clarke v. Police Life, etc., Ins. Board, 127 Cal. 550, 59 P. 994; Kavanagh v. Board of Police P. F. Com'rs, 134 Cal. 50, 66 P. 36; Holmberg v. City of Oakland, 55 Cal.App. 270, 203 P. 167; O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Jordan v. Retirement Board, supra), and therefore of no avail to appellant city. Likewise the contention that this particular pension should be controlled by a previous act of the legislature, Stats.1889, p. 56, is without merit.

[7] In Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800, a proceeding in mandamus by a widow to compel the payment to her of a pension, the court held that her cause of action accrued at the time of the death of her husband, and that the widow's right to receive a pension is a continuing one. In Dryden v. Board of Pension Com'rs, supra, it was stated that a pension right becomes vested in a "member" upon acceptance of employment, and in a widow upon the death of her husband. Whatever has been said in the numerous decisions in this state, a liberal construction in favor of the pensioner should be given. McKeag v. Board of Pension Com'rs, 21 Cal.2d 386, 132 P.2d 198. It must be held by an intermediate reviewing court that although a pensioner has no right to a specific sum, which may be changed, whatever rights exist are vested, subject to specified contingencies. Klench v. Board of Pension Fund Com'rs, supra; O'Dea v. Cook, supra; Jordan v. Retirement Board, supra; Sweesy v. Los Angeles, etc., Retirement Bd., supra; Brooks v. Pension Bd., supra; Casserly v. City of Oakland, supra; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464; Dryden v. Board of Pension Com'rs, supra. At the time the right of respondent to the pension accrued, there was no contingency for forfeiture upon conviction of a felony.

[8-10] The clean hands doctrine may be invoked in a mandamus proceeding. Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513. It is true that the present litigation arose as a result of the refusal to continue monthly pension payments because of the recipient's commission of felonies. However, the rule does not apply if the wrongdoing is unconnected with the matter before the court. The commission of the felonies herein had no connection with the award of the pension when the right thereto accrued, subject to specified contingencies. "The maxim that he who comes into a court of equity must do so with clean hands has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the person seeking relief." Western U. Tel. Co. v. Commercial Pac. C. Co., 177 Cal. 577, 585, 171 P. 317, 320; City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 48 P.2d 87. Relief is not to be denied because of general iniquitous conduct on the part of a complainant. 19 Am.Jur., p. 327, sec. 473; Miller & Lux v. Enterprise, etc., Co., 142 Cal. 208, 209, 213, 75 P. 770, 100 Am.St.Rep. 115.

In view of the foregoing, it is not necessary to consider Penal Code, sections 2600, 2601, and 2604, as applied to respondent's present status as a felon.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 560

DI GIORGIO FRUIT CORPORATION v. ZACHARY et al.

Civ. 12516.

District Court of Appeal, First District. Division 2, California.

Sept. 24, 1943.

1. Sales ⇐2
Venue ⇐7

Where order for wine under its express terms did not become a binding contract until signing and mailing of letter of acceptance, and mailing occurred in San Francisco, the contract was entered into in that city and county, and that city and county was proper place for bringing action for breach of the contract. Code Civ. Proc. § 395(1).

2. Evidence ⇐413

Defendants could not by oral testimony contradict express provision of written order for wine making it subject to acceptance by seller at its San Francisco office.

3. Venue ⇐52(1)

In considering a motion for change of place of trial on ground of convenience of witnesses, the court may not consider convenience of the parties nor of parties' employees.

4. Appeal and error ⇐965

In reviewing an order denying a motion for change of place of trial on ground of convenience of witnesses, the appellate court can only reverse the order upon a clear showing of abuse of discretion.

5. Venue ⇐52(1)

On motion for change of place of trial on ground of convenience of witnesses, a mere preponderance in number of witnesses which either party expects to produce will not necessarily determine the order to be made.

6. Venue ⇐52(3)

Generally, experts are excluded from consideration in passing on a motion for change of place of trial on ground of convenience of witnesses, except when they have personal knowledge of facts on which their testimony will be based.

7. Venue ⇐52(4)

Trial court did not abuse its discretion in refusing defendants' motion for change of place of trial from the City and County of San Francisco to the County of Los Angeles on ground of convenience of witnesses, in view of character and importance of evidence to be given by witnesses on either side whose convenience was properly to be considered.

Appeal from Superior Court, San Francisco County; Edward P. Murphy, Judge.

Action by Di Giorgio Fruit Corporation against Irving Zachary and others for purchase price of certain wines sold and delivered by plaintiff's predecessor under two separate contracts in writing, wherein the defendants filed a counterclaim. From an order denying defendants' motion for change of place of trial from the City and County of San Francisco to the County of Los Angeles, the defendants appeal.

Affirmed.

Lindelof & Perelli-Minetti, of Los Angeles, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This appeal is prosecuted from an order denying defendants' motion for change of place of trial from the City and County of San Francisco to the County of Los Angeles.

The complaint seeks recovery for the purchase price of certain wine sold and delivered by plaintiff's predecessor, Earl Fruit Company, under two separate contracts in writing. One of said contracts was admittedly entered into in San Francisco. The other contract was negotiated by one Tucker, a salesman for plaintiff's predecessor, in Los Angeles County and an order was signed there by Tucker designated as "salesman" and by Irving Zachary representing defendants. It was on a printed form containing the provision: "This order is subject to approval and acceptance of the office of Earl Fruit Co., at San Francisco, Calif."

Pursuant to this provision a letter of acceptance of the order by Earl Fruit Company was mailed in San Francisco addressed to defendants on April 18, 1941.

[1] Under the express terms of the writing above quoted it did not become a binding contract until the signing and

mailing of the letter of acceptance, and the mailing having occurred in San Francisco the contract was entered into in that City and County. Parker Co., Inc., v. Exeter Refining Co., 26 Cal.App.2d 610, 79 P.2d 1114. The county in which the contract "in fact was entered into" was a proper place for trial under sec. 395, subd. 1, Code Civ.Proc. Limited Mut. Compensation Ins. Co. v. Curtis, 45 Cal.App.2d 507, 114 P.2d 404; Pacific Const. Finance Co. v. Kramer, 42 Cal.App.2d 190, 108 P.2d 723.

[2] Defendants claim to have shown by affidavit that the contract was actually intended to be complete when signed by Tucker and Zachary in Los Angeles County. They cannot by oral testimony thus contradict the express provision of the writing making it subject to acceptance by the seller at its San Francisco office. 10 Cal.Jur. 916; Barrios & Co., Inc., v. J. R. Garrett Co., 72 Cal.App. 786, 796, 238 P. 155.

[3] Defendants filed an answer and counterclaim based on allegations that the wine delivered was unstable and that it spoiled after bottling by them, and further that there had been a later compromise agreement entered into with one Martini as manager of plaintiff. Defendants stated as one ground for change of place of trial convenience of witnesses and supported the motion on this ground by an affidavit setting out the names of nineteen witnesses. Of those so named two were the defendants, at least eight the court was entitled to find were defendants' employees, and one named as John Doe was obviously fictitious. In considering a motion for change of place of trial on the ground of convenience of witnesses the court may not consider the convenience of the parties (Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991) nor of the parties' employees. Security Inv. Co. v. Gifford, 179 Cal. 277, 176 P.2d 444; Wood v. Silvers, 35 Cal.App.2d 604, 96 P. 2d 366, 97 P.2d 265.

Excluding the parties, their employees and the John Doe, the other eight witnesses and the facts to which it was deposed that they would testify were as follows: Two wine distributors who were present at the alleged settlement with Martini and would testify to the settlement; a former bookkeeper of plaintiffs who would testify to a statement by Martini acknowledging the fact of settlement; an investigator of the Department of Health of Los Angeles who examined some of the alleged spoiled wine and investigated complaints; and four wine merchants who would testify to the instability of the wine in their markets, the effect on their customers, and the frequency of occurrences of this type with defendants' wines both before and after this trouble.

In opposition plaintiff by affidavit set out the names of four witnesses on whom it would rely, namely: Martini, the manager with whom the settlement was alleged to have been made, "who left plaintiff's employ on December 31, 1942"; a wine chemist who analyzed samples of the wines shipped by plaintiff to defendants; and two liquor dealers, who will testify that Kosher wines purchased from defendants in 1942 turned cloudy and deposited sediment in the bottles.

[4-6] In reviewing an order denying a motion for change of place of trial on the ground of convenience of witnesses the appellate court can only reverse the order upon a clear showing of abuse of discretion (Wrin v. Ohlandt, supra, 213 Cal. 158, 1 P. 2d 991; Ayres v. Wright, 205 Cal. 201, 270 P. 453; 25 Cal.Jur. 884, 885) and "a mere preponderance in the number of witnesses which either party expects to produce will not necessarily determine the order to be made". 25 Cal.Jur. 885, 886; Scott v. Stuart, 190 Cal. 526, 529, 213 P. 947; Willingham v. Pecora, 44 Cal.App.2d 289, 112 P.2d 328. Martini, although a former employee of plaintiff, is entitled to consideration as is the former bookkeeper of defendants (Pacific States Corp. v. Shepardson, 105 Cal.App. 747, 751, 288 P. 714) and while experts are generally excluded from consideration this is not true when they have personal knowledge of the facts on which their testimony will be based. 25 Cal.Jur. 886; Pacific States Corp. v. Shepardson, supra, 105 Cal.App. 747, 288 P. 714; Security Investment Co. v. Gifford, supra, 179 Cal. 277, 176 P.2d 444.

We thus have on the plaintiff's side Martini, who is the only witness for plaintiff who can testify that the claimed settlement was not made with him, and the chemist, who is the only one who can testify for plaintiff to the results of chemical analyses of samples of the wine sold to defendants and which is alleged by defendants to have been "sick and unstable", together with two other witnesses whose testimony of the spoilage of other wines bought by them from defendants in 1942

would certainly be material to rebut the testimony of defendants' four wine merchants who would testify "to the frequency of occurrences of this type with defendants' wines both before and after this trouble".

On the defendants' side the two wine distributors who were present at the alleged settlement with Martini and the former bookkeeper would only give evidence of the settlement corroborative of the testimony on that subject of defendant Irving Zachary; and the four wine merchants would give testimony largely corroborative of that of defendants and their employees. The only one of these witnesses for defendants whose testimony might not be considered mainly cumulative is the Los Angeles Health Department investigator.

[7] In view of the character and importance of the evidence to be given by the witnesses on either side whose convenience is properly to be considered we cannot say that the trial court abused its sound discretion in denying the motion.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.



60 Cal.App.2d 508

SMITH et al. v. WESTERN CASUALTY & SURETY CO.

Civ. 12435.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1943.

1. Automobiles ⇐19

Under statute relating to transfer of title to a motor vehicle, upon delivery of an automobile and the indorsed certificate, title passes to the transferee so as to divest the transferor of his ownership and he is not subject to civil liability for operation of such vehicle thereafter by another. Vehicle Code, §§ 178, 186, St. 1935, pp. 115, 118.

2. Automobiles ⇐19

Under statute relating to transfer of title to a motor vehicle, upon delivery of an automobile and the indorsed certificate, the transferee becomes the owner for the purposes of fixing liability for operation of the automobile by another with owner's consent and the transferor ceases to be the owner for that purpose. Vehicle Code, §§ 178, 186, 402, St.1935, pp. 115, 118, 153.

3. Insurance ⇐328(2)

Where probate court confirmed administrator's sale of automobile and properly indorsed certificate of ownership was delivered to transferee, who left certificate at highway patrol office for issuance of a new certificate to her, automobile had been "sold, transferred and assigned" to transferee within automobile liability policy providing that where automobile is sold, transferred, or assigned, policy shall not inure to transferee except by insurer's consent indorsed thereon, notwithstanding that certificate of ownership had not been issued to transferee. Vehicle Code, §§ 178, 186, St.1935, pp. 115, 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Sell, Transfer or Assign".

4. Insurance ⇐328(1)

"Additional assureds" clause of automobile liability policy was not a "rider", but was an integral provision of policy and did not modify condition that where covered automobile is sold, transferred, or assigned, policy shall not inure to benefit of transferee, except by insurer's indorsed consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Rider".

5. Insurance ⇐328(1)

Where transferee of automobile was excluded from coverage of automobile liability policy by express terms of "additional assureds" clause, coverage of policy was not extended to transferee on ground that such transferee before sale of automobile to her had use thereof with named insured's permission, and that transfer of automobile did not constitute a material breach of policy condition that, where automobile is sold, transferred or assigned, policy should not inure to benefit of transferee except by indorsed consent of insurer.

6. Trial ⇐89

In action on automobile liability policy, portion of testimony of insurance bro-

ker that his duties were those of a recording agent "with power to bind the company" was properly stricken as a "conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

7. Insurance ⇐76

In action on automobile liability policy where record showed no foundation of authority in insurer's alleged agent to bind insurer by claimed representations, trial judge properly refused to permit plaintiff to prove an estoppel by agent's statements.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Zella Smith and others against the Western Casualty & Surety Company on an automobile liability policy. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Gumpert & Mazzera, Emil Gumpert, Harry Mazzera, J. Calvert Snyder, Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip Cavalero, Stephen Dietrich, and Richard W. Dickenson, all of Stockton, for appellants.

Neumiller & Ditz, of Stockton (C. H. Hogan, of Stockton, of counsel), for respondent.

DOOLING, Justice pro tem.

Plaintiffs appeal from a judgment in favor of defendant in an action to recover upon a policy issued by defendant to Bank of America National Trust and Savings Association (hereinafter called the bank) as administrator of the estate of J. E. Funk, deceased, and insuring against liability for damages from the operation of certain automobiles belonging to said estate. The policy was issued on July 27, 1935. Among the automobiles covered by this policy was a De Soto sedan. After proceedings regularly had the probate court on December 26, 1935, made an order confirming the sale of this De Soto sedan to Mrs. J. E. Funk, and pursuant to this order in January, 1936, the certificate of ownership of the sedan properly endorsed was delivered to Mrs. Funk. Mrs. Funk left this certificate at the office of the California Highway Patrol in San Andreas to be forwarded to the office of the Motor Vehicle Department for the issuance of a new certificate to her some time in January, 1936, but for some reason the certificate was not received in the Sacramento office until June 5, 1936, and a certificate of ownership was not issued to Mrs. Funk until June 16, 1936. In the meantime and on May 10, 1936, the automobile, while operated by one Dan Morotti with the consent of Mrs. Funk, collided with another automobile causing the injuries to plaintiffs herein and plaintiffs thereafter recovered judgment for damages against Morotti and Mrs. Funk by reason of such injuries. Plaintiffs then brought the present action upon the policy of insurance above mentioned.

The policy contained, among others, the following provisions:

"(J) In the event any automobile covered hereunder is sold, transferred or assigned, this Policy shall not inure to the benefit of the purchaser, transferee or assignee, except by the consent of the Company endorsed hereon; and no assignment of interest hereunder shall bind the Company, unless the consent of the Company shall be endorsed hereon."

"Additional Assureds

"The insurance provided by this Policy shall be available, in the same manner and under the same conditions as it is available to the named assured, to any person operating, and/or any other person, while riding in, and/or to any other person, firm or corporation legally responsible for the operation, of any of the automobiles described in the Schedule of Statements, provided such use or operation is lawful and with the permission of the named Assured, * * * provided that (a) no person, firm or corporation to whom the automobile described herein has been sold, transferred, or assigned by the named Assured, shall be entitled to recover hereunder, unless this Policy is transferred or assigned in accordance with Condition J. hereof * * *."

The trial court found that at the time of the injuries to plaintiffs the De Soto sedan had been sold, transferred or assigned to Mrs. Funk within the meaning of the quoted provisions of the policy, and since no consent thereto had been endorsed upon the policy by defendant the injuries to plaintiffs were not covered by the policy.

The correctness of this conclusion depends on the proper construction of the quoted policy provisions in view of the language of sections 178 and 186 of the Vehicle Code, St.1935, pp. 115, 118, reading:

"178. Whether notice of a transfer be given or not as hereinbefore required an owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser and has made proper endorsement and delivery of the certificate of ownership as provided in this code shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another."

"186. No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a transfer and except as provided in sections 178 and 180 hereof and in Chapter 3 of this division."

[1] It is appellants' primary contention that under the broad language of sec. 186 there could be no "sale, assignment or transfer" to Mrs. Funk, as contemplated by condition J of the policy until June 16, 1936, the date that a certificate of ownership was issued to her. This might be true were the all inclusive language of the first part of sec. 186 not substantially qualified by the later exceptions. The language "except as provided in section(s) 178" so modifies the preceding language of sec. 186 that its effect is that upon delivery of the automobile and the endorsed certificate the title does pass to the transferee so as to make the transferee the owner, and to divest the transferor of his ownership (to quote the language of sec. 178), "so as to be subject to civil liability for the operation of such vehicle thereafter by another."

[2] Upon such delivery the transferee becomes the owner for the purpose of fixing liability for the operation of the car by another under sec. 402, Vehicle Code, St.1935, p. 153 (Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 135 P.2d 569), and the transferor ceases to be owner for that purpose. Piacun v. Hexem, 18 Cal.App. 2d 145, 63 P.2d 315.

[3] Under the express terms of the policy the bank (administrator) as owner was the primary assured. We see no escape from the conclusion that when the bank as owner was no longer liable for the operation of the automobile, by reason of the probate sale and delivery of the automobile and the endorsed certificate to Mrs. Funk, the automobile had been "sold, transferred or assigned" to Mrs. Funk within the intent of condition J of the Policy.

[4] Appellants rely strongly upon Votaw v. Farmers A. Inter-Ins. Exchange, 15 Cal.2d 24, 97 P.2d 958, 126 A.L.R. 538. This case is not in point. It was there held that a rider attached to the policy had the effect of modifying a provision contained in the policy itself. In our case the "additional assureds" clause, under which appellants seek to recover, was not contained in a rider, but was one of the integral provisions of the printed policy; and the "additional assureds" clause contained within itself the language hereinabove quoted: "provided that (a) no person, firm or corporation to whom the automobile described herein has been sold, transferred or assigned by the named Assured, shall be entitled to recover hereunder, unless this Policy is transferred or assigned in accordance with Condition J hereof."

The language of the policy in this case expressly negatives a construction holding that condition J was in any respect modified by the "additional assureds" clause.

In Sly v. American Indemnity Co., 127 Cal.App. 202, 15 P.2d 522, also relied upon by appellants, the primary assured was held liable for damages by reason of ownership of the automobile, and the court held that the policy covered him although he had transferred an equitable interest to another. The accident giving rise to the liability occurred on February 9, 1930, and no new certificate had been issued to the transferee. At that time sec. 45(e) of the Motor Vehicle Act St.1929, p. 514, read: "Until said division shall have issued said new certificate of registration and certificate of ownership * * * delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said in-

tended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

This section was sweeping and all inclusive and, unlike sec. 186, Vehicle Code, contained no exceptions. It was not until 1931 that sec. 45¾ of the Motor Vehicle Act was first enacted to provide Stats.1931, p. 2105: "provided, however, that in the event said notice be given or in the event of failure to give said notice, an owner who has made a bona fide sale or transfer of such motor vehicle and delivered possession thereof to a purchaser and who has made proper endorsement and delivery of the certificate of ownership as provided in this act, shall not by reason of any of the provisions of this act be deemed the owner of such motor vehicle so as to be subject to liability under the provisions of section 1714¼ of the Civil Code of this state."

By reason of the difference in the controlling statutory provisions the Sly case cannot be authority for the proper construction of sec. 186 Vehicle Code as applied to a policy containing the provisions against transfer of ownership involved in this case.

Appellants rely on the Sly case for another argument, that since Mrs. Funk before the probate sale to her had the full use of the De Soto sedan with the permission of the bank, the subsequent sale and transfer to her did not increase the risk and therefore did not constitute a material breach of condition J of the policy.

[5] In the Sly case the question, as already pointed out, was whether the named assured, who remained liable for the hazard insured against, lost his rights under the policy by the alleged breach of condition. In the case before us the question is quite different, whether persons not named in the policy are covered by the "additional assureds" clause, when those persons are excluded from coverage by the express terms of the clause relied upon. The coverage cannot thus be extended to persons expressly excluded from coverage by the terms of the policy itself.

Finally appellants complain of the refusal of the trial judge to permit them to prove an estoppel by the statement of one Ahearn, the broker who sold the policy, that Mrs. Funk was covered after the sale without compliance with condition J of the policy. The record shows that after an offer of proof on this subject the trial court said:

"You would have to show the agent's authority even if that were admissible at all."

Counsel for appellants elicited the following answer from Ahearn on this subject: "My duties as agent for the Western Fire Insurance Company and the Western Casualty and Surety Company are those of recording agent, with power to bind the company."

[6, 7] The words "with power to bind the company" were stricken on motion of counsel for respondent as the conclusion of the witness. This action of the trial court was clearly proper. The record shows no foundation of authority in the agent to bind the company by the claimed representations.

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concur.



60 Cal.App.2d 441

SOEST v. BALSINGER.

Civ. 13978.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1943.

Rehearing Denied Oct. 4, 1943.

Hearing Denied Nov. 8, 1943.

1. Physicians and surgeons ⇐18(8)

In malpractice action, expert evidence necessary to overcome presumption that physician or surgeon exercised ordinary skill and care required in treating patient need not necessarily be derived from plaintiff's experts if it can be found in testimony of surgeon's experts.

2. Physicians and surgeons ⇐18(8)

Evidence of medical experts was sufficient to authorize jury's inference that surgeon, in performing operation on plaintiff's nose, did not use the degree of care and skill exercised by doctors in same locality, and sustained judgment for plaintiff.

3. Physicians and surgeons ⇐18(8)

In malpractice action, testimony that nurse who assisted at first operation was charged by surgeon with failure to sterilize instruments he used, and that surgeon performed second operation at time when plaintiff's nose presented a dirty field of infection, authorized verdict and judgment for plaintiff.

4. Physicians and surgeons ⇐18(8)

Where results of negligence on part of physician or dentist are peculiarly within knowledge of experts, testimony of experts is necessary element of plaintiff's case.

5. Evidence ⇐20(1)
Physicians and surgeons ⇐18(9)

The danger of infection from an unsterile instrument or a dirty field of operation is a matter of such common knowledge that a jury is authorized to draw inference that an infection was caused by negligence if an unsterile instrument was used or the operative field was not properly sterilized.

6. Physicians and surgeons ⇐18(9)

In malpractice action, against surgeon arising out of operation on plaintiff's nose which became infected, conflicting evidence as to whether there was a lack of due care on part of surgeon which was proximate cause of infection resulting in preparation of the septum of plaintiff's nose was for jury.

7. Physicians and surgeons ⇐18(8)

In malpractice action, it is not necessary to demonstrate conclusively that negligence of physician resulted in injury to patient, but substantial evidence which reasonably supports judgment for patient is sufficient.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Action by Grace Soest against Dr. W. E. Balsinger to recover for defendant's alleged malpractice. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Boyd Barrington, of Santa Monica, and George N. Foster and Chas. L. Nichols, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent Soest brought the instant action in malpractice to recover damages from appellant, a physician and surgeon, for alleged disfigurement and permanent deformity resulting from operations performed by him on respondent's nose.

This appeal is prosecuted from the judgment for $5,000 which was entered pursuant to the verdict of the jury, as well as from an order denying appellant's motion for a new trial.

The record herein discloses that respondent had for some time suffered from severe headaches and had difficulty in breathing, and that two doctors had advised her that she needed a submucous resection of the nose in order to relieve such trouble. On May 28, 1940, she consulted appellant regarding her condition and after examining her nose by pinching it on the bridge, probing it with a letter opener and looking into it, appellant told her that her "septum was as crooked as a letter S"; whereupon plans were made for an operation to be performed by appellant on May 30, 1940, in his office. At this time appellant urged respondent to permit him to remove a scar on her forehead and also to reshape her nose by removing the hump, but respondent expressed her disapproval and declined to have such work done.

Without making any further examination, appellant operated on respondent's nose on May 30, 1940, first applying a local anesthetic through needles introduced into the nose, and in addition to the so-called submucous resection, he removed the hump on respondent's nose and the scar on her forehead. The nose was securely packed with gauze to prevent bleeding and to ward off any infection from the outside, and respondent returned to appellant's office daily for a check-up. After about a week had elapsed, the packing was removed and it was found that the nose had become infected. During this time respondent suffered from sore-throat, swollen lymph glands and severe throbbing pains; her nose was swollen and tightly closed, and her eyes were swollen shut. To relieve this condition, appellant incised both nostrils which resulted in a discharge of pus from the nose.

From the day of the operation on May 30 until the middle of August, 1940, respondent followed appellant's instructions in the care of her nose and reported to him frequently for check-ups. On August 19th, appellant performed a second operation on respondent's nose, which was then completely closed. This second operation involved the taking of sixteen stitches in the

nose and thereafter it was necessary for respondent to insert a rubber tubing in order to keep the nose open. Within a few days after this second operation, respondent was cleaning her nose at home, as instructed by appellant, and discovered a hole in the septum. Three such holes developed, over which incrustations formed, making it impossible for respondent to keep her nose either open or clean. Shortly after the second operation, appellant left for Chicago, and upon his return to Los Angeles on October 6, 1940, respondent complained to him of the holes in the septum, the misshaped rims of the nostrils and other ill-effects of the operations. Appellant then for the first time admitted the infected condition of the nose, and told respondent another operation would be necessary. Again in November of 1940, appellant urged respondent to submit to a further operation, but she refused owing to her lack of confidence in him.

The complaint herein alleged, among other things, that:

Appellant "carelessly and negligently removed too much of the septum of the nose, leaving therein a hole too large to heal; that he cut and removed from the nose a large portion of the hump on top of plaintiff's nose which he was specifically instructed not to do, and which plaintiff avers was not necessary to be done in order to correct plaintiff's breathing; that (defendant) herein removed a great deal of the flesh around the bridge and on the septum and cut away too much of the membrane from other parts of the nose of said plaintiff; that in doing so he did not use proper care; the defendant did not, in furtherance of said operations take any blood test of said plaintiff, he did not take plaintiff's blood pressure; he made no urine test; he took no X-rays nor did he make any test of any kind to determine whether or not said plaintiff was a bleeder and in fit condition to undergo said operation. Plaintiff avers that it was defendant's duty to do these acts and things as enumerated in accord with proper and skillful practice * * *.

"That through lack of * * * and cleanliness of said defendant who did not use protective rubber gloves in performing said operations, through lack of ordinary proper medical skill, and through lack of proper precaution, cleanliness and carelessness on the part of said defendant while performing said operations, the nose of said plaintiff became inflamed, swollen, festered and infected; that by reason of said negligence and carelessness of said defendant, as aforesaid, and as the direct result thereof, and as the sole and only cause of said carelessness and negligence said plaintiff suffered and still suffers intense pain and great mental distress and anxiety and the nose of said plaintiff has become sore, wholly disfigured and is permanently deformed."

In his answer appellant denied generally and specifically the allegations of the complaint, alleged that he was a physician and surgeon restricting his practice to that branch of medicine known as plastic surgery; and as a defense alleged that if respondent "sustained any results not anticipated, or any infection, or otherwise, as represented or described in her complaint, such condition resulted from Plaintiff's acts, carelessness and improper exposure, which was not under the control or care of this answering defendant, and for which this defendant is in nowise responsible."

Appellant doctor testified in his own behalf to the effect that he examined respondent's nose and "found that in the right nostril the septum extended down here aways and occupied about one-third of the right nostril, and on the left, about three-quarters of an inch to one inch above the nostril margin I found a recessed mucous membrane with the septum curved to the left almost touching the lateral wall on the left side. * * * I got the history that she had had these headaches and a good bit of secretion from the nose and difficulty in breathing." In answer to the question: "Did you make inquiry about her health in general * * * Will you tell us what inquiry was made and your observations at that time?", the witness answered: "Well, as to her general condition, if she had ever been subject to bleeding, if there was any condition of the heart or lungs that she had been affected with, or any condition other than this complaint of lack of breathing, and I made this examination, as I say, of the nose, and the interior of the nose, and that practically covers it." Appellant then described in minute detail how he performed the first operation, and was then asked if, in performing this operation, he had followed the same procedure he had in several thousands of operations previously performed by him. To this he replied: "I did the surgical preparation. Now, as far as the technique

of the operation, I mean, certain things may have been done in this like correcting a deviated type of septum, but our surgical technique is a routine procedure, like a hospital. We have established what has been good technique and we follow it out and did follow it out in this operation."

Appellant using a diagram also testified regarding what he observed from an examination in court of the perforations then present in respondent's nose:

"This morning, on examination in this region, * * * it looked like as though there might be a little opening of a sebaceous gland, or cyst, or something of that sort, but on bending this over, evidently in the line of incision there, there had been a small opening that either did not heal from the infection that you might put the point of a toothpick into. As I indicated here, this was my line of incision for the straightening out of this curved septum. * * * The first opening is about in this position two-thirds up from the palate and just in the line of incision back of the columella. * * * If I did not bend that over that wouldn't show. There was a hole there, but doing that you could detect—you could stick a small toothpick through that point, probably at the point of incision. * * * Now, this is a minute opening. I was led to believe the other day that you could stick your finger through it. Here is your palate in here. Right on the floor where I made this incision, there is a little area, I judge almost an inch up from the entrance of the nostril and that opening is about this shape, but not so big. It isn't round at all. It would indicate probably that the mucous membrane here had not quite healed together but it is something that could be readily brought down. It is just a tiny opening. It isn't a quarter of an inch. It is between one-eighth and a quarter of an inch and about 1/32 of an inch wide. When I put an applicator in one nostril and look at the other, I could just see my white cotton shining through that. The third opening is yet to be discovered.

"Q. In respect to * * * the second opening, as you have illustrated it here, it is sort of lipshaped, is that right? * * * A. Yes. It should go just where this incision came down right there and here is the other pin point."

Regarding the second operation performed on August 19, 1940, appellant testified: "It was done as a temporary procedure because both the patient and I had in view the doing of a corrective operation resulting from the infection, so this was merely done as a minor thing until some future date when the complete job could be done."

Appellant was asked:

"Is there anything you could have done from your experience as a physician and surgeon that would have prevented—that you could have done that would have prevented the infection that this lady contracted?" His reply follows: "A. No, I believe not.

"Q. Is there anything from your experience as a physician and surgeon that you did not do, or that you did do, that you can attribute the little scars and dimples to that have been described on a number of occasions? A. There was no avoiding it. Of course, the scars are the result of my opening it, but I had to open it for the infection, if that is the answer."

The nurse who assisted appellant at the first operation testified that when the packing was removed from respondent's nose about a week after the operation, a purulent discharge followed the removal of such packing; that when appellant removed the packing he wore neither a smock nor a cap and was smoking cigarettes; that respondent asked appellant what was wrong, and he replied that everything was all right, that there was nothing wrong. This witness also testified that she had a conversation a day or two after the packing was removed from respondent's nose at which time appellant blamed said witness for a slip-up in technique. "He rather blamed me for not sterilizing the instruments properly—not carrying out the technique."

[1] Appellant contends that respondent failed to offer in support of her charge of malpractice any expert opinion that he failed to disport himself in his treatment and operative technique along the pattern recognized by legal authorities. In support of this contention, appellant cites the cases of Ross v. Hieronymus, 2 Cal.App.2d 258, 37 P.2d 837; McNamara v. Emmons, 36 Cal. App.2d 199, 97 P.2d 503, and Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695, 697, the latter of which holds that "negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary skill and care required of him in treating his patient."

Respondent produced three physicians and surgeons, who gave their expert opinions, to the following effect:

Dr. Ginsberg was asked:

"Doctor, what is the usual procedure in an operation of this kind, in this vicinity, in the vicinity of Los Angeles, with reference to examinations, or examination of the patient prior to an operation of this kind? A. There is an external and internal examination of the nose to examine, to see the quality of his skin. We diagnose the deformity of the nose. We see that there are no lesions, or infections on or around the inside of the nose and it is wise to examine the urine for sugar. Some surgeons do make blood examinations, others don't. * * *

"Q. And you state that you check the matter of any lesions in the nose as well as the deformity. Now explain to the Court and jury what you mean by that. A. There might be ulcers inside the nose that would complicate surgery and these might be syphilitic, which might complicate the surgery. The nose might have a very bad perforation which would make a plastic procedure more or less unadvisable. * * *

"Q. Now, in a case where an operation upon the nose was performed on May 30, 1940, and subsequently on, let us say, August 13th, or 19th * * * another operation was performed while there was still an infection, would that be proper procedure? * * * A. * * * If there is an infection present no surgery should be performed."

Dr. Kiskadden, a physician and surgeon specializing in plastic and reconstructive surgery, who examined respondent subsequent to the operations on her nose, testified:

That he found three holes in the septum of respondent's nose; that "two of them are rather low down and can be plainly visible by just looking through her nostrils. The third one is further back and one has to look deeply into her nostrils to see it. * * * The small hole is probably 1/8 of an inch across and the next one is probably 3/8 and the larger one is probably 1/2 inch across, in the back. * * *

"Q. Where there is an infection in the nose, let us say at the bridge, and a drainage has been established to assist in that infection, what can you say as to a doctor or surgeon squeezing these places where the drainage has been established, with his finger nails? A. Well, that is not the ordinary way of evacuating infection. * * *

"Q. What is the ordinary way, Doctor? * * * A. Given an infection in the nose, if there is an opening and there is serum, or pus, or infection present, usually a sterile instrument is introduced into the area and the sterile gauze is placed about the wound to collect any discharge. The wound itself is swabbed with an antiseptic usually before and always afterwards. * * *

"Q. From your examination of the septum prior to this operation of May 30th, which I believe was back in 1938, and your examination afterward, would you say that there had been an attempt,—would you say or would you not say that there had been an attempt on Mrs. Soest's nose to perform a submucous resection to remove a portion of the septum? A. Yes, I think an attempt has been made.

"Q. And what can you say as to that attempt from your observation as an expert? A. Well, I believe at the present time her septum is fairly straight. She has these holes.

"Will or will not these holes affect this plaintiff's health? * * * A. Well, that is a very difficult question to answer yes or no. The holes are there, and they may or may not accumulate crusts, and they may or may not collect infection. If they do collect crusts and infection, perhaps underneath, it may have something to do with her health, on the contrary, if they don't collect crusts and remain perfectly clean as small holes, I don't believe her general health will be particularly affected. * * *

"Q. If you found that this same patient, Mrs. Soest, did accumulate scabs in her nose and crusted mucous at these holes in the septum and was required to have a doctor to clean out her nose at approximately two week intervals, or at about that time, what would you say as to whether or not that condition would affect her health? A. Yes, I think it would affect her health * * * holes in the nose may cause a whistling noise and odd sensations."

Dr. Kiskadden was then requested to examine the bridge of respondent's nose and to state what he found, whereupon he stated:

"On the right lateral aspect there appears to be a small scar and then over the bridge

there is a round pit and just below that pit there is a second rather trap-door shaped scar. The scar at the present time seems a little red.

"Q. Can you give a cause for that, Doctor? * * * A. I would say that is probably because the scar on the bridge seems to be attached to the bone underneath and there does not seem to be a free return of the circulation in and to it because of that attachment. It causes congestion of blood there.

"Q. And what can you say as to the destruction of any of the blood vessels there, or enlargement, or whatever it may be? A. In these operations there is a destruction of the blood vessels, but Nature restores them. The redness here is due to the fact that there is an adhesion between this skin, or between this scar and the underlying tissue.

"Q. You mean it is attached to the bone? A. Yes."

The witness' attention was called to certain depressions on respondent's nostrils and was asked what was the cause thereof, to which he answered:

"The indentation could be caused first, either taking away too much tissue so that there is no underlying tissue separating the lining of the nose and the outside of the nose. This underlying tissue could likewise be lost through infection. It could be pushed away, the position of the tissues there, due to operative interference, or swelling, and swelling immediately post-operative. It could be due to the placing of a stitch in the nostril through and through the scab. * * *

"Q. As a plastic surgeon could you or could you not make a recommendation at this time to the jury as to any correction of Mrs. Soest's nose so far as the outward appearance is concerned? A. The correction of her nose is an extremely difficult thing and I would say, under the circumstances, she would face at least two operations and possibly more, and I personally would not promise her that I would be able to restore her nose to what it was before or to what would pass as a normal appearing nose. * * *

"Q. From the history of the case and your various examinations of Mrs. Soest, have you come to any opinion or have you reached any opinion as to the cause of the holes in the septum? * * * A. Yes, I think I have. * * *

"Q. What is your conclusion, or opinion as to the cause? A. I believe that the holes probably occurred from the work done at a time a probable submucous resection was performed.

"Mr. Rose: I move that be stricken on the ground the answer is based on probabilities. There is nothing to show a submucous resection was ever performed.

"The Court: The motion is denied. Of course, we are getting his own opinion from this witness."

The third physician and surgeon to testify for respondent was Dr. Rambo, specializing in eye, ear, nose and throat and rhino-plastics. He was asked:

"Q. Are you acquainted with the ordinary surgery in this line, in this community, of surgeons with reference to the removal of what you have referred to as the perpendicular strut at the very front of the nose? * * * A. Yes.

"Q. What is the practice as to that? A. There are times when it should be removed, or may be removed, and there are times when it should not be removed."

With respect to what might have caused the perforations in respondent's nose, this witness stated: "Perforations in the septum following a submucous resection, if a submucous has been done here, may be caused either from perforation of both layers through and through, perforations at the time of surgery which broke down the circulation and caused the perforation. They may be due to infection either before or after surgery which remains after surgery."

[2] An examination of the record, including the reporter's transcript from which the above excerpts are quoted, reveals ample evidence of medical experts from which the jury could have inferred that appellant did not use that degree of care and skill exercised by doctors in the same locality.

[3] Moreover, as heretofore pointed out, the nurse assisting at the first operation testified that appellant charged her with failure to properly sterilize the instruments he used on respondent's nose in performing that operation; and the record clearly shows that appellant performed the second operation at a time when respondent's nose presented a dirty field of infection.

[4, 5] "Where the results of negligence on the part of a physician or dentist are peculiarly within the knowledge of experts, the testimony of those experts is a necessary element of a plaintiff's case. The danger of infection from an unsterile instrument, or a dirty field of operation, is a matter of such common knowledge that a jury is authorized to draw the reasonable inference that an infection was caused by negligence where an unsterile instrument is used, or the operative field is not properly sterilized. [Citing authorities.]" Mastro v. Kennedy, 57 Cal.App.2d 499, 134 P.2d 865, 867.

[6] While there is much conflicting testimony in the record, there is also substantial evidence, which, coupled with the reasonable inferences to be drawn therefrom, points to a lack of due care on the part of appellant as the proximate cause of the infection suffered by respondent and the resulting perforations in the septum of her nose. Since the evidence produced presented questions of fact for the determination of the jury, appellant's motion for a nonsuit was properly denied.

[7] As was so aptly stated by this court in the case of Mirich v. Balsinger, 53 Cal.App.2d 103, 114, 127 P.2d 639, 644: "It must also be remembered that in malpractice cases it is not necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence of the physician resulted in the injury to the patient. Were such the rule, it would rarely be possible to recover in a case of negligence in the practice of a profession which admittedly is not an exact science. It is therefore not required in the trial of such cases that the negligence of the defendant as the proximate cause of the injury be established with such absolute certainty that any other conclusion is excluded. Substantial evidence which reasonably supports the judgment is sufficient. Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311."

In view of the conclusion reached by this court, it is not deemed necessary to discuss the other two points raised by appellant.

The attempted appeal from the order denying motion for a new trial is dismissed.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

60 Cal.App.2d 845

PERKINS v. BENGUET CONSOL. MINING CO. (HARTMAN et al., Interveners).

Civ. 12584.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1943.

Hearing Denied Oct. 25, 1943.

Appeal and error ⇐1207(4)

On appeal from amended judgment, where there was no contention that amended judgment was not in exact accord with instructions to trial court contained in prior opinion of District Court of Appeal, judgment was affirmed.

Appeal from Superior Court, City and County of San Francisco; Hon. C. J. Goodell, Judge.

Action by Idonah Slade Perkins against Benguet Consolidated Mining Company to recover dividends declared by defendant on certain shares of its capital stock, wherein Samuel I. Hartman, as receiver, etc., and others intervened. From an amended judgment entered upon return to trial court of remittitur in former appeal, defendant appeals.

Affirmed.

W. H. Lawrence and Pillsbury, Madison & Sutro, all of San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher and Caulfield & Keil, all of San Francisco, for respondents.

Smith, Southwell & Smith, of San Francisco, for interveners.

PETERS, Presiding Justice.

This is the second appeal in this case. On the prior appeal the judgment was affirmed, without dissent, except as to an item of interest. 55 Cal.App.2d 720, at page 774, 132 P.2d 70, at page 101. A petition for rehearing was denied, one justice voting to grant the same. The majority and dissenting justices filed opinions on such denial. 55 Cal.App.2d at page 774, 132 P.2d at page 102. The Supreme Court of California denied a petition for hearing. 55 Cal.App.2d at page 775, 132 P.2d at page 102. Thereafter, the Supreme Court of the United States denied a petition for certiorari. 63 S.Ct. 1435, 87 L.Ed. 1721.

After the return of the remittitur to the trial court, it amended its findings, conclusions and judgment in relation to the item of interest above mentioned, as directed by this court. From this modified judgment the Benguet Consolidated Mining Company prosecutes this appeal on the same record (supplemented by the amended findings, conclusions and judgment) and on the same briefs as were presented on the prior appeal. No contention is made that the modified judgment is not in exact accord with the instructions to the trial court set forth in the prior opinion. Upon the authority of, and for the reasons set forth in, the prior opinion, the judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



BENNETT v. FORREST et al.

Civ. 12454.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1943.

Hearing Granted Nov. 18, 1943.

1. Wills ⇐179

Where two testamentary instruments cannot stand together, the first must fall.

2. Courts ⇐91(1)

The latest pronouncement by Supreme Court is the authority which an intermediate reviewing court must follow.

3. Wills ⇐194

A property settlement agreement, whereby wife relinquished all right to any interest in husband's property, and providing that each party might dispose of their property as if they had never been married, was not inconsistent with provisions of husband's will theretofore executed in which wife was named as chief beneficiary, and hence did not operate as a "revocation" thereof. Probate Code, § 73.

See Words and Phrases, Permanent Edition, for all other definitions of "Revocation".

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Helen F. Bennett against Georgina E. Forrest, executrix of the last will and testament of Francis G. Forrest, deceased, and Georgina E. Forrest, individually, and the San Francisco Bank, for a decree that plaintiff, as sole heir at law of the deceased, was entitled to the whole estate with the exception of the amount of a legacy given to a former wife of the deceased, and that defendant bank holds the funds as agent of the executrix in trust for the use and benefit of the plaintiff, and for an order restraining the defendant Georgina E. Forrest from disposing of any of the property. From an adverse judgment, the plaintiff appeals.

Affirmed.

Fletcher A. Cutler, Duncan A. McLeod, and Clarence M. Oddie, all of San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for respondents.

WARD, Justice.

The plaintiff brought this action against Georgina E. Forrest individually and as executrix of the last will and testament of Francis G. Forrest, deceased, and The San Francisco Bank, depositary of the funds of the estate, praying for a decree that, as sole heir-at-law of the deceased, she is entitled to the whole estate with the exception of the sum of $2,000, the amount of a legacy given a former wife of the deceased; restraining Georgina E. Forrest from disposing of any of said property, and that the bank holds said funds as the agent of the executrix in trust for the use and benefit of plaintiff.

The complaint contains a number of allegations as to which no issue was taken by the answer. They are to the effect that on February 28, 1938 Francis G. Forrest and Georgina E. Forrest were husband and wife; that on that day they entered into a property settlement agreement (the material parts of which will later appear); that in March of 1938 an interlocutory decree of divorce was entered in favor of Mrs. Forrest; that about fifteen months later Mr. Forrest died, at which time no final decree of divorce had been made; that he left a will dated August 6, 1921 and a codicil thereto dated July 14, 1933,

that the will and codicil were duly admitted to probate in the superior court in San Francisco; that Mrs. Forrest was appointed executrix thereof, and that by it the entire estate was devised and bequeathed to Mrs. Forrest with the exception of the sum disposed of by the said legacy.

On the issues raised by the denials and averments of the answer of defendant Forrest, the trial court made findings to the following effect:

That on July 8, 1937 Mrs. Forrest commenced an action for separate maintenance against her husband, during the pendency of which the parties entered into a written agreement which settled their property rights, and provided for mutual releases as to the items of property therein allotted to each; that upon the execution of such agreement and releases the wife amended her complaint and prayed for a divorce; that in said action an interlocutory decree in favor of the wife was entered in March 1938 but was not followed by a final decree; that the said agreement contained, among others, the following provisions: "All property hereafter acquired by and all future earnings of each shall be and become the sole and separate property of each party, respectively, free from all claims of the other party, and each party shall have the right to dispose of his or her property, both real and personal, that he or she may hereafter acquire, as fully and effectively as if the parties hereto were not and had never been married. Each party shall have the right to dispose of his or her property, by last will and testament, or otherwise, and each party agrees that all the estate of the other party shall, subject to the within agreement and to his or her debts and engagements, go and belong to the person, or persons, who would have become entitled thereto if the parties had never been married; and it is further covenanted and agreed that each party will permit any will of the other to be probated, and will allow administration upon his or her estate to be taken out by the persons or person who would have been entitled thereto, if the parties had never been married";

That the plaintiff and Georgina E. Forrest were opponents in the probate proceedings hereinbefore referred to, wherein an order was duly made and entered adjudicating that plaintiff was not the sole heir-at-law of Francis G. Forrest, deceased; that plaintiff appealed from said order, which, however, was affirmed and remittitur filed in said proceedings;

That Georgina E. Forrest claims to be entitled to distribution of a portion of the property of said estate pursuant to the terms of said will referred to in the complaint; that as executrix of said estate she has filed in said proceedings a petition for distribution of said estate to herself individually; that plaintiff herein filed objections to said petition for distribution of said estate to herself; that said petition and objections thereto were heard and submitted to the court for decision, and said objections sought distribution of said estate to plaintiff upon the same grounds as asserted in the complaint herein; that a decree of distribution has been entered, directing distribution of said estate as prayed for in said petition for distribution; that no appeal has been taken therefrom, and said decree has become final; that the claim of said Georgina E. Forrest to be entitled to distribution of a portion of said estate is not in violation of the terms of said property settlement agreement or of the understanding and agreement of the parties thereto, and the assertion of said claim does not constitute a fraud upon the plaintiff as the sole heir of said decedent; that the title acquired by said Georgina E. Forrest individually under the last will and testament of said deceased, or as executrix thereof, is not held by her in trust for plaintiff;

That the above-mentioned decree of distribution contains the following finding: "that prior to the death of said Francis G. Forrest, and after the execution of said agreement [referring to the agreement here involved], said decedent and Georgina E. Forrest effected and consummated a reconciliation and resumed marital relations; that said agreement dated February 28, 1938, including the provisions thereof set forth in the opposition of Helen F. Bennett to petition for final discharge, was not in force or effect at the time of the death of said decedent";

That said decree of distribution was made and entered in said probate proceedings on December 18, 1941, and that no appeal has been taken from said decree and that time for appeal therefrom has expired, but the trial court expressly declined to find that

the finding and adjudication of the probate court just quoted is res judicata in this action.

As conclusions of law from the foregoing admissions and findings the trial court determined that Georgina E. Forrest was entitled to judgment that plaintiff take nothing by her complaint, that the property involved in the action is the sole and separate property of Georgina E. Forrest individually, and that The San Francisco Bank be directed to pay to her individually, pursuant to the aforementioned decree of distribution, the money in its hands. Judgment was rendered accordingly. Plaintiff has appealed therefrom and prosecutes the appeal upon the judgment roll alone.

Appellant makes the following contentions: (1) That the property settlement agreement between Mr. and Mrs. Forrest was inconsistent wtih the provisions of the will theretofore executed and operated as a revocation thereof; (2) that in order that a defendant may avail himself of a former judgment as res judicata it is necessary that it be pleaded as such; and (3) that the probate court rendering such judgment was without jurisdiction to try title to the property involved.

The merits of the controversy revolve around the first question. If respondents are correct in their contention that the will of the deceased was not revoked by the property settlement agreement, it is immaterial, so far as the present action is concerned, whether the decree of the probate court is res judicata or whether that court has jurisdiction to try title.

Appellant cites Probate Code, sec. 73, as follows: "If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect." She particularly relies upon In re Estate of Bassett, 196 Cal. 576, 238 P. 666; In re Estate of Martin, 31 Cal.App.2d 501, 88 P.2d 234; In re Estate of Benner, 155 Cal. 153, 99 P. 715; In re Weinstein v. Moers, 207 Cal. 534, 279 P. 444, and others to the effect that if the agreement purports to make a disposition of all of decedent's property, it is wholly inconsistent with the will. The cases cited, with the exception of Weinstein v. Moers, are concerned with the right to take by succession, or the right of a third party to take adversely to a decedent and to an estate, or the right to administer following the execution of a property settlement agreement. Cases applying to a subsequently executed will are not in point. Probate Code, sec. 72.

[1] The basic reasoning behind section 73 is that where two instruments can not stand together, but are unequivocally opposed, since the latter of the two is the more recent expression of the testator's intent, the first must fall. The instruments herein are not wholly inconsistent—the property settlement agreement specifically permits each party to dispose of his individual property by will. In the present case the wife is not provided for as an heir at law, but is mentioned by name. After the property settlement decedent could bequeath his property to his former or his present wife just as effectually as to a stranger. In Re Estate of Forrest, 43 Cal.App.2d 347, 110 P.2d 1023, an appeal from an order appointing Mrs. Forrest as executor of her husband's estate, the court held (43 Cal.App.2d at pages 349, 350 110 P.2d at page 1024): "The next point made by the appellant is that the provisions of the property settlement agreement entered into by and between Georgina E. Forrest and F. G. Forrest were inconsistent with the provisions of the will and operated as a revocation thereof. An examination of said agreement discloses nothing inconsistent with the provisions of the will. With reference to the right to act as executrix, in said agreement it is provided, 'And the parties hereto and each of them, do hereby expressly waive, relinquish, and surrender * * * the right to administer upon the estate of the other party.' That provision it may be conceded would have been pertinent if this were an application for letters of administration but it is an application for letters testamentary." "So in the instant case there is nothing on the face of the property settlement agreement showing that the existence of the will of the decedent, or any part or portion thereof, was before the contracting parties."

In the Weinstein case, where reciprocal wills were made prior to a property settlement agreement in connection with a di-

vorce proceeding, it was held that the surviving spouse could not claim under the will. In that case, where it affirmatively appeared that fraud had been practiced, the court found (207 Cal. at pages 538, 539, 279 P. at page 445): "that said Theresa W. Moers believed and understood that it was not necessary for her to revoke her then existing will in order that said Albert A. Moers should not, in the event of her death, receive any of her property through or under the terms of said will; that in addition said Theresa W. Moers was induced to and did refrain from revoking her said will by representations made by said Albert A. Moers that he did not and would not thereafter claim any right or interest in or to any of said property except such property as was by the express terms of said agreement set over and apart to him." "That said claim is in violation of the terms of said agreement in this paragraph set forth, and of the understanding and agreement of the parties thereto, and its assertion constitutes a fraud upon the plaintiffs as heirs at law of said Theresa W. Moers." The complaint herein alleges that the assertion of respondents' claim is a fraud upon the plaintiff. It is not claimed, however, that in reaching the terms of the agreement, or in its execution, fraud was practiced by either party, and the court found that there was no fraud, which effectively distinguishes the present from the Weinstein case.

Appellant's position is that in the property settlement agreement there is an express waiver, forfeiture and abandonment of all rights under the will. In Re Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101, an agreement, similar to that herein, providing that there would be no opposition by either party to probate of the other's will and stating that the rights of each party in any inheritance or in the estate of the other had been settled, it was held that the agreement did not take from one the right to a bequest by the other. It was there contended that the agreement was sufficient to disclose the intent of the decedent, and the court held that its language—similar to that herein—was not susceptible to being construed as extinguishing the fund bequeathed and thus preventing its disposition by will. In Re Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241; 2 Words and Phrases, Perm. Ed., p. 354 et seq. In the Crane case, 6 Cal.2d at pages 220, 221, 57 P.2d at page 478, 104 A.L.R. 1101, the court said: "But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift inter vivos, by devise, or by bequest." "If the testator had not executed this will until after the date of the property settlement agreement, it would not be reasonable to say that he was without right to make such subsequent will and thereby give additional property to his wife. But in substance and effect he did the same thing by leaving his will unchanged after the date of said contract." The court then commented upon the "continuance of affectionate relations" following the agreement, as reinforcing the conclusion reached.

[2] Appellant herein contends that the conclusion reached in the Crane case is at variance with previous cases. The previous cases cited differ in factual background from the Crane and the present case. The Crane case is the latest and is therefore the authority which an intermediate reviewing court must follow. It was preceded by In re Estate of Patterson, 64 Cal.App. 643, 222 P. 374, and followed in Re Estate of Johnson, 31 Cal.App. 2d 251, 87 P.2d 900. See In re Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101.

The decree in the probate court, which has become final, was admitted in evidence, the court finding "that a decree of distribution has been entered, as aforesaid, and that said defendant is entitled to deliver and pay over the properties of said estate remaining in her hands as directed in said decree of distribution, free of any claim of plaintiff, legal or equitable."

[3] We conclude that as an instrument the property settlement agreement did not revoke the will and codicil, and did not specifically nullify the provisions thereof bequeathing property to Georgina E. Forrest.

The judgment is affirmed.

PETERS, P. J., concurs.

KNIGHT, Justice (concurring).

I concur in the conclusion that the judgment herein should be affirmed, but place such concurrence upon grounds somewhat

different from those upon which the majority opinion is based.

The decedent's will and the codicil thereto were holographic. The will was dated August 6, 1921, and the codicil July 14, 1933. By the terms of the will the decedent bequeathed his entire estate, except $2,000, to his wife, the respondent herein; and by the codicil he merely directed that a certain life insurance policy made payable to his mother, be paid to his sister, Mrs. Bennett, the appellant herein, for the benefit of his father and herself. Some sixteen years after the will was made and in July, 1937, respondent filed suit for separate maintenance, and obtained a decree awarding her a portion of the property and directing her husband to pay her certain sums of money, including counsel fees. He appealed, and pending the appeal negotiations were initiated for a property settlement, and on February 28, 1938, they entered into the property settlement agreement in question, which was approved by the trial court. It is a lengthy document, covering some eighteen pages of the printed transcript, and in consummation thereof the parties transferred to each other the property as provided for therein. Thereupon respondent amended her complaint in the suit for separate maintenance by asking for a divorce, and in March, 1938, she was granted an interlocutory decree; but about fourteen months later and on May 27, 1939, her husband died, no final decree of divorce having been entered.

The two major questions presented by the appeal are whether the provisions of the property settlement agreement of February 28, 1938, reasonably construed, constitute a renunciation by the parties thereto of the right to take under each other's will, and if so, whether the determination by the probate court in its decree of final distribution, that prior to the decedent's death the property settlement agreement was not in force or effect, is conclusive herein on that issue, since no appeal was taken from that decree.

As will be noted, the majority opinion, in directing an affirmance of the judgment, holds in effect that the decision rendered in In Re Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 478, 104 A.L.R. 1101, is decisive of this appeal; and this holding is based upon the assumption that the language of the property settlement agreement there considered is similar to that used in the property settlement agreement here involved. I am unable to agree with that conclusion. The material provisions contained in the agreement in that case are quoted in the opinion rendered on that appeal, and in summarizing them the court said: "The agreement of each party was, first, not to oppose the probate of the other's will; second, not to contest or oppose such will; and, third, not to apply for letters of administration or letters of administration with the will annexed upon the estate of the other. Both parties agreed that by said contract they had settled, adjusted, and forever determined 'all of their respective rights to, of, and in any inheritance of the one from the other, respectively, or in or to the estate of either'." The court then goes on to say: "Reading the terms of the contract as thus limited, it took away from appellant all right or claim to any interest in the property of her husband either by virtue of her status as wife or widow or as heir of her husband. But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift inter vivos, by devise, or by bequest. As applied to such gift, we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will."

Thus it will be seen that it was because of the absence from the agreement of any language whatever indicating a renunciation of the right to receive any devise or bequest that the court held that the wife had not surrendered her right to take under the will. But the agreement in the present case contains language and technical legal terms not found in the one in the Crane case, which in my opinion, reasonably construed, can import no other meaning than an intentional renunciation of the right of each party to take not only as heir at law of the other, but also as a devisee or legatee, and which therefore overcomes the objections upon which the decision in the Crane case mainly turned.

The language and terms referred to are embodied in the fifteenth clause of the agreement, bearing the title "Mutual Release and Discharge," and in part read as follows: "This agreement is intended to be, and is, a full, complete, entire and final settlement of all property rights between the parties and all rights, duties and obligations arising out of the marital relation

now existing, *and such rights,* duties and obligations *as might hereafter accrue but for this agreement;* * * * And the parties hereto, and each of them, do hereby expressly waive, relinquish and surrender any and all claims and rights to inherit or claim dower in, or family allowance or homestead from, *or otherwise secure an interest in, any property whatsoever by, through or from the other party hereto, which claim and right said parties, and each of them, respectively, do hereby relinquish and surrender in favor of all of the heirs, legatees, devisees and assigns of such party so dying, and to the exclusion of either and each of said first and second parties hereto, respectively,* including the right to administer upon the estate of the other party." (Italics added) According to settled rules of construction, some meaning must be given, if posssible, to each and every part of a written agreement, and if any meaning at all is to be given to the above italicized portion of the fifteenth clause, and especially the latter portion wherein the technical legal terms "legatees" and "devisees" are employed, it is quite impossible to reconcile such meaning with the conclusion that the parties did not intend thereby to surrender their respective rights to take under each other's will, because it is only in connection with the subject of wills that the words "legatees" and "devisees" are used.

In other words, nowhere in the Crane agreement were any such terms as "legatee" and "devisee" used, and evidently it was because of the total absence of any such terms as relate to the subject of wills that the court held that the agreement therein was "limited" to the surrender by the respective parties of their rights and interests *as an heir at law* to share in the estate of the other; whereas here, as pointed out, the language of the agreement was not so limited. It goes on to provide in broader terms that each of the parties "do hereby relinquish and surrender in favor of all of the heirs, *legatees, devisees* and assigns of such party so dying, *and to the exclusion* of either and each of said first and second parties hereto, respectively, * * *" (Italics added) It is my opinion, therefore, that if the disposal of the appeal herein rested solely upon the legal construction to be placed upon the property settlement agreement, the judgment could not be sustained.

However, in any event, if at the time of the decedent's death the agreement was not in force and effect, it could not preclude respondent from taking under her husband's will; and such was the adjudication by the probate court in its decree of final distribution. In this connection it was adjudged "that prior to the death of said Francis G. Forrest, and after the execution of said agreement, said decedent and Georgina E. Forrest effected and consummated a reconciliation and resumed marital relations; that said agreement dated February 28th, 1939, including the provisions thereof set forth in the opposition of Helen F. Bennett to petition for final discharge, was not in force or effect at the time of the death of said decedent; * * *" As stated, no appeal was taken from that decree, and this appeal was taken and is presented on the judgment roll alone; so that, in the absence herein of any evidence whatever, it will be presumed that the probate court's adjudication is founded on evidence legally sufficient to support it.

In contending that the probate court's adjudication is not here controlling, appellant calls attention to the trial court's finding that "This court does not find that this finding [of the probate court] is res adjudicata." But at the most, the meaning thereof is that the court refrained from passing on that question; and even if it had, it would have been the trial court's legal conclusion, and consequently not binding on appeal.

Appellant further contends that the probate court was without jurisdiction to adjudicate the question of whether or not the agreement was in effect at the time of the decedent's death; but the cases cited in support of such contention are not in point. They deal with situations where title to property is claimed by a third party adversely to the decedent or to the estate; while here both parties claimed distribution through the decedent, appellant asserting her right thereto only as an heir at law of the decedent, and respondent basing her claim on the provisions of the will; and it is held generally that a contest involving the validity of a will or the distribution of the estate thereunder is within the jurisdiction of the probate court. In re Estate of Cover, 188 Cal. 133, 204 P. 583; In re Estate of Warner, 6 Cal.App. 361, 92 P. 191. Furthermore,

in each of the following probate cases, and others which might be cited, the question of the interpretation or validity of property settlement agreements was involved, and all of the issues relating thereto were heard and determined by the court in the exercise of its probate jurisdiction. In re Estate of Cover, supra; Estate of Warner, supra; In re Estate of Johnson, 31 Cal. App.2d 251, 87 P.2d 900; In re Estate of Patterson, 64 Cal.App. 643, 222 P. 374. In fact in the In re Estate of Crane, supra, the question of the effect of the property settlement agreement was the only question presented for determination, and the matter was heard and determined by the court in the exercise of its probate jurisdiction on hearing of the petition for final distribution, and the appeal was taken from the decree made in that behalf. In the present case, the record shows that it was in response to the issues raised by respondent's petition for distribution and appellant's objections thereto and her counter-petition for distribution based upon the claim that the property settlement agreement precluded respondent from receiving any portion of the estate, that the probate court made its adjudication that the agreement was not in force or effect at the time of decedent's death; consequently the estate was distributed in accordance with the provisions of the will.

Appellant makes the point also that the bar of res judicata is not available to respondent because it was not pleaded. The record shows, however, that it was quite impossible so to do because at the time the answer was filed the contest involving the distribution of the estate was then under submission by the probate court; and the decree of distribution was not rendered until some four months after the filing of the answer. Among the defenses pleaded therein were that the matter of the petition for distribution and the objections thereto had been heard and ordered submitted by the probate court, and that the decision therein was then pending; also that "The agreement mentioned in said complaint was revoked and cancelled by the parties thereto prior to the death of said Francis G. Forrest." It would seem that under the circumstances that was as far as respondent could go. Moreover it would appear from the trial court's final findings herein which were filed some eight months subsequent to the final decree of distribution that the question of the controlling effect of the probate court's adjudication was presented at the trial of the action.

For the reasons stated, it is my conclusion that the judgment herein should be affirmed, but upon the ground that the record herein shows that at the time of the decedent's death the property settlement agreement was not in force or effect.



60 Cal.App.2d 514

HAYS v. COWLES et al.

No. 12453.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1943.

1. Venue ⇐5(3), 21

The statute requiring trial of action for recovery and partition of realty in county wherein it is situated is effective only when realty or title thereto is exclusive subject matter of action, and when cause of action for relief in personam also is joined, defendant is entitled to transfer of cause to county of his residence from county in which realty is situated. Code Civ.Proc. §§ 392, 395.

2. Venue ⇐46

In action for dissolution and liquidation of partnership operating hotel in county of defendant partner's residence, defendant was entitled to change of place of trial to such county from county in which action was brought, though complaint alleged that defendant invested some of partnership funds in realty situated in county of venue, in absence of allegation that title to such realty stood solely in defendant's name or prayer for recovery thereof by partnership or plaintiff. Code Civ.Proc. §§ 392, 395.

3. Venue ⇐21

An "action for accounting" is "proceeding in equity" and essentially a "personal action", which defendant has right to have tried in county of his residence, and plaintiff cannot deprive defendant of such right by uniting in complaint a de-

mand that defendant convey to plaintiff realty situated in another county, wherein action is brought. Code Civ.Proc. §§ 392, 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Accounting Action", "Equity Proceeding" and "Personal Action".

4. Venue ⇐22(3)

In action against resident and nonresident of county of venue, nonresident defendant is entitled to change of place of trial to county of his residence, unless resident defendant is necessary party. Code Civ.Proc. § 395.

5. Venue ⇐22(3)

In action for dissolution of partnership operating hotel in county of defendant partner's residence outside county of venue, wherein codefendant bank, sought to be restrained pendente lite from paying over partnership funds deposited therewith, was domiciled, such bank was not "necessary party", so that its joinder did not deprive defendant partner of right to change of place of trial to county of his residence, in absence of allegation that bank had or claimed any interest in such funds. Code Civ.Proc. §§ 392, 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Vera Mae Hays against Edward H. Cowles and others for dissolution and liquidation of a partnership. From an order denying defendant Cowles' motion to change the place of trial to the city and county of his residence, he appeals.

Reversed.

Hugh K. McKevitt and Newell J. Hooey, both of San Francisco, for appellant.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from an order denying appellant's motion for a change of place of trial of the within action from the county of San Mateo, wherein it was brought, to the city and county of San Francisco, wherein appellant and respondent resided at the time of and prior to the commencement of the action. There was no counter-affidavit filed and the sufficiency of the moving papers is not questioned; but in support of the trial court's order respondent contends first that the action is one for the recovery and the partition of real property situate in San Mateo county, and that therefore by virtue of section 392 of the Code of Civil Procedure such is the proper county for the trial of the action. It is our conclusion that the order is not sustainable on that ground.

[1] By an unbroken chain of decisions beginning with Smith v. Smith, 88 Cal. 572, 26 P. 356, it has been definitely established that section 392 upon which respondent here relies is effective only when real property or the title thereto is the exclusive subject matter of the action, and that when a cause of action for relief in personam also is joined, the defendant is entitled to have the cause transferred to the county of his residence. Among the later cases in which the foregoing doctrine has been restated and applied are Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; and Stesel v. Santa Ana R. Water Co., 35 Cal.App.2d 117, 94 P.2d 1052; and in all of them numerous earlier decisions are cited holding to the same effect. In the Turlock Theatre case [12 Cal.2d 573, 86 P.2d 347, 120 A.L.R. 786] the court quotes at some length from the decision in Smith v. Smith, supra, part of which is as follows: "The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence." Obviously this is such a case.

[2] As shown by the complaint, the action is one for the dissolution and liquidation of a hotel copartnership which was formed and has since been carried on in San Francisco, and only incidentally to the granting of such relief does the action involve real property. According to the prayer of the complaint the specific relief sought is an accounting, the appointment of a receiver, the sale of the partnership property, the liquidation of its affairs, and after the payment of the debts, a division of the proceeds between appellant and respondent as their interests may appear; also that pendente lite a restraining order be issued restraining the withdrawal, transfer or other disposal of any cash or other property of which the copartnership is alleged to be the owner. And the essential allegations of the complaint upon which respondent bases her demand for such relief are as follows: That pursuant to an oral agreement made about the year 1921 respondent and appellant entered into a copartnership "for the purpose of conducting a hotel business and for other purposes"; that "the business of said copartnership as now conducted" consists of the operation of the Hacienda Hotel at 580 O'Farrell Street in San Francisco, together with the leasehold interest and good will thereof; that "the property of said copartnership consists of said hotel business" with its furnishings, equipment, good will and a lease of the hotel property, cash in banks, automobiles, and other personal property, "together with certain real property located in the County of San Mateo" described as lots 25 and 26, Block 2, Redwood Park, San Mateo county, and the "equipment, furniture and furnishings contained in said real property." Respondent then goes on to allege on information and belief "that part of said cash, together with other personal property belonging to said copartnership, is on deposit with and in the possession of or under the control of" the First National Bank of San Mateo County at Redwood City, and the Bank of America and the Anglo California Bank at San Francisco, and that unless restrained by court order the appellant will withdraw and said banks will pay over and deliver to him the funds and other personal property so deposited with said banks. In paragraph III of the complaint respondent enumerates the grounds for the dissolution of the copartnership, among them being a general allegation that without respondent's knowledge appellant has invested some of the partnership funds in real property and taken title thereto in his name. But the only real property described in the complaint consists of the two lots in Redwood Park, and it is not alleged that title thereto stands solely in appellant's name. Furthermore, nowhere in the complaint does respondent ask for the recovery of any real property or that appellant be compelled to convey any interest in any real property to the copartnership or to respondent. From the foregoing it will be seen that there is no legal ground upon which it may be held that real property or the title thereto is the exclusive subject matter of the action.

[3] Respondent, in her brief, goes outside of the allegations of the complaint to narrate certain facts and circumstances relating to the acquisition by appellant in his name, with partnership funds, of "a piece of property situated in San Mateo county," and continuing she asserts that appellant falsely represented to her, and that not until shortly before bringing the present action did she learn that title thereto stood in both names. Even assuming, however, that the property thus referred to in respondent's brief consists of the two lots described in the complaint and alleged therein to be part of the partnership assets, and assuming also that incidentally to the determination of the issues relating to the partnership accounting and the liquidation of its affairs the trial court will be called upon to determine the title to those lots, appellant cannot thus be deprived of the right to have the trial of the cause transferred to the county of his residence, for it is well settled that an action for an accounting is a proceeding in equity and is essentially a personal action; that the defendant has the right under section 395 of the Code of Civil Procedure to have such an action tried in the county of his residence; and that a plaintiff cannot deprive him of such right by uniting in his complaint a demand that as a sequence of such litigation the defendant be required also to convey certain real property situate in the county other than the defendant's residence. Smith v. Smith, supra; Stesel v. Santa Ana R. Water Co., supra; Howe v. Tucker, supra; Bardwell v. Turner, supra. In so holding the court in Smith v. Smith says [88 Cal. 572, 26 P. 358]: "Unless the cause of action set forth in the complaint falls wholly within the provisions of section 392, or of one of the

two next succeeding sections, the provisions of section 395 prevail." Respondent also challenges the accuracy of the statement of the legal doctrine declared in the Smith case. But the doctrine as therein stated has been reiterated, quoted at length with approval, and applied in many later cases. It must therefore be taken as the established law of the state.

[4, 5] All three depositary banks mentioned in the complaint were named also as parties defendant. One of them, First National Bank of San Mateo County, is a resident of San Mateo county; and the second contention made by respondent in support of the trial court's order is that said bank is a necessary party to the action, and that therefore in any event appellant is not entitled to have the place of trial changed to the city and county of San Francisco. The governing rule in such cases is, however, that where an action is brought against two defendants, one of whom resides in the county where the action is commenced and the other a nonresident thereof, the latter is entitled to have the place of trial changed to the county of his residence unless the resident defendant is a necessary party (Hannon v. Nuevo Land Co., 14 Cal.App. 700, 112 P. 1103; Sayward v. Houghton, 82 Cal. 628, 23 P. 120; Bailey v. Cox, 102 Cal. 333, 36 P. 650); and it is apparent from the record herein that the First National Bank of San Mateo County is not a necessary party to the action. There is nothing in the record showing that summons was ever served on any of the bank defendants or that any of them ever appeared in the action; it is averred in the affidavit filed by appellant in support of his motion that all of the bank defendants are only nominal and not proper or necessary parties defendant; no counter-affidavits were filed, and the allegations and prayer of the complaint substantiate such averment. In other words, nowhere in the complaint is it alleged directly or inferentially that said banks have or claim to have any interest whatever in the partnership funds or property deposited with them, and the only relief sought against the banks is that they be restrained pendente lite from paying over or delivering to appellant any of said funds or property so deposited with them, and clearly they could have been so restrained by the service upon them of an appropriate restraining order without making them parties defendant to the action. In this respect the situation is the same as the one presented in Sayward v. Houghton, supra. There the action was to compel the defendant Houghton to transfer certain corporate stock to plaintiff, and the corporation issuing the stock was made a party defendant. The relief demanded was that the defendant Houghton be required to make such transfer and to account for the dividends received thereon, "and, incidentally, that defendants, and each of them, * * * be perpetually enjoined and restrained from selling, transferring, or permitting to be transferred" any of the stock involved in the action. In holding that the corporation was not a necessary party to the action and that the defendant Houghton was entitled to a change of place of trial of the action to the county of his residence the court said: "There is nothing in the complaint showing, or tending to show, that the corporation defendant is in any sense interested in this action. So far as can be seen from reading the allegations of the complaint, the attitude of the defendant corporation toward its co-defendant Houghton and the plaintiff is one of absolute indifference. Quite as much so as any stake-holder could be between conflicting claimants to a fund, in his hands, to which he had no claim himself. Not having any interest in the action which can be affected in any degree by the result of a trial, it makes no difference to the corporation defendant where the action is tried. Although not improperly made a party, the corporation defendant is not a party in interest; and it does not appear that it has ever manifested any interest in the case. We think the corporation defendant is not a necessary party to the action. The plaintiff might obtain all the relief he demands without making it a party."

The case of Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980, 981, cited and relied upon by respondent, is not in point. There the plaintiff sought an accounting and certain injunctive relief growing out of a partnership enterprise involving the performance of a street improvement contract entered into with the city of Palo Alto in which the city was joined as and held to be a necessary party to the action. But there the factual situation existing between the partnership and the city was essentially different from the one here existing between the alleged partnership and the banks; and this is clearly shown by that part of the decision in that case wherein the court said: "The accounting is but incidental to a determina-

tion of the rights of the plaintiff which may suffer serious detriment and involve plaintiff in a liability to the city and his bondsmen and possible financial loss, and therefore, in order to render full and complete relief and prevent possible multiplicity of suits, the city of Palo Alto and its officers who are defendants are necessary parties to a complete determination of the issues over which the court has jurisdiction. It is helpful to note that, while by section 1184 of the Code of Civil Procedure the materialmen and laborers may give to the city a notice to withhold the amount of their claims, such right is not accorded the respondent—who was the contractor. He and the city are both interested in having the fund applied to the extinguishment of the obligations. Thus the case is distinguished from Sayward v. Houghton, 82 Cal. 628, 23 P. 120."

The order is reversed.

PETERS, P. J., and WARD, J., concur.



60 Cal.App.2d 521

GUNNING et al. v. FORBES et al.

Civ. No. 6940.

District Court of Appeal, Third District, California.

Sept. 22, 1943.

1. New trial ⇐153

Under statutes requiring motions for new trial on ground of newly discovered evidence to be presented by affidavits, the mere filing of such affidavits with the clerk without actually presenting them to the court on the motion is insufficient. Code Civ.Proc. §§ 657, 658, 953a.

2. New trial ⇐150(2)

On motion for new trial on ground of newly discovered evidence, movant's affidavits must fully set out alleged newly discovered evidence that is material and not merely cumulative and that its production would likely result in a judgment different from the one rendered, that it can be adduced on new trial, and that it could not have been reasonably secured at the trial by due diligence. Code Civ. Proc. §§ 657, 658, 953a.

3. Appeal and error ⇐706(3), 933(1)

Where record on appeal was insufficient to show that affidavits on motion for new trial on ground of newly discovered evidence were filed or presented to the trial court on the motion, appellate court was not permitted to review an order denying the motion, but was required to presume that order was proper. Code Civ.Proc. §§ 657, 658, 953a.

4. Appeal and error ⇐688(1)

Where record on appeal was insufficient to indicate what showing, if any, was made upon plaintiffs' motion to set aside the submission and to open the case for further evidence, appellate court was not authorized to review an alleged order denying the motion.

5. Costs ⇐260(4)

Application to impose a penalty upon successful appellants for instituting a frivolous appeal was denied where appellate court was not satisfied that the appeal was taken merely to harass appellees or to delay satisfaction of the judgment.

Appeal from Superior Court, Yuba County; George L. Jones, Judge.

Action by Thomas W. Gunning and others, as trustees for and on behalf of the Archimedes Gold Mining Company, a defunct corporation, against Hazel J. Forbes and others, to quiet title to a placer mining claim, wherein a cross-complaint was filed. From a judgment for defendants, plaintiffs appeal, and defendants apply for a penalty upon plaintiffs for instituting a frivolous appeal.

Judgment affirmed and application denied.

Manwell & Manwell, of Marysville, for appellant.

Rich & Weis and F. E. Carlin, all of Marysville, for respondent.

THOMPSON, Justice.

Judgment was rendered against plaintiffs, quieting title in the defendants, Edwin F. and Hazel J. Forbes, to a placer mining claim in Yuba County. A motion for new trial was also denied. The only points

urged by the appellants for a reversal of the judgment are: (1) The alleged abuse of discretion on the part of the trial court in refusing to set aside the submission of the case to permit them to introduce further evidence of their title to the land, and (2) the denial of a new trial on a motion based on alleged newly discovered evidence. No other errors in the trial of the cause are assigned or relied upon.

The complaint to quiet title alleges that the individual plaintiffs were duly appointed under section 403b of the Civil Code, and instituted this suit as trustees in behalf of the defunct mining corporation, Archimedes Gold Mining Company, as owners and entitled to the possession of a placer mining claim in Yuba County adjacent to the Yuba River. The answer and cross-complaint of Edwin F. and Hazel J. Forbes deny the material allegations of the complaint, with the exception of the allegation that the previously mentioned mining company is defunct, and affirmatively allege that they are the owners and entitled to the possession of said mining claim. They further allege the recovery of a final judgment in a former suit, May 15, 1936, quieting title in Edwin F. and Hazel J. Forbes to the same property as res judicata of the issues in this case. At the trial of the case it appeared that, pursuant to a written agreement dated September 21, 1936, the Archimedes Gold Mining Company conveyed the mining claim in question by deed to Archimedes Gold Dredging Company, from which Dredging Company said individual defendants derived their title. The judgment roll in that case, the agreement and said deed were received in evidence. The individual defendants also proved that for twenty years preceding the commencement of this action they occupied and mined the property in question, openly and adversely, and that for the last five years they paid all taxes levied against the property.

The court adopted findings favorable to the defendants in every essential respect and rendered judgment quieting title to said mining claim in Edwin F. and Hazel J. Forbes, holding that plaintiffs have no right, title or interest in said claim or in any portion thereof.

The clerk's transcript contains plaintiff's notice of intention to move for a new trial on statutory grounds, including that of alleged newly discovered evidence. It also contains the order of the court denying the motion for new trial. Neither the clerk's transcript nor the reporter's transcript prepared at the request of appellants under Section 953a of the Code of Civil Procedure contains evidence that the motion for new trial was ever actually made, or that affidavits were filed or presented, or that other evidence was adduced on the motion for a new trial. The record on appeal is insufficient to show what evidence, if any, presented by affidavits or otherwise, was adduced or considered by the court on the motion for new trial.

[1, 2] A motion for new trial, under Section 657 of the Code of Civil Procedure, on the ground of newly discovered evidence, must be presented by means of affidavits. Sec. 658, Code Civ.Proc.; 20 Cal.Jur. 148, secs. 101 and 120. The mere filing of such affidavits with the clerk, without actually presenting them to the court on the motion is insufficient. Ambrose v. Allen, 113 Cal.App. 107, 117, 208 P. 169; People v. Thompson, 5 Cal.App. 2d 655, 43 P.2d 600; Deary v. Shields, 54 Cal.App.2d 795, 129 P.2d 935. The affidavits must fully set out the alleged newly discovered evidence, that it is material and not merely cumulative, that its production would likely result in a judgment different from the one which was rendered, that it can be adduced in the event of a new trial, and that it could not have been reasonably secured at the trial by the exercise of due diligence. 20 Cal.Jur. 182, secs. 119 and 120. In the present case the record on appeal does not show that any affidavits on motion for a new trial were even filed in the case.

[3] For the reason that the record on appeal is insufficient to show that affidavits on motion for a new trial were filed or presented to the court on the motion, we are unable to determine what alleged newly discovered evidence, if any, existed, whether due diligence was exercised, or whether it was merely cumulative. We are therefore not permitted to review the order of the court denying the motion for new trial. West v. Mears, 17 Cal.App. 718, 121 P. 700; Union Lumber Co. v. Webster, 15 Cal.App. 165, 113 P. 891; 2 Cal.Jur. 700, sec. 403. Under such circumstances this court must presume the trial court properly denied the motion for new trial. Kendall v. Kolb, 119 Cal.App. 581, 6 P.2d 965; Meier v. Hayes, 20 Cal.App.2d 451, 455, 67 P.2d 120.

[4] For the same reason that the record on appeal is insufficient to indicate what showing, if any, was made upon plaintiffs' motion to set aside the submission and open the case for further evidence, we may not review the alleged order of the court denying that motion. We are pointed to no record that any such motion was either made or denied. We have searched the record in vain for that motion.

[5] Defendants' application to impose a penalty upon the plaintiffs for instituting a frivolous appeal is denied. We are not satisfied the appeal was taken merely to harass the defendants, or to delay satisfaction of the judgment.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



60 Cal.App.2d 564

GRAY v. BYBEE et al.

Civ. 6869, 6950, 6980.

District Court of Appeal, Third District, California.

Sept. 24, 1943.

Rehearing Denied Oct. 21, 1943.

Hearing Denied Nov. 22, 1943.

1. Judgment ⇐518

An equitable action to enjoin defendants from levying an execution issued in a previous suit for possession of realty constituted a "collateral attack" on the former judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Appeal and error ⇐954(1, 2)
Injunction ⇐135

The granting or denial of a preliminary injunction rests in trial judge's discretion, and his order in that regard will not be disturbed on appeal except upon a showing of clear abuse of discretion.

3. Execution ⇐172(6)

The granting of temporary stay of execution in action to enjoin defendants from levying an execution issued in previous suit for possession of realty, though it be deemed to constitute a denial of plaintiff's application for preliminary injunction, was not an abuse of discretion, where order granting temporary stay of execution had effect of a preliminary injunction, and it did not appear that, upon proper application therefor, it might not have been extended during trial.

4. Dismissal and nonsuit ⇐60(1)

The plaintiff has duty to expedite trial of his case and to diligently prosecute it to a final determination.

5. Dismissal and nonsuit ⇐60(1)

Trial court had discretion to determine good or bad faith of plaintiff in seeking to continue trial while he prosecuted his appeal from order granting a stay of execution, and to dismiss case or to render judgment against him on merits for failure to proceed with trial at time it was regularly set.

6. Appeal and error ⇐447

Although an appeal would lie from an order refusing to grant a preliminary restraining order pending determination of the cause on its merits, such appeal did not deprive trial court of jurisdiction to proceed to try cause on its merits. Code Civ.Proc. § 963.

7. Injunction ⇐132

A "temporary restraining order" amounts to a mere preliminary or interlocutory order to keep the subject of litigation in status quo pending determination of the action on its merits.

See Words and Phrases, Permanent Edition, for all other definitions of "Temporary Restraining Order".

8. Homestead ⇐177(1)

Where trust deed was valid lien on realty when single woman acquired title to realty, homestead declaration was filed after such woman was subsequently married, and husband drew pleadings and represented his wife in action brought by parties claiming title through trustee's sale under trust deed against wife for possession of realty and made no claim of his homestead rights, husband was "estopped" from now asserting his homestead rights therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Homestead ⇐94, 107

Where trust deed was valid lien on realty when single woman acquired title to realty and homestead declaration was filed after such woman was subsequently married, the homestead rights were subject to prior valid trust deed given to secure an antecedent debt, as against the owner and all persons claiming through or under him, and foreclosure of the prior trust deed extinguished homestead rights.

10. Estoppel ⇐32(1)

Where trust deed was valid lien on realty when single woman acquired title to realty, homestead declaration was filed after such woman was subsequently married, and her husband executed quitclaim deed to parties claiming title through trustee's sale under trust deed, no homestead rights could be asserted by husband against such parties.

Appeal from Superior Court, Butte County; W. T. Belieu, Judge.

Equitable action by John Gray against Coyle E. Bybee and others to enjoin the defendants from levying an execution issued in a previous suit for possession of real property, wherein the defendants filed a cross-complaint. From two adverse orders and an adverse judgment, the plaintiff appeals.

Affirmed.

John Gray, of Chico, in pro. per., for appellant.

Coyle Bybee, of Chico, for respondents.

THOMPSON, Justice.

The plaintiff, appearing in proper person, has presented three separate appeals growing out of the same equitable action to enjoin the defendants from levying an execution issued in a previous suit for possession of real property. The former suit, in which the execution in question was issued, is entitled Bracey v. Gray. It involved the right of Arthur Bracey and wife to secure possession of the real property which they purchased after foreclosure of a trust deed executed by a former owner. After the execution of that trust deed, the property was conveyed by the owner, Alice Anderson, to Dora Stuart, then unmarried. She subsequently married the appellant, John Gray, after which she filed a homestead. The former action determined that the homestead was subject to the trust deed and that the grantee of the purchaser of the property at the foreclosure sale was entitled to possession. That judgment was affirmed on appeal. Bracey v. Gray, 49 Cal.App.2d 274, 121 P.2d 770. That judgment was pleaded in the answer and cross-complaint in this case as res judicata.

These appeals will be designated by their respective numbers, 6869, 6950 and 6980. The first one is from an order made on April 3, 1942, staying execution and failing to grant a temporary injunction pending the trial. The second appeal is from the judgment rendered against plaintiff on June 17, 1942, on account of his refusal to prosecute the trial at the time it was regularly set. The third one is from an order made January 14, 1943, after judgment, denying plaintiff's motion to recall and quash the execution and to restore him to possession of the real property, under his alleged homestead rights.

Each appeal is presented to this court on a transcript of documents and proceedings included in the judgment roll, which is stipulated to be correct so far as the documents and proceedings appear in the record on appeal. The evidence which was adduced at the hearings and on the trial is not before us. No bill of exceptions was settled or presented.

Stripped of its confusing intricacies, this suit for injunctive relief was brought by John Gray against Arthur Bracey and wife, the purchasers of certain real property, and against others, following the foreclosure sale thereof under a trust deed, after a previous judgment for possession had been rendered and affirmed on appeal in favor of Mr. Bracey and his wife. The appellant, John Gray, claims the right of possession under a declaration of homestead filed by his wife Dora, after the execution of the deed of trust by Alice Anderson, the former owner of the land, and after Dora's marriage to John Gray. The theory of the court, upon which the former judgment was rendered, was that the homestead was filed *subject to the existing deed of trust,* and that the subsequent foreclosure of that mortgage for default of payments pursuant to its terms terminated the homestead.

From the records, pleadings and opinion filed in the former action of Bracey v. Gray, supra, we glean the following facts:

On and prior to April 21, 1928, Alice Anderson owned the land in question. On

the last mentioned date she executed a deed of trust to the Title Insurance and Trust Company, as trustee, to secure a debt of $2,250 which she owed to State Mutual Building and Loan Association. That debt was not paid. Subsequently Alice Anderson conveyed the land subject to the trust deed to Dora Stuart, who was then unmarried. We are not informed concerning the consideration for that grant. Thereafter, on September 14, 1930, Dora Stuart married John Gray. She filed a declaration of homestead in December of that year. For breach of the terms of that instrument, the trust deed was duly foreclosed in 1934. The Association became the purchaser at that sale. In consideration of the payment of $1,500, the Association conveyed the property on July 5, 1935 to Arthur Bracey and wife. John Gray and his wife Dora were then in possession of the property. July 25, 1936, Arthur Bracey and wife commenced an action against John Gray and wife to recover possession of the property. On December 21, 1938, upon execution and delivery of a quitclaim deed from John Gray to Arthur Bracey, the last mentioned suit was dismissed as to John Gray. That action was tried and judgment was finally rendered against Dora Stuart Gray, May 1, 1939, granting Arthur Bracey and wife the right of possession. A motion for new trial was denied. John Gray did not participate as a party in that trial. On appeal to this court, that judgment was affirmed. It has become final. Pursuant to that judgment execution was issued and placed in the hands of the officer, George Allen, to levy and thereby to restore Arthur Bracey and wife to the lawful possession of the property. John Gray and wife subsequently filed in this court two separate proceedings, one of which was a petition for certiorari and the other a petition for a writ of supersedeas, to review the proceedings in the former case and to recall and quash the execution therein. Both petitions were denied. These special proceedings were also set up as res judicata in the answer and cross-complaint in this case.

[1] The present equitable action for injunctive relief was then commenced March 30, 1942, to restrain the levying of the execution. It constitutes a collateral attack on the former judgment. The complaint in this suit asks for an order to show cause why a temporary injunction should not be granted pending the litigation. That order to show cause was returnable April 3, 1942. After hearing on the last mentioned date, the desired temporary injunction was not granted, but the court did order a stay of execution for the period of thirty days. No motion to extend that stay was presented. The evidence adduced at that hearing is not before us. The record fails to show whether the complaint was verified. From that order granting the temporary stay of execution John Gray gave notice of appeal on the theory that it amounted to a denial of his prayer for a temporary injunction. The foregoing facts are embraced in the first mentioned appeal number 6869.

[2] We are of the opinion the granting of the temporary stay of execution, in appellant's favor, is not reversible error even if it be deemed to constitute a denial of the application for a preliminary injunction. While that thirty day stay was in force the appeal from that order was taken. The order had the effect of a temporary injunction. It does not appear that, upon proper application therefor, it might not have been extended during the trial. No such application was made. The granting or denial of a preliminary restraining order is usually within the sound discretion of the court. The order to show cause was presented on plaintiff's complaint before the answer was filed. It does not appear that the complaint was even verified. If affidavits on that order to show cause were filed, they do not appear in the transcript. We assume they were not filed. If evidence was taken on that hearing, it is not before us. Aside from the allegations of the complaint, we are not advised as to what showing was made on that hearing. Before the temporary stay of execution expired the answer and cross-complaint were filed showing adequate grounds for denying a preliminary injunction. The rule is well established by a multitude of authorities that the granting or denial of a preliminary or temporary injunction rests in the sound discretion of the trial judge and that his order in that regard will not be disturbed on appeal except upon a showing of clear abuse of discretion. Asiatic Club v. Biggy, 160 Cal. 713, 117 P. 912; 14 Cal.Jur. 180, sec. 7.

[3] In the present case no such abuse of discretion appears. The order granting a temporary stay of execution (appeal number 6869) is therefore affirmed.

[4, 5] The court did not err in rendering judgment against the plaintiff for fail-

ure and refusal to prosecute his case at the time it was regularly set for trial. It is the duty of a plaintiff to expedite the trial of his case and to diligently prosecute it to a final determination. The court had a sound discretion to determine the good or bad faith of the plaintiff in seeking to continue the trial while he prosecuted his appeal from the order granting a stay of execution, and to dismiss the case or to render judgment against him on the merits for failure and refusal to proceed with the trial at the time it was regularly set. Jackson v. De Benedetti, 39 Cal.App.2d 574, 103 P. 2d 990; 9 Cal.Jur. 526, sec. 18. In the present suit the trial was regularly set upon notice and with the knowledge of plaintiff for April 29, 1942, and continued from time to time, with either plaintiff's consent or with his knowledge, and finally set for trial for the 20th day of May of that year. The plaintiff appeared in court in proper person on the last mentioned date, together with the defendants and their attorney. The defendants insisted on trial at that time. The plaintiff moved for a continuance on the ground that his appeal from the order granting a temporary stay of execution had ousted the court of jurisdiction to proceed to try the case on its merits until the appeal was first disposed of. The court denied plaintiff's motion for a continuance, and directed him to proceed with the trial, which he refused to do. The defendants then moved for a default judgment against the plaintiff for refusal to proceed with the trial or to prosecute his cause with diligence. The plaintiff also moved for judgment on the pleadings. Evidence was adduced in behalf of the defendants. The respective motions were argued and submitted for decision. On June 17, 1943, the court denied plaintiff's motion for a continuance of the case and for judgment and granted defendants' motion for judgment against the plaintiff on account of his refusal to proceed with the trial or to prosecute it with due diligence. Judgment was accordingly rendered against the plaintiff to the effect that he take nothing by his action. That judgment provides in part:

"The defendants * * * having thereupon moved for judgment upon the pleadings * * *, *plaintiff having refused to proceed to trial* of the action, and the plaintiff having also moved for judgment upon the pleadings * * *, and said motions, respectively, having been duly presented and argued on June 2, 1942, *documentary evidence having been offered in support thereof* by the respective parties * * * the court * * * orders that defendants' motion for judgment on the pleadings herein in favor of defendants and against plaintiff be granted, and plaintiff's motion be denied.

"It Is Therefore Ordered Adjudged and Decreed as follows:

"1. That judgment be entered herein in favor of defendants and against the plaintiff and that plaintiff take nothing by his complaint herein."

From that judgment the plaintiff has appealed on the theory that his former appeal taken on April 21, 1942, from the order staying execution for thirty days was a denial of his application for a temporary injunction pending the trial, and that the appeal ousted the trial court of jurisdiction to proceed with the trial on its merits.

[6, 7] There is no merit in this contention. While it has been determined that an appeal lies, under Section 963 of the Code of Civil Procedure, from an order granting or refusing to grant a preliminary restraining order pending the determination of the cause on its merits (Laam v. McLaren, 28 Cal.App. 632, 153 P. 985; 2 Cal.Jur. 179, sec. 37), that appeal does not deprive the court of jurisdiction to proceed to try the cause on its merits. The granting or denial of a temporary restraining order is discretionary with the trial judge (14 Cal.Jur. 180, sec. 7) and amounts to a mere preliminary or interlocutory order to keep the subject of litigation in status quo pending the determination of the action on its merits. People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361, 362; 14 Cal.Jur. 180, sec. 9. Such an order does not divest the court of jurisdiction to proceed to try the cause on its merits. In the Black's Food Store case last cited it is said in that regard: "A sound discretion was therefore conferred upon the trial court to grant or deny the preliminary injunctions. It does not appear that discretion was abused. The orders do not determine the merits of the controversies. They have the effect of merely maintaining the status quo until the cases are decided on their merits."

If an appeal from an interlocutory or preliminary order granting or denying a temporary injunction has the effect of depriving the trial court of jurisdiction to proceed to try the case on its merits until the appeal is disposed of, it would tend to

disrupt calendars, unduly extend trials, encourage "piece-meal" determination of issues and defeat justice, contrary to the uniform policy of the law. Bank of America v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357; Doudell v. Shoo, 159 Cal. 448, 455, 114 P. 579; 31 Cal. Law Rev. 90.

[8] Regardless of the fact that the trial court did not determine that the former judgment is res judicata, the pleadings show conclusively there is no merit in this action. It is an undisputed fact that the plaintiff never had any interest in the property except that which he may have acquired by the filing of the homestead. The land was conveyed to Dora Stuart before her marriage, subject to the trust deed. She subsequently married the plaintiff and almost immediately thereafter filed the homestead, which was subject to the lien created by the trust deed. Mr. and Mrs. Bracey became the owners of the land by purchase from the State Mutual Building and Loan Association, the successful bidder for the land at the foreclosure sale. In the suit for possession, which the purchasers brought against Mr. and Mrs. Gray, John Gray procured a dismissal as to him by executing and delivering to the owners a quitclaim deed. Mr. Gray drew the pleadings and represented his wife in the prosecution of that case. He knew of the issues which were involved therein, and he made no claim of his homestead rights. We are of the opinion he is therefore estopped to now assert his homestead rights therein, under the circumstances of this case.

[9] It has been determined that the homestead rights are subject to a prior valid trust deed given to secure an antecedent debt, as against the owner and all persons claiming through or under him, and that the foreclosure of a prior trust deed extinguishes the homestead rights. Bracey v. Gray, supra; Carpenter v. Smallpage, 220 Cal. 129, 29 P.2d 841. In the Bracey case, supra [49 Cal.App.2d 274, 121 P.2d 771], this court said with respect to the very issues which are involved in this suit:

"The action was dismissed as to defendant John Gray on December 21, 1938, and in consideration thereof said defendant executed and delivered to respondents a quitclaim deed to the property involved. *This should have, and did end the litigation, so far as that defendant was concerned.* * * "The position of appellants seems to be that the court had no jurisdiction to enter the judgment of May 1st. It is contended that, as there was a homestead declared upon the property, the husband was a necessary party, and that judgment should have also been ordered against him. The deed of trust was a valid lien upon the property when appellant Dora Stuart Gray acquired the property as a single woman. The homestead declaration was filed after she was married. *A properly executed deed of trust is effective to convey the legal title to the trustee, so far as it is necessary to convey it to the purchaser at the trustee's sale, free of all right or estate of the trustor, or anyone claiming under or through her. The conveyance of the trustee relates back to the estate of the trustor at the time she executed the trust deed, and transfers to the purchaser the entire estate then vested in the trustor, thereby completely extinguishing the homestead which was filed subsequent to the deed of trust.* That is the precise situation here. 13 Cal.Jur. § 83, page 512. Not only is any assertion of appellants' homestead right precluded by law, but appellant John Gray has no rights which he could assert, for the reason that he had, previous to trial, conveyed his interest in the property to respondents. The contention is without merit." (Italics added)

To the same effect is the Carpenter case, supra. In that case it appeared that Charles A. Menne owned the real property in question. He married in October, 1925. In April, 1926, he filed a homestead on the property. The following month he deeded it to his wife. July 7, 1926, they executed a trust deed of the property to secure a debt due to Stockton Morris Plan Company. February 6, 1932, Menne and wife deeded the property to A. H. Carpenter. Prior to the last mentioned deed, the trust deed was regularly foreclosed and M. M. McFarland became the purchaser at the sale of the property. In a subsequent suit to quiet title the trial court determined that McFarland was the owner and entitled to possession and that plaintiff had no right, title or interest therein. The Supreme Court said [220 Cal. 129, 29 P.2d 842]:

"McFarland's title related back to the deed of trust executed by Menne and wife to secure the obligations of the Stockton Morris Plan Company which was recorded

on July 9, 1926, over five years before appellant received his deed. Appellant, when he accepted delivery of his deed from Menne and wife, had constructive, and the evidence shows also actual, notice of the trust deed. * * *

"Plaintiff's title to the property was subject to the trust deed, and when this trust deed was foreclosed, it extinguished whatever interest plaintiff acquired under his deed from Menne and wife." (Italics added)

[10] Applying the preceding language to the present case, the title of these defendants, Bracey and wife, "related back to the deed of trust". They became the owners and entitled to possession of the property as purchasers thereof from the beneficiary, State Mutual Building and Loan Association, the purchaser of the property at the foreclosure sale. Further applying the language of the Carpenter case, "Plaintiff's title to the property was subject to the trust deed, and, when this trust deed was foreclosed, it extinguished whatever interest plaintiff acquired" either by a subsequent deed or by means of the alleged homestead declaration. Moreover, in the present case there is much more convincing reason why John Gray may not assert a homestead interest in this property. He had no real interest in the property. It was conveyed to Dora Stuart, subject to the trust deed, before she became his wife. He had actual notice of the existence of that mortgage, and the subsequent foreclosure proceedings. He was an original party defendant in the former suit of Bracey and wife for possession. He procured a dismissal of that action as to himself, by executing and delivering to the owners a quitclaim deed in which he specifically renounced any interest therein which he might have claimed. He prosecuted that action in behalf of his wife without asserting any interest therein. Certainly he may not now repudiate his own deed and assert a homestead interest under the circumstances of this case. There is no merit in plaintiff's contentions in that regard. The judgment (appeal number 6950) is therefore affirmed.

Finally the plaintiff has appealed from the order of the court made January 14, 1943, after the rendition of judgment, denying his motion to recall and quash the execution previously levied, and to restore plaintiff to possession of the land. This is designated as appeal number 6980.

For the reasons heretofore stated, there is no merit in this third appeal. Whatever interest the plaintiff may have had in the property by virtue of the homestead which his wife filed within three months after their marriage, it was terminated by the foreclosure of the trust deed. Mrs. Gray took title to the real property subject to the trust deed and prior to her marriage. The homestead was also subject to the trust deed. John Gray relinquished whatever homestead interest he may have had by executing and delivering to the owners of the land his quitclaim deed. He had full knowledge of the entire transaction. The court therefore properly refused to quash the execution.

The order denying plaintiff's motion to quash the execution and to restore him to possession of the real property is affirmed.

ADAMS, P. J., and PEEK, J., concur.



60 Cal.App.2d 463

PEOPLE v. RENTERIA.
Cr. 3715.

District Court of Appeal, Second District, Division 3, California.

Sept. 14, 1943.

1. Infants ⇐18

Juvenile court could remand cause to superior court for prosecution under general law against person 17 years of age charged with theft of automobile upon finding that minor was not a fit person to be dealt with under juvenile court law. St. 1937, p. 1037, § 734; p. 1044, §§ 825, 826; St. 1939, p. 2712, § 827.

2. Infants ⇐18

Under provisions of the Welfare and Institutions Code, the provision that the probation officer should file a petition asking that a minor against whom a criminal cause is pending be declared a ward of the juvenile court is "directory" and not "mandatory", where the juvenile court considers only whether the minor is a fit subject for consideration under the Juvenile Court Law, and does not retain the case in the

juvenile court but remands it for proceedings under the general law. St. 1937, p. 1033, §§ 701, 720; p. 1044, §§ 825, 826; St. 1939, p. 3027, § 700(m).

See Words and Phrases, Permanent Edition, for all other definitions of "Directory Provision" and "Mandatory Provision".

3. Infants ⇐18

The matter of determining whether a minor prosecuted for a criminal offense is a fit subject for consideration under Juvenile Court Law rests in the sound discretion of the judge of the juvenile court at any time during the progress of some proceeding in the juvenile court. St. 1937, p. 1046, § 831.

4. Infants ⇐16

General purpose of statute providing that juvenile court law should be liberally construed to the end that supervision of ward of juvenile court shall approximate that which should be given by his parents is to supplant parental supervision which has been lacking with view that the minor should not become a criminal, but a useful member of society. St. 1937, p. 1021, § 551.

5. Infants ⇐18

Where minor had been in two corrective schools and violated parole and was paroled again, and record showed a prima facie case of two felonies, and juvenile officer gave opinion that minor was incorrigible, judge of the juvenile court could under statute find that minor prosecuted for theft of an automobile was not a fit subject to come under the jurisdiction of the juvenile court and remand the cause to the general jurisdiction of the superior court. St. 1937, p. 1046, § 831.

6. Infants ⇐18

Juvenile Court Law recognizes that a minor may have such a record of delinquency and his derelictions be of such character that to make him a ward of the juvenile court would not aid him to serve the purpose of the juvenile court law and defeat such purpose in so far as the protection of other wards is concerned and remand cause to general jurisdiction of the superior court. St. 1937, p. 1046, § 831.

7. Criminal law ⇐371(12)

In prosecution for stealing automobile, testimony of witness, a minor, relative to conversation between her and defendant concerning plans for her escape from a correctional institution with defendant, was admissible to show motive for stealing automobile though it may have established commission of another offense.

8. Criminal law ⇐1169(2)

In prosecution for stealing automobile, error, if any, in admission of witness' evidence, a minor, concerning defendant's plan to assist her in escaping from a correctional institution, was cured by defense counsel's cross-examination of officer bringing out the same testimony.

9. Larceny ⇐63(1)

In prosecution for stealing automobile, whether defendant took automobile was for the jury.

10. Criminal law ⇐317

In prosecution for stealing automobile where defendant did not testify, the jury was entitled to consider that fact in determining whether he took the automobile. Const. art. 1, § 13.

11. Larceny ⇐68(2)

In prosecution for stealing automobile, question whether defendant took automobile with intent to deprive owner of it permanently was for the jury. Pen.Code, § 499b; Vehicle Code, § 503, St. 1939, p. 1481.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Sam Marino Renteria was convicted of theft, and he appeals.

Affirmed, and appeal from orders dismissed.

William T. Selby, of Ventura, for appellant.

Robert W. Kenny, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and M. Arthur Waite, Dist. Atty., of Ventura, for respondent.

PARKER WOOD, Justice.

Defendant was accused of theft of an automobile. In a trial by jury he was convicted. He appeals from the judgment, the order denying his motion for a new trial and all orders and "rules" of the court. His contentions are: (1) The case should have been tried in the juvenile court for the reason he was 17 years of age; (2) the purported hearing in the juvenile court wherein it was ordered that the case be tried in the superior court was a sham and

conferred no jurisdiction on the superior court; (3) certain evidence was received improperly; (4) there was no evidence that defendant took the automobile; and (5) there was no evidence of an intent to deprive the owner of the automobile permanently.

On February 13, 1943 (Saturday), about 8:45 p.m., Harry Dysart parked his Ford automobile on a street in Ventura. About an hour later he observed that his car was gone. He did not give anyone permission to take the car. The next morning the car was found by officers in an orchard near the State School for Girls at Ventura.

An employee of that school testified that on February 14, 1943 (Sunday), about 7:30 a.m., while he was driving an automobile on a road near the school, he passed a Ford automobile which was parked at the side of the road about 30 feet from the witness, and he saw a lone person therein, at the driver's place, who appeared to be the defendant; that a few minutes thereafter he saw the same person drive the automobile from the place where it had been parked into a private driveway in a nearby orchard and park it near the entrance; that the witness then drove his car into that driveway from an entrance at the opposite side of the orchard, and in passing the parked car on the 16-foot-wide driveway, he saw, and was within an arm's length of, the person who was at the driver's place in that car, and the said person was the defendant; that the witness proceeded to the school, returned to the orchard about 10 a.m., and saw the same car therein that he had passed previously, but no one was in it; that the car taken from the orchard by the officers was the same car in which the witness had seen the defendant.

About 9 a.m. on February 14 (Sunday), two officers saw defendant running on a street, in a direction away from the car, about 500 yards from the place where the car was found in the orchard. One of the officers asked him what he was doing, and he replied: "I am out exercising." They searched the defendant and saw a pair of gloves in his pocket, but they did not take the gloves from him. After they had questioned defendant in the sheriff's office, those gloves were found on the floor therein under a table at which defendant had been sitting. Dysart, the owner of the car, testified that the gloves were his, and he had left them in his car.

Bertha Aguilar, an inmate of the State School for Girls at Ventura, testified that she knew defendant, that he had visited her at the school on Thursday, February 11, under the name of James Aguilar which was her brother's name. She testified further, after objections by defendant's counsel to such further testimony were overruled, that defendant asked her if she wanted to run away, and she said, "No"; that he said if she changed her mind he would be halfway up the road to the school on Sunday at 8:00 a.m., and that she should run to the car when she was marching to mass on Sunday; that she was not at the school on Sunday because the officers, who arrested defendant, had taken her to a detention home on Friday.

In defendant's suitcase, which was at the side and near the rear of an apartment house, the officers found a letter dated February 11, 1943, written by defendant, which was received in evidence and stated in part: "Dear Johnnie * * * Now getting to some real confidential business you know why I'm here in Ventura. I saw Bertha as I planned * * *. When I saw her * * * I was kind of nervous * * *. If you had of been in my place you'd be nervous too, because if you get hooked it's the pen for you, but I had to take that chance because she means * * * a lot to me * * *. If I get her out and we get married, and if she breaks up with me, well it'll hurt me a lot inside * * *. I wouldn't have nothing to look forward in the future, as she is all that counts with me now. If I make it a clean beat, I am taking her to my sister's house * * *. You see, right now that I'm only wearing drapes. The guys keep staring like hell at me. They ain't nothing but a big bunch of squares * * *. Wish me luck as I'll need it bad. Sam."

On cross-examination by defendant's counsel, concerning conversations with defendant, one of the officers stated that defendant said he had told Bertha Aguilar he was going to, or attempt to, get her out of the school. Also on such cross-examination the officer said he found two bus tickets in defendant's billfold which tickets were for transportation from Ventura to Los Angeles and were purchased on February 12 (Friday); that at first defendant said he bought the tickets at different times, but later, after the officers had shown that the numbers on the tickets were consecutive, he said he bought both tickets at

the same time and that he bought them for Bertha and himself so that he would be sure of a way to go south if he got Bertha out of the school.

Defendant did not testify.

[1] It was not error to try the case in the superior court instead of the juvenile court. Section 825 of the Welfare and Institutions Code, St. 1937, p. 1044, provides: "No court shall have jurisdiction to try the case of any person under the age of eighteen years at the time of * * * commission of a * * * crime unless the matter has first been submitted to the juvenile court by petition * * * or by certificate of any other court * * * and said juvenile court has made an order therein directing that such person be prosecuted under the general law." At the preliminary examination in the justice court, upon the complaint charging defendant with theft of the automobile, it appeared that defendant was 17 years of age, and thereupon the justice, in accordance with the provisions of section 826 of the said code, suspended the proceedings, and certified and transferred the case to the juvenile court. Section 734 of the Welfare and Institutions Code provides: "If upon the hearing [in juvenile court] * * * the court determines that any person alleged to come within the provisions of subdivision (m) of section 700 [relating to persons who commit crime] is not a fit and proper subject to be dealt with under [the juvenile court law], the court may dismiss the petition, and direct that the person be prosecuted under the general law." The juvenile court found that defendant was not a fit person to be dealt with under the juvenile court law and remanded the cause for prosecution under the general law. Section 827 of the Welfare and Institutions Code as amended in 1939, St. 1939 p. 2712, provides that upon receipt of the certification from the court in which the accused was charged, "* * * the clerk of the juvenile court shall immediately notify the probation officer who shall thereupon file a petition as provided in sections 721 and 722 of this code, except that such petition need not be verified; and the probation officer need make no investigation prior to the filing of such petition. * * *" A petition was not filed in the juvenile court. Defendant asserts that the superior court did not acquire jurisdiction to try the case because such petition was not filed.

The "manner of invoking the jurisdiction of the juvenile court" is stated in section 720 of the Welfare and Institutions Code as follows: "A person subject to its jurisdiction may be brought before the juvenile court by any of the following means: (a) A petition praying that such person be declared a ward of the juvenile court * * *. (b) A petition that such person be declared free from the custody and control of his parents. (c) Certification from any other court before which such person is brought, charged with the commission of a crime."

[2] Jurisdiction of the juvenile court includes minors who are within various descriptions, Welfare and Institutions Code, sec. 700, St. 1939, p. 3027, including a minor "(m) Who violates any law of this State * * * defining crime." Other subdivisions of that section relate to the habits and acts of a minor, or conditions affecting him, which require that he be declared a ward of the juvenile court for the purpose of eliminating the habits, acts, or conditions. Under such circumstances the juvenile court acquires jurisdiction by a petition asking that the minor be declared a ward of the court. Welfare and Institutions Code, sec. 720, subd. (a). Section 701 of that Code provides that the acts or condition of his parents may require that he be freed from their control. In that event the jurisdiction of the juvenile court is invoked by a petition. Welfare and Institutions Code, sec. 720, subd. (b). The petition which the probation officer is directed to file upon notice from the clerk after the certification of a case to the juvenile court from another court is not necessary to confer jurisdiction upon the juvenile court, inasmuch as the certification from the other court filed under section 720, subd.(c) of the Welfare and Institutions Code confers jurisdiction. The provision that the probation officer should file a petition is therefore directory and not mandatory, under the circumstances of this case wherein the juvenile court considered only whether defendant was a fit subject for consideration under the juvenile court law, and did not retain the case in the juvenile court, but remanded it for proceedings under the general law. As above noted, section 825 of the Welfare and Institutions Code, concerning jurisdiction, does not include a provision for such petition by a probation officer. In People v. Wolff, 1920, 182 Cal. 728, 190 P.

22, a cause was certified by a justice court to a juvenile court after finding that the defendant was under 18 years of age, but it failed to attach to its certificate a certified copy of the complaint in accordance with a provision of the Juvenile Court Act. It was contended therein that such omission deprived the juvenile court of jurisdiction. The court said at page 733 of 182 Cal., at page 24 of 190 P.: "We do not think the requirement was intended to be jurisdictional. The clause requiring such copy to be attached is obviously merely directory in character and effect, the object being to apprise the juvenile court of the nature of the charge." A similar provision, relative to attaching a copy of the complaint, is now in section 827 of the Welfare and Institutions Code as amended in 1939. As above noted, the provision relative to filing a petition by the probation officer is also in section 827. It is to be noted, further, it is therein provided that such petition need not be verified, and the probation officer need make no investigation prior to filing such petition. If such a petition were filed it would embody practically the same information, relevant to a consideration of defendant's fitness for the juvenile court, as that disclosed by the certification from the other court. If the provision of section 827 relative to attaching a copy of the complaint is directory, it would seem that the provision of the same section relative to filing a petition by a probation officer, without verification or investigation, after certification of the proceedings by another court, would likewise be directory and of no jurisdictional importance, at least insofar as the right of the juvenile court to determine whether the person is a proper subject for consideration under the juvenile court law is concerned.

[3-6] Defendant also contends that the hearing in the juvenile court was a sham, in that the evidence was inadmissible and without probative force. The hearing was sufficient and justified the order remanding the cause for prosecution under the general law. Section 831 of the Welfare and Institutions Code provides in part: "If the judge of the juvenile court finds that the person * * * is a fit subject for consideration under the provisions of this chapter, he may make such order * * * as he deems best in relation to such person. If the judge at any time thereafter concludes that the person is not a fit subject for further consideration * * * he may sit as a committing magistrate and hold a preliminary examination * * * or he may remand the person to the court in which the charge is pending * * *." It was contemplated, as shown by that section, that the juvenile court judge might conclude at any time during the progress of some proceedings in the juvenile court that defendant was unfit for further consideration under the juvenile court law. The matter of determining that issue rested within the sound discretion of the juvenile judge. See In re Spiers, 1939, 32 Cal.App.2d 124, 129, 89 P. 2d 456. Section 551 of the Welfare and Institutions Code provides: "This chapter [juvenile court law] shall be liberally construed, to the end that the care, custody, and discipline of a ward of the juvenile court * * * shall approximate as nearly as possible that which should be given by his parents. * * *" The general purpose of that law, therefore, is to supplant parental control, custody, and discipline which has been lacking, with the end in view that the child should not become a criminal in later years, but a useful member of society. The law recognizes, however that a minor may have such a record of delinquency and his derelictions be of such character that to make him a ward of the juvenile court would not aid him or serve the purpose of the juvenile court law, and probably would defeat such purpose insofar as the protection of other wards of the court is concerned.

At the hearing in the juvenile court a deputy sheriff testified in substance the same as hereinabove stated concerning the arrest of defendant on the present charge; that the officers found defendant's suitcase and blanket under bushes at the side and near the rear of an apartment house where defendant said he had ditched them; that defendant said he was a fighter by profession and that he was running the morning of his arrest because he was in training, taking exercise; that Bertha Aguilar, an inmate of the school, said in the presence of defendant and the officers that plans were made for defendant to assist her in escaping from the school by meeting her on the school road after she "broke lines" on the way to mass; that he (officer) believed that Bertha was connected with a group of Mexicans which was involved in a murder in Los Angeles County; that the officers found, in defendant's suitcase, an album containing newspaper clippings and pictures relative to a murder in Los

Angeles County; that another inmate of the school identified defendant as a person who was at the window of her cottage on the night of February 10, 1943; that he (officer) received a teletype from the sheriff of Los Angeles County which stated that defendant had been arrested at different times upon charges of kidnapping, robbery and burglary; that he had been committed to Whittier State School and Preston State School; that he had violated parole from Preston School, and had been recommitted.

A juvenile officer testified in the juvenile court that he had examined the record of defendant, and in his opinion defendant was incorrigible and not a fit subject for the juvenile court; that he had been committed to Whittier State School, and to Preston State School, and had violated his parole and had been recommitted to the Preston School, and was paroled again.

At the time the judge of the juvenile court found that defendant was not a fit subject for the juvenile court, he stated: "The thing that rather settles my mind as far as you are concerned is that you have been in Whittier and you have been in Preston, and paroled and violated it, and went back and were paroled again and out, and now the record shows at least a prima facie case of two felonies up here in this County."

[7, 8] Defendant contends further that the superior court erred in admitting the testimony of Bertha Aguilar relative to the conversation between her and defendant concerning plans for her escape. His argument is that such evidence did not tend to show that he took the automobile; that it was offered to injure defendant by suggesting that he was connected with an attempt to commit a crime other than the one upon which he was being tried. Such evidence was admissible to show a motive for stealing the automobile. People v. Lucich, 1931, 111 Cal.App. 293, 295 P. 593; People v. Guttmann, 1935, 10 Cal.App.2d 490, 52 P.2d 495, and to show intent. People v. Coltrin, 1936, 5 Cal.2d 649, 55 P.2d 1161. Furthermore defendant's counsel cross-examined one of the officers (Bowman) extensively concerning statements made by defendant to the officers relative to his plans to assist Bertha in escaping from the school, which officer had not testified previously concerning such statements. In such cross-examination the reference to the attempted escape was repeated at defendant's request. If it had been error to receive such testimony, the error was cured by such cross-examination. People v. Hendricks, 1933, 129 Cal.App. 156, 159, 18 P.2d 715; People v. Raymond, 1927, 87 Cal.App. 510, 526, 262 P. 442.

[9, 10] Another contention of defendant is that there was no evidence defendant took the automobile. The facts we have related sufficiently dispose of that contention. The jury was entitled to consider the fact that defendant did not testify, in determining whether he took the automobile. Art. I, sec. 13, Const. of Cal. There was sufficient evidence from which the jury might infer, as it did, that defendant took the automobile.

[11] The last contention of defendant is that there was no evidence of an intent to deprive the owner of the automobile permanently. His argument is that it might be that defendant violated section 499b of the Penal Code, which relates to taking an automobile for the purpose of temporarily using it; or it might be that he violated section 503 of the Vehicle Code, St. 1939, p. 1481, which relates to taking an automobile with intent to either permanently or temporarily deprive the owner thereof; however, in either event he would not be guilty of grand theft, the only crime with which he was charged; that "anything but a permanent taking is not theft although it may be a violation of one of the other sections mentioned." He argues further that if there was any evidence of an intent it was an intent to use the car temporarily in transporting the girl from the school to the bus station, as evidenced by the fact that he had purchased two bus tickets. It might also be argued, with equal force, that he purchased the tickets for use in the event he did not steal an automobile. Whether the automobile was taken with intent to deprive the owner of it permanently was a question of fact for the jury. The trial court gave three instructions to the effect that the jury could not find defendant guilty of grand theft unless it was proved beyond a reasonable doubt that defendant intended to permanently deprive the owner of said automobile. The court also gave an instruction that: "If it appears that property has been taken with the intent to make but a temporary or specific use of the property, then a conviction of grand theft may not occur." The court instructed the jury further that: "Evidence of the recent, unexplained possession of stolen

property, standing alone, is not sufficient to justify a verdict of guilty of the crime of theft." The instructions were accurate and clear, and the evidence was sufficient to justify the verdict.

The judgment and the order denying the motion for a new trial are affirmed. The appeals from the other orders and the "rules" of the court are dismissed.

DESMOND, P. J., and SHINN, J., concur.



60 Cal.App.2d 553

CAMPBELL (STATE COMPENSATION INS. FUND, Intervener) v. FONG WAN et al.

HOCKING (STATE COMPENSATION INS. FUND, Intervener) v. SAME.

PEGNEM et al. v. SAME.

Civ. 12247.

District Court of Appeal, First District, Division 2, California.

Sept. 24, 1943.

Hearing Denied Nov. 22, 1943.

1. Evidence ⇐47

Court takes judicial notice of the general safety orders of the Industrial Accident Commission. Code Civ.Proc. § 1875(3); St.1937, p. 320, § 7157.

2. Evidence ⇐516

In action to recover for injuries sustained in falling from a scaffolding, expert testimony relating to the custom and usage in constructing scaffoldings was admissible in face of safety rules of the Industrial Accident Commission, as relating to a matter not within the common knowledge of jury. Code Civ.Proc. § 1875(3); St.1937, pp. 308, 320, §§ 6318, 7156.

3. Negligence ⇐6

Merely because one has complied with the terms of a statute or ordinance does not absolve him from negligence, since one may act in strict conformity with the terms of an enactment, and yet not exercise the amount of care which is required under the circumstances.

4. Appeal and error ⇐1050(1)

Permitting expert testimony relating to custom and usage of building contractors in constructing scaffoldings in face of safety rules of Industrial Accident Commission, which required less bracing than testified to, was not reversible error, since such rules established a minimum standard of care and did not abrogate higher standards. St.1937, pp. 308, 320, §§ 6318, 7156.

5. Appeal and error ⇐1050(1)

Permitting expert testimony relating to custom and usage of building contractors in constructing scaffoldings in face of safety rules of Industrial Accident Commission, if erroneous, was not prejudicial where the rules in force at time involved required the ledgers to be constructed of boards of a certain size and the number of boards was to be determined solely by the words "unsafe or improper". St. 1937, pp. 308, 320, §§ 6318, 7156.

6. Negligence ⇐136(26)

Where subcontractor's employees who were injured as result of contractor's alleged negligence in erection of scaffolding were claiming defects in addition to use of but one ledger, some of which defects were not patent, question of contributory negligence was properly for jury, notwithstanding employees' testimony that they either saw that one ledger was used or paid no attention to it. St.1937, pp. 308, 320, §§ 6318, 7156.

7. Negligence ⇐136(26)

Where there is evidence of negligence in construction and maintenance of an instrumentality, which is not patent and could not be observed by use of ordinary care, question of negligence of party using instrumentality is a question of fact.

8. Master and servant ⇐330(1)

In action by subcontractor's employees against owners of building for injuries sustained in falling from a scaffolding, where one of defendants, a Chinese, though not a record owner, was conducting a cafe upon premises and held himself out as part owner of premises, put some of his own funds into the building and paid for the work and materials, burden was upon such defendant to prove that his activities were limited to the relation of agent for other defendants, and where burden was not sustained, a finding that such defendant was an owner of some interest in premises

was warranted. St.1937, pp. 308, 320, §§ 6318, 7156.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

On rehearing.

Judgments below affirmed.

Prior opinion, 136 P.2d 808.

D. W. Brobst, of Oakland, and John L. McNab and A. J. Harwood, both of San Francisco, for appellants.

Weinmann, Quayle & Berry and Charles Burkett Jr., all of Oakland, for respondents Hocking and Campbell.

Nichols & Richard and Leonard Dieden, all of Oakland, for respondents Pegnem and State Compensation Ins. Fund.

NOURSE, Presiding Justice.

These three actions were brought for personal injuries by Hocking, Pegnem and Campbell against Fong Wan and his two sons Richard R. Fong and Edward E. Fong. The cases were consolidated for trial and the jury returned a verdict in favor of each of the plaintiffs upon which three judgments were entered. The State Compensation Insurance Fund was allowed to intervene, it being a compensation insurance carrier for the employer of the three plaintiffs, and it also had judgment against defendants to recover compensation paid. The defendants above named appeal from the judgments entered against them. A rehearing was granted in this case in order to give further consideration to the effect of safety orders of the Industrial Accident Commission in determining the standard of care required in building a scaffolding.

The plaintiffs, Hocking, Pegnem and Campbell, were employed by Witt as plasterers in remodeling the new Shanghai Cafe in Oakland, which property stood in the names of Richard and Edward Fong, but which was managed by Fong Wan, who was an alien incapable of holding real property in his own name. The plaintiffs were injured when they fell from a scaffolding placed in front of the New Shanghai Cafe building. One Lloyd Dawson, a contractor, had supervised the erection of the scaffolding and had made an oral agreement with Witt for the plastering job. Dawson was paid $10 a day plus a fixed percentage of the cost if he kept the cost of building within certain limits; he supervised the work but all workmen, insurance, both social security and workmen's compensation, and materials were paid for through Fong Wan's office; Dawson had not posted a bond, but he secured the building permit; and some testimony was given that Fong Wan was around the job frequently, and urged the workmen to rush the completion of the remodeling. Fong Wan testified that he was making the improvements for himself and for his sons. He put some of his own funds into the job. He managed the New Shanghai Cafe when it was in operation and his sons had no interest in the venture, other than their ownership of the realty. The rentals from the real property were collected by him, and he would turn part over to his sons. At the time they purchased the real property, Fong Wan told the sons that they would have to take title because he was an alien who could not hold real property.

There is a sharp conflict in the testimony concerning how the scaffolding was constructed—what grade of lumber was used, how many nails supported the framework, and how the ribbons were placed beneath the ledger supporting the platform planks upon which the workmen stood. Two of the injured workmen testified that they noticed that the platform upon which they were working was supported by only a single ledger. Over objection that the usual and standard practice in the community was immaterial where there were laws and statutes of the State of California covering the matter, testimony of a qualified expert was admitted concerning the "usual and standard of custom and practice of the building trade in" the vicinity in constructing scaffoldings. This testimony paralleled the requirements of the General Construction Safety Orders of the Industrial Accident Commission then in force. It also paralleled the requirements of the Construction Safety Orders effective approximately two months after the accident except that it failed to mention the alternative method of construction providing for either two ledgers of a small size or one ledger of a large size. The testimony mentioned only the two ledger type construction. Defendant Dawson testified that the scaffolding in question conformed to the one ledger type construction. However, on this point his tesimony is in conflict with the testimony of the men who

built the scaffold, who testified the ledgers used were of the size of the double ledger type construction.

Appellants, on the basis of Lloyd Dawson's deposition, contend that there is insufficient evidence to support the implied finding of the jury that Dawson was an employee of the appellants, but they contend that this evidence shows that he was an independent contractor having complete control over the construction of the improvements, though paid upon a per diem basis. After this deposition was taken, special counsel was employed for the witness and his testimony at the trial was directly contrary to that given in his deposition. The jury chose to accept the tesimony given at the trial, and that ends the controversy.

[1, 2] Next appellants contend that the court committed reversible error in allowing the expert testimony relating to the custom and usage of building contractors in constructing scaffoldings in the face of the safety rules of the Industrial Accident Commission. The court takes judicial notice of the general safety orders of the Industrial Accident Commission. Code of Civil Procedure, section 1875(3); Drillon v. Industrial Accident Comm., 17 Cal.2d 346, 352, 110 P.2d 64; Code, sec. 7157, St. 1937, p. 320. However, it is clear that it was not error to admit the testimony of general usage and standard. The evidence was relative to the issues at hand as expert testimony on a matter not within the common knowledge of jury. Brockman v. Aldous, 11 Cal.App.2d 650, 54 P.2d 43; Long v. John Breuner Co., 36 Cal.App. 630, 636, 172 P. 1132; McStay v. Citizens' Nat. T. & S. Bank, 5 Cal.App.2d 595, 43 P.2d 560. The testimony was necessary in order for the jury to come to an intelligent conclusion concerning the standard of care required of an ordinary man in constructing a scaffolding.

[3,4] But the appellants contend that the safety orders of the Industrial Accident Commission establish the only standard for the construction of scaffolding. They argue that evidence of custom or usage may not be admitted to vary the express terms of a statute. This position is not tenable. California Jurisprudence states the rule: "It does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence. One may act in strict conformity with the terms of an enactment, and yet not exercise the amount of care which is required under the circumstances." 19 Cal.Jur. 634; Sickles v. Mt. Whitney Power & Elec. Co., 177 Cal. 278, 280, 170 P. 599; Bush v. Southern Pac. Co., 106 Cal.App. 101, 108, 289 P. 190; Harper v. Northwestern Pac. R. Co., 34 Cal.App.2d 451, 454, 93 P.2d 821. Although we can conceive of regulatory statutes, compliance with which would be due care as a matter of law in the absence of other circumstances (cf. James v. White Truck etc., Co., 1 Cal.App.2d 37, 42, 36 P.2d 401), the regulations before us were not intended to be more than the minimum standard of care stated to meet the charge of wilful misconduct or of a criminal violation. Section 6318 of the Labor Code, St.1937, p. 308, found in the workmen's safety part of the safety in employment division, provides that orders of the Industrial Accident Commission establish a minimum standard of care to be construed in connection with any local order relative to the same matter, provided that the local order may not lower the standard of care required by the commission. This section foresees a possibly higher standard of care in relation to safety in places of employment in the particular locality than that imposed by the commission. Although no similar provision is found in the article relating to scaffolding which contains special provisions with respect to employees working on a scaffolding, it is clear that the legislature did not intend to abrogate higher standards in relation to scaffolding and not in other places of employment.

[5] Finally, it should be noted that we can find no prejudice in the admission of the testimony if any error there was. To show prejudice in the admission of the testimony, the appellants assert that it varied from the Industrial Accident Commission construction safety orders in stating that two ledgers were required instead of one. This accident happened on July 2, 1940. At that date the following pertinent statutes and orders were in force:

Labor Code, § 7156—"Offenses. Any person employing or directing another to do or perform any labor in the construction, alteration, repairing, painting, or cleaning any house, building, or structure within this State is guilty of a misdemeanor who does any of the following:

"(a) Knowingly or negligently furnishing, etc. Knowingly or negligently furnishes or erects, or causes to be furnished or erected for the performance of such labor, unsafe or improper scaffolding * * *."

Labor Code, § 7157—"Safety orders, making and enforcing. The commission may make and enforce safety orders in the manner prescribed by law, to supplement and carry into effect the purposes and provisions of this article."

General Construction Safety Orders—"The platform of the scaffold shall be supported by putlogs made of one by six (1 x 6) inch boards or heavier material, laid on edge." ("Putlogs" are the ledgers herein referred to.)

Although on October 1, 1940, revised construction safety orders went into effect which allowed the alternative methods of construction for light building trades (cf. Order 1120) testified to by the expert and Dawson, depending on the size of the ledger board, at the date of accident the only criterion laid down by the Industrial Accident Commission was that the ledgers be 1" x 6" boards at least, and the number was to be determined solely by the words "unsafe or improper" in section 7156 of the Labor Code. Therefore the testimony of the expert was not in conflict with the statutes of the State of California, but explanatory of a statutory duty.

[6, 7] Next it is argued that the respondents were guilty of contributory negligence as a matter of law. Two of them testified that they looked at the scaffolding before going up and saw that it was constructed with but one ledger, the third testified that he paid no attention to it. If the only claimed defect in the construction of the scaffolding was the use of one ledger the argument of appellants would be more persuasive. But where other defects were claimed, some of which were not patent, the question of contributory negligence was properly left with the jury. To put it another way, where there is evidence of negligence in the construction or maintenance of an instrumentality, which is not patent and cannot be observed by the use of ordinary care, the question of the negligence of the party using the instrumentality is one of fact.

[8] Finally it is argued that the judgment should not stand against appellant Fong Wan since he was merely the agent of his two sons. It appears that the sons were the record title owners of the premises, that Fong Wan, independent of the sons, conducted the cafe upon the premises and made the plans to construct a new building. Into this building Fong Wan put some of his own funds, and paid for the work and materials. Whether his status was that of a trustee, agent, or equitable owner cannot be determined from the record. In all his dealings with labor and material he did not represent himself as agent for his sons, but held himself out as at least a part owner in the premises. He was sued as such, and the burden was upon him to prove that his activities were limited to the relation of agent for his sons. Thus the question of that relation was one of fact for the jury, and the implied finding that he was an owner of some interest is supported by substantial evidence.

The judgments are affirmed.

SPENCE, J., concurs.



60 Cal.App.2d 478

LOS ANGELES BRICK & CLAY PRODUCTS CO. v. CITY OF LOS ANGELES et al.

Civ. 14125.

District Court of Appeal, Second District, Division 2, California.

Sept. 16, 1943.

Rehearing Denied Oct. 4, 1943.

Hearing Denied Nov. 8, 1943.

1. Municipal corporations ⇐846

Complaint, alleging improvement of plaintiff's land on which city, by permission, had discharged water from city streets, and demand that city make other provision for discharge of water, and disclosing damage to improved land by continued discharge of water thereon by city, was sufficient and stated cause of action for injunction.

2. Eminent domain ⇐2(10)

City's permissive use of plaintiff's land from 1912 until 1940 to discharge water

from city streets was not an "expropriation" of the land by city.

See Words and Phrases, Permanent Edition, for all other definitions of "Expropriate".

3. Municipal corporations ⇐835

Power of city to proceed under eminent domain does not convert its wrongful trespass in precipitating accumulated storm waters upon land of another into an act of virtue.

4. Waters and water courses ⇐124

When one interferes with natural conditions and causes surface water to be discharged upon land of his neighbor in greater quantity or in different manner than would occur under natural conditions, such injurious acts will be enjoined.

5. Municipal corporations ⇐835

A municipal corporation may not intentionally divert water from its streets by artificial means and discharge it with collected force and destructiveness upon property of an adjoining owner.

6. Municipal corporations ⇐737

A municipality is not exempt from liability for a trespass caused by its corporate act.

7. Municipal corporations ⇐835

A municipality is liable for damage caused by dumping of storm water from city streets onto privately owned realty, even though each act in constructing a street improvement was done according to statute.

8. Municipal corporations ⇐846

Permissive use for a time by municipality of adjoining owner's land for discharge of water from city streets will not defeat adjoining owner's right to an injunction inhibiting a continuance of such use.

9. Municipal corporations ⇐846

In action to enjoin city from continuing nuisance by discharge of storm waters from city streets onto plaintiff's land, allegation that city was negligent in creating nuisance was not essential.

10. Municipal corporations ⇐846

In suit to enjoin city from continuing to discharge storm waters from city streets onto plaintiff's land, where facts recited alleged a nuisance per se entitling plaintiff to an injunction, complaint was not lacking in equity because of its failure to allege irreparable injury.

11. Municipal corporations ⇐1021

Los Angeles charter requirement that a claim must first be presented to city as a prerequisite to bringing of an action against city applies only to claims for money.

12. Municipal corporations ⇐1021

Los Angeles charter provision requiring presentation of claim as prerequisite to action against city is in derogation of common right and must be strictly construed.

13. Municipal corporations ⇐846

Los Angeles charter provision requiring presentation of claim as prerequisite to action against city is not applicable to suit to abate a nuisance maintained by city and does not prevent a recovery of damages demanded as incidental to injunction to abate a nuisance

14. Municipal corporations ⇐846

Where it appeared that city was maintaining a continuing nuisance by discharging storm waters from city streets on plaintiff's land to plaintiff's damage, city could not properly assert that plaintiff brought an injunction suit to avoid plea of statutory limitation by reason of failure to present claim of damages to city as required by charter.

15. Nuisance ⇐1

Anything is a "nuisance" which obstructs free use of property so as to interfere with its comfortable enjoyment. Civ. Code, § 3479.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

16. Nuisance ⇐18

Injunction is a proper method of abating a nuisance.

17. Nuisance ⇐18

Fact that victim of a nuisance may in alternative to injunction recover damages does not for that reason oblige him to renounce his right to injunction and sue for damages only.

18. Pleading ⇐34(5)

Where complaint alleged that plaintiff permitted city to discharge storm waters from city streets on land from 1912 to 1940, at which time permission was withdrawn, allegation that defendant "now"

maintains without permission conduits for conducting storm water onto plaintiff's land meant that nuisance was maintained at present time.

See Words and Phrases, Permanent Edition, for all other definitions of "Now".

19. Trial ⇐396(3)

Where complaint, when construed as a whole, alleged a present nuisance maintained by city rather than a nuisance continuing since 1912 when city received permission to discharge storm waters from city streets onto plaintiff's land, finding of a present nuisance was not at variance with pleading.

20. Municipal corporations ⇐846

Where it appeared that city's use of plaintiff's land as dumping ground for storm waters from city streets since 1912 was not adverse prior to December, 1940, and suit was brought 17 months after latter date, suit was not barred by prescription.

21. Appeal and error ⇐882(11)

In suit against city to abate nuisance caused by city's discharge of storm waters on plaintiff's land, where city failed to offer any proof that its use of land was adverse, it could not, on appeal, complain of finding against adverse use. Code Civ.Proc. § 321.

22. Municipal corporations ⇐835

A prescriptive right of city to discharge storm waters from city streets onto plaintiff's land could be established by plaintiff's acquiescence only after city's license so to do had been revoked. Code Civ.Proc. § 321.

23. Limitation of actions ⇐19(3)

Suit brought against city to enjoin discharge of storm waters from city streets onto plaintiff's land 17 months after city's license so to do was revoked was an action for recovery of an "interest in land" and not barred by five-year statute of limitations. Code Civ.Proc. § 321.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Land".

24. Equity ⇐84

Laches is a fact to be determined by court from the evidence.

25. Appeal and error ⇐931(1)

In absence of proof of date upon which cause of action accrued, District Court of Appeal must assume from judgment for plaintiff that trial court drew inferences from established facts to warrant finding that plaintiff was free of laches.

26. Municipal corporations ⇐846

For the purpose of determining plaintiff's laches, the maintenance of conduits by city to discharge storm waters from city streets onto plaintiff's land after city's license so to do was revoked was a "continuing potential wrong" which ripened into actuality thereby giving plaintiff a cause of action when storm waters were discharged through such conduits.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Potential Wrong".

27. Municipal corporations ⇐835, 846

Where city never asserted a claim of right to discharge waters onto plaintiff's land adversely to plaintiff's title prior to filing answer to plaintiff's suit to abate nuisance, no period of prescription ever started to run and plaintiff could not be guilty of "laches". Code Civ.Proc. § 321.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

28. Equity ⇐72(1)

Where no damages are proved to have been suffered by the pleader, the plea of laches must fail.

29. Municipal corporations ⇐846

Where city relied upon perpetual acquiescence of plaintiff in allowing discharge of storm waters from city streets on plaintiff's land, but neither expended money in improvements upon land, paid taxes thereon, nor made any other investment and suffered no detriment by reason of plaintiff's delay in filing suit, city could not maintain plea of "laches".

30. Eminent domain ⇐122

An owner cannot be disseized of his land or deprived of its free enjoyment without fair consideration.

31. Adverse possession ⇐112

If a claim of ownership is made on ground of occupancy or of a prescriptive right, one asserting claim must establish that he occupied adversely to titular owner for five years, and that his use or occupancy was hostile, open, continuous, and notorious, and made under claim of right so asserted as to convey to titular owner a

knowledge of asserted claim. Code Civ. Proc. § 321.

32. Adverse possession ⇐112

Proof to sustain claim of ownership on ground of occupancy or of prescriptive right must clearly overcome presumptions that occupation by claimant is deemed in subordination to legal title, that all rights in land are vested in record owner, and that use of land by claimant was made by express permission or silent acquiescence. Code Civ.Proc. § 321.

33. Municipal corporations ⇐835

Plaintiff's permission to city, express or implied, to use plaintiff's land to discharge storm waters from city streets, could not ripen into a right of perpetual enjoyment on part of city. Code Civ.Proc. § 321.

34. Municipal corporations ⇐846

Where action sought to enjoin city from discharging flood waters from city streets onto plaintiff's land through certain conduits extending onto plaintiff's land, gist of action was abatement of nuisance caused by discharge of water rather than abatement of a completed public improvement, since, when flow of water ceased, damage caused by mere presence of conduits was "damnum absque injuria".

See Words and Phrases, Permanent Edition, for all other definitions of "Damnum Absque Injuria".

35. Eminent domain ⇐276

Where a public agency vested with power of eminent domain which, without condemnation proceedings, enters upon private lands, completes public works thereon, and uses them for a time with acquiescence of owner, equity denies relief to owner because he could not have defeated expropriation proceedings, a possessory right should not be used as a means of extortion, and public convenience outweighs owner's possessory right.

36. Eminent domain ⇐279(2)

Where the granting of an injunction to remove a public improvement placed on owner's land without resort to condemnation would serve only to inconvenience public by depriving it of advantages gained by construction of facilities for public use upon land which would have been awarded under condemnation while fair value of land taken can be paid after improvement as well as before, owner's remedy is at law.

37. Injunction ⇐24

Where public has no interest in construction which plaintiff desires removed from his land, the rule protecting improvement from injunctive relief does not apply.

38. Municipal corporations ⇐846

Where it appeared that if city were enjoined from discharging storm water from city streets onto plaintiff's land, plaintiff would enjoy the unrestricted use of a valuable property and that city by comparatively slight expense could conduct water into river and that conduits from street onto plaintiff's land were of little monetary value, were not indispensable to public interest, and merely facilitated nuisance created by such discharge of water, plaintiff was entitled to injunction.

39. Eminent domain ⇐279(2)

Where it appeared that conduits through which storm water from city streets flowed onto plaintiff's land were of slight monetary value and even after they rusted away water would still flow onto plaintiff's land from street, conduits were not a part of a "completed public work" within rule against injunctions to remove completed public works on private lands which could be acquired by condemnation.

See Words and Phrases, Permanent Edition, for all other definitions of "Completed Public Work".

40. Municipal corporations ⇐835

A city has no right to maintain paved streets so that in seasons of flood they will serve as channels for draining surface waters resulting in deposit of silt, sand, and debris upon adjacent lands or to gully them to detriment of owner.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Suit by Los Angeles Brick & Clay Products Company against City of Los Angeles and others to enjoin defendant from discharging ponded waters from city streets onto plaintiff's land, and for other relief. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Ass't City Atty., and Wilbur Bassett, Deputy City Atty., all of Los Angeles, for appellants.

Cryer & Jones and George E. Cryer, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

By this action plaintiff procured a permanent injunction to abate a storm water nuisance resulting from the City's causing ponded waters on its streets to be discharged upon plaintiff's land. The bases of appeal are insufficiency of the complaint, variance of findings from the pleading, defendants' prescriptive easement, laches, statutory limitation and the court's failure to find on the issue of plaintiff's negligence in grading its tract.

Since 1902, plaintiff has been the owner of a parcel of 12 acres in the Los Angeles industrial district. It lies adjacent to east Seventh Street which bounds it on the north. Its easterly line is practically parallel to Boyle Avenue which extends northerly across the city. Between the avenue and the premises of plaintiff is a residential area within which, in 1912, the city paved two cul-de-sac streets, namely Atlantic and Garnett, which extend the 500 feet from Boyle to plaintiff's land and which are a short distance from the Los Angeles River. They are 40 feet in width, are 10 feet higher at the avenue than at the easterly line of plaintiff's acres, and the surface of each is more than two feet lower than the contiguous ground. Thus with the aid of sidewalks, curbs and gutters the streets have served to collect the storm waters from the area and by reason of the two percent declivity such waters flow rapidly westward to be discharged upon plaintiff's tract through two 14 inch steel conduits or culverts which were installed by defendants in 1912 and maintained without objection from plaintiff until 1940.

During the 28 years following the paving of the two streets, the surface of the 12 acres was "broken and uneven and abounded with deep holes and hollows" into which the storm waters flowed. There they were quickly absorbed into the gravel strata without detriment to the land. But in the summer of 1940 plaintiff obtained a permit from the city to grade and improve its realty. It removed the hills, filled the holes and leveled the depressions so that the surface of the tract was reduced to a uniform grade sloping from east to west. Thereupon, plaintiff gave notice to defendants that in the land's improved condition the discharge of storm waters would cause serious erosion of the surface and great damage to plaintiff. Such protest was ignored by defendants who continued thereafter to discharge the collected storm waters from the two streets as they had done since 1912. The result was that the improved surface was eroded, channels and gullies were cut across the surface and it is certain that this would continue with increasing detriment should the waters collected on the streets be forever discharged thereon. In its treatment of this subject the trial court determined that while the storm waters were openly and notoriously discharged upon the parcel for more than 20 years, yet at no time was such discharge caused by defendants adversely or under claim of right and, hence, defendants have neither by uninterrupted enjoyment nor otherwise acquired an easement or any prescriptive right in plaintiff's land.

Upon these facts appropriately pleaded, by its complaint plaintiff demanded that defendants be required to make other provision for disposing of the collected storm waters and that they be permanently enjoined from allowing such waters to be discharged upon the 12 acres. Judgment for permanent injunction was entered as demanded by plaintiff and defendants were ordered to remove the steel conduits which protrude for more than 20 feet upon plaintiff's land.

[1-5] The complaint is sufficient. A cause of action for injunction is alleged. The property of plaintiff was not expropriated by the city directly or in reverse. The power of a city to proceed under eminent domain does not convert its wrongful trespass into an act of virtue because municipal agencies have precipitated accumulated storm waters upon the land of another. Conniff v. San Francisco, 67 Cal. 45, 7 P. 41. There is no statute which authorizes such piratical practice. None could do so under either the state or the federal constitution. When any person corporate or natural interferes with natural conditions and causes surface water to be "discharged upon the land of his neighbor in greater quantity or in different manner" than would occur under natural conditions such injurious acts will be enjoined. Heier v. Krull, 160 Cal. 441, 444, 117 P. 530. Neither may a municipal corporation intentionally divert water from its streets by artificial means and discharge it with collected force and destructiveness upon the

property of an adjoining owner. 18 Cal. Jur. 1102; Farrell v. City of Ontario, 36 Cal.App. 754, 173 P. 392.

[6-8] A municipality is not exempt from liability for a trespass caused by its corporate act. It is liable for the damage caused by the dumping of storm water onto privately owned realty even though each act in constructing a street improvement is done according to statute. Stanford v. San Francisco, 111 Cal. 198, 43 P. 605. It is a positive interference with the owner's free enjoyment of his property wrongfully to divert accumulated waters onto his land which would not naturally flow thereon. Learned v. Castle, 78 Cal. 454, 460, 18 P. 872, 21 P. 11. Moreover, the permissive use of plaintiff's premises for a time by defendants will not defeat plaintiff's right to an injunction inhibiting a continuance of such use. Ibid.

[9] An allegation that defendants were negligent in creating the nuisance was not essential to the statement of a cause of action. A trespass voluntarily committed causes no less detriment that one resulting from neglect. Defendants achieved exactly what they set out to do, namely, to send ponded flood waters from public streets onto plaintiff's private acres.

[10] Neither is the complaint lacking in equity because of its failure to allege irreparable injury. The facts recited allege a nuisance per se which entitles plaintiff to an injunction. The possibility that a continued trespass might ripen into a servitude is sufficient. Learned v. Castle, supra.

To File a Claim, Not Required in Trespass Cases.

[11-17] It is a vain contention that the complaint is insufficient because of the absence of an allegation of a compliance with the charter requirement (Section 376) that a claim must first be presented to the city. Such provision applies only to claims for money. Since it is in derogation of common right it must be strictly construed. Giuricevic v. Tacoma, 57 Wash. 329, 106 P. 908, 28 L.R.A.,N.S., 533; 19 R.C.L. 1041. Such provision cannot by any construction be made applicable to a suit to abate a nuisance. Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N.W. 550, 553. Failure to allege the presentation of a claim does not even prevent the recovery of damages demanded as incidental to the injunction to abate a nuisance. Murcott v. City of New York, 181 App.Div. 171, 168 N.Y.S. 50. The assertion that plaintiff sought an injunction to avoid the plea of statutory limitation is a gratuity and is without factual foundation. Anything is a nuisance which obstructs the free use of property so as to interfere with its comfortable enjoyment, Section 3479, Civil Code, and injunction is the traditional method of abating a nuisance. 14 R.C.L. 315. Because the victim of a nuisance may in the alternative recover damages he is not for that reason obliged to renounce his right to injunction and sue for damages only. Katenkamp v. Union Realty Company, 6 Cal.2d 765, 776, 59 P.2d 473.

No Variance of Findings from Pleading.

[18, 19] In contending that the findings do not follow the complaint appellants direct our attention to the following allegation of the complaint: "Defendants have installed * * * and now maintain without legal right and without permission * * * of plaintiff conduits or culverts for carrying off water from said streets." Appellants argue that this language was intended to mean that defendants have maintained the conduits without the permission of plaintiff since 1912. The complaint in its entirety completely confutes such construction. The facts found are that from 1912 until 1940, by reason of the nature of the terrain of the tract, no detriment was caused by the storm waters. It was only after the land had been leveled that plaintiff withdrew the license theretofore enjoyed by the city and demanded that its nuisance be abated. Therefore the discharge of the waters was "without the permission of plaintiff" only after it had protested. In the light of such facts the declaration that "defendants now maintain without permission of plaintiff conduits for conducting the storm water onto plaintiff's land" does not require any finely filtered legalistic logic to unfold its meaning, namely, that the nuisance is maintained at the present time.

[20-22] The claims that the city's agencies entered upon the property in the course of public works in 1912 and that the conduits have since 1912 been "maintained openly, notoriously and against the will of plaintiff and without his consent," are not supported by any evidence in the record and the finding is to the contrary. Moreover, it was the duty of the court to find in favor of plaintiff since there were no facts

to compel the conclusion that the city's use of the 12 acres as a dumping ground for the storm waters was adverse prior to December 1940. Brandon v. Umpqua Lumber Co., 26 Cal.App. 96, 146 P. 46; Clarke v. Clarke, 133 Cal. 667, 66 P. 10. Inasmuch as defendants failed to offer any proof that their use of the land was adverse they are in no position to criticise the finding made. Section 321, Code of Civ.Proc. A prescriptive right could have been established by plaintiff's acquiescence only after the city's license to discharge the storm waters thereon had been revoked.

Action Not Barred.

[23-27] The action was barred neither by laches nor statutory limitation. Should we consider the protest of December 1940 as the date on which the cause of action arose, only seventeen months elapsed prior to the filing of the complaint herein. There is no such period of limitation prescribed by statute to bar an action for the recovery of an interest in land. Sec. 321, Code Civ. Proc. Laches is a fact to be determined by the court from the evidence. No date was established on which the cause of action arose. After the license to discharge the ponded waters upon plaintiff's tract had been revoked no occasion for legal action could have arisen until defendants should cause other flood waters to pour upon the land. There is no direct evidence of the date upon which that event occurred. In the absence of such proof it is assumed that the court below drew inferences from established facts to warrant the finding that plaintiff was free of laches. The maintenance of the conduits to discharge the waters onto plaintiff's acres was a continuing potential wrong which ripened into actuality when the storm waters poured through. Having never asserted a claim of right adversely to plaintiff's title prior to filing their answer, no period of prescription ever started to run. Livermore v. Beal, 18 Cal.App.2d 535, 549, 64 P.2d 987. In the absence of such claim adverse to plaintiff it could not be guilty of laches. While it may be assumed that occasional storm waters flowed through the steel conduits after plaintiff's protest in December 1940, there is no evidence that such protest was at any time flatly rejected.

[28, 29] Moreover, the plea of laches must fail where no damages are proved to have been suffered by the pleader. Conceding that defendants relied upon the perpetual acquiescence of plaintiff in allowing the discharge of the storm waters, they neither expended money in improvements upon the land, paid taxes thereon, nor made any other investment by reason of such reliance either before or after plaintiff's protest. Neither had they on any account suffered detriment by reason of plaintiff's delay in filing suit. 19 Am. Jur. 343, Sec. 498. This fact alone is sufficient to defeat the plea. 30 C.J.S., Equity, § 118, p. 541.

No Easement Established.

[30-33] No easement or prescriptive right was established. Titles to lands are not readily snuffed out by the brandishing of a slight presumption or by deductions from wishful thinking. Since the nomad ceased from his wanderings the progress of man has been reassured by his consciousness that his ownership of land was by the custom of his tribe or by the law of his state rendered secure against the predatory rapacity of the greedy and the malevolent. An owner cannot be disseized of his land or be deprived of its free enjoyment without fair consideration. Niles v. City of Los Angeles, 125 Cal. 572, 576, 58 P. 190. If claim of ownership is made to land on the ground of occupancy or of a prescriptive right to use it, he who asserts such right is obliged to establish that he has occupied it adversely to the titular owner for five years. Sec. 321, Code Civ.Proc. He must clearly prove (1) that his use or occupancy was hostile to the record title; (2) that such use was open, continuous, and notorious; (3) that it was made under claim of right; (4) that such claim during the five years was so asserted as to convey to the titular owner a knowledge of the asserted claim. Such proof must clearly overcome the presumptions that occupation by the claimant is deemed in subordination to the legal title; that all rights in and to the land are vested in the record owner, and that the use of it by the claimant was made by express permission or by silent acquiescence. Clarke v. Clarke, 133 Cal. 667, 66 P. 10. Because plaintiff through its kindness allowed defendants to abuse its land no easement was thereby gained. Middlesex Company v. Lowell, 149 Mass. 509, 21 N.E. 872. Such permissive use could not have ripened into a right of perpetual enjoyment; and this holds true where the license is implied as well as

where it is expressed. 19 C. J. 887; 28 C.J.S., Easements, § 14; Clarke v. Clarke, supra.

Gist of This Action, to Abate a Nuisance

[34] In support of their claims (a) that they hold a prescriptive right in the 12 acres and (b) that the action is barred, defendants contend that the installation of the conduits was a part of a completed public improvement. They pursue their logic by invoking the application of authorities which are not in point and by boldly asserting that the action arose out of the mere presence of the two conduits projecting from the streets onto the land involved. If this action had been brought solely to effect the removal of the steel pipes it would have slight basis for recovery. They might have been by plaintiff severed at the property line after a reasonable delay following the protest. The gist of this action is the abatement of the nuisance created by the discharge of the accumulated waters onto plaintiff's land. Should such flow cease the damage caused by the presence of the pipes would be damnum absque injuria.

Appellants' Authorities.

[35, 36] The cases cited treat of those situations in which public corporations or other agencies of the state were vested with the right to invoke the power of eminent domain and which, without condemnation proceedings, entered upon private lands, completed public works thereon and used them for a time with the acquiescence of the owner of the premises. Equity denies relief under such circumstances for three reasons, namely: (1) The owner could not have defeated expropriation proceedings; (2) a possessory right should not be used as a means of extortion; and (3) the public convenience outweighs the owner's possessory right. Such doctrine controlled in the cases cited by defendants. Newport v. Temescal Water Co., 149 Cal. 531, 87 P. 372, 6 L.R.A., N.S., 1098; Miller & Lux v. Enterprise Co., 169 Cal. 415, 417, 147 P. 567; Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A., N.S., 185; County of Los Angeles v. Rindge, 69 Cal.App. 72, 230 P. 468; Gordon v. Cadwalder, 172 Cal. 254, 156 P. 471; Collier v. Merced Irrigation, 213 Cal. 554, 2 P.2d 790; Sutro Heights Land Co. v. Merced Irrigation Dist., 211 Cal. 670, 690, 296 P. 1088; Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 17 P.2d 1061. To close a public highway constructed over private premises or to remove a section of a pipeline, power line or railway laid thereon would destroy public rights which have already intervened. Obstruction to progress is not thus allowed. In the cases involving irrigation districts and the upper riparian proprietors the public had gained superior rights while the legal owners of the land or water rights involved acquiesced in the use of their properties by the public corporation. In the case last cited the Athletic Club made no objection while the city at an immense cost constructed the extensive works, drove piles and placed between them huge granite boulders. It was denied relief on the grounds of public policy. The granting of injunctions in such cases would serve only to inconvenience the public by depriving it of advantages gained by the construction of facilities for public use near or upon land which would have been awarded under condemnation proceedings, while the fair value of the land taken can be paid after the improvement as well as before. For this reason the courts have consistently referred such claimants to courts of law to recoup their losses. Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Cubbins v. Mississippi River Commission, D.C., 204 F. 299. It cannot be said that the benefit to accrue to plaintiff by abating the nuisance would be slight as compared to the injury to defendants. Plaintiff will now enjoy the unrestricted use of a valuable property. Defendants can at a comparatively slight expense conduct by flume the storm waters to the Los Angeles River or into a public drain.

[37, 38] Of course, if the public has no interest in the construction whose removal is sought, the rule protecting such improvement from injunctive relief does not apply. Miller & Lux v. San Joaquin, 8 Cal.2d 427, 65 P.2d 1289. The conduits are not parts of a public improvement. They cost but little and were not indispensable to the public interest. They were installed after the streets had been paved. They did not hasten the discharge. Gravity only carried the ponded waters from the streets. The nuisance created was merely facilitated by the presence of the conduits and was thereby rendered more destructive.

The Conduits, Only Incidental.

[39, 40] The contention that the pipes are a part of a completed public work and for that reason cannot be abated is therefore without merit. The streets were not constructed upon plaintiff's property. But at the time of their construction they were graded so that flood waters falling upon the area served by them would flow toward the twelve acres. When the pipes shall have rusted away the sloping pavements will still continue to discharge their accumulated waters upon the 12 acres unless the judgment now under review be sustained. It is the damage to the land caused by the flow of such flood waters that plaintiff would avoid and which the chancellor below decreed should not be repeated. A city has no right to arrange and maintain its paved streets so that in seasons of flood they will serve as channels for draining surface waters resulting in the deposit of silt, sand and debris upon adjacent lands or the cutting of gullies in them to the detriment of the owner. Farrell v. City of Ontario, 36 Cal.App. 754, 173 P. 392.

The judgment is affirmed.

W. J. WOOD, and McCOMB, JJ., concur.

Hearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.



60 Cal.App.2d 492

PEOPLE v. McCABE et al.

Cr. 3680.

District Court of Appeal, Second District, Division 2, California.

Sept. 16, 1943.

1. Larceny ⇐23

Where accused for a share in the profits from alleged sale of a secret formula to treat cottonseed obtained money on false representations that it would be used to pay farmers growing experimental cotton, the cost of an income tax report, and the expenses of buyers of formula, accused was guilty of "grand theft". Pen.Code, §§ 484, 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

2. Larceny ⇐14(1)

A "theft by trick and device" usually results when the victim of a fraud intends not to pass complete title to his property but that it shall be applied to a special purpose, while the recipient of the property intends to appropriate it to its own use, and the crime is on a parallel with "theft by false pretense". Pen.Code, §§ 484, 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft by False Pretense" and "Theft by Trick and Device".

3. Larceny ⇐14(1)

Where accused gained money upon his representation that it would be applied to a described project which did not exist, his thefts were by "trick and device". Pen. Code, §§ 484, 487.

4. Larceny ⇐62(2)

To sustain a conviction of theft by trick and device, no corroboration is required. Pen.Code, §§ 484, 487.

5. False pretenses ⇐49(1)

Where there was evidence of pretense in each theft, by sale of participating shares in profits from alleged sale of secret formula to treat cottonseed and testimony of each witness concerning his own conversations with accused or his agent was corroborated by those had by other witnesses with accused and his agent and several statements made by accused to inquiring prospects and by notes executed by agent to witnesses and assumed by accused, accused was guilty of "theft by false pretense". Pen.Code, § 1110.

6. False pretenses ⇐49(3)

The only corroboration required in theft by false pretense is with reference to the pretense, and the requirement is met by proof of similar statements to others, and no corroboration is required in such cases if the false pretense is accompanied by a false token or writing. Pen.Code, § 1110.

7. Larceny ⇐27

Where accused and another had formed a conspiracy to steal, accused was liable as a co-conspirator for the other's acts, and where the other was an agent of accused, accused was equally liable with his agent for every act in execution of the agency.

8. Criminal law ⇐316

In prosecutions for grand theft and violations of the Corporate Securities Act, accused's failure to explain or deny the evidence against him was for jury. Const. art. 1, § 13.

9. Criminal law ⇐317

In prosecution for grand theft in sale of participating shares in the profits from sale of secret formula for treating cottonseed, it was incumbent upon accused to invoke the testimony of the escrowee for the alleged sale, the agent of an alleged buyer of the formula and any farmer growing cotton by use of the formula, where existence and domicile of such persons lay peculiarly within accused's knowledge.

10. Licenses ⇐18½

Where accused's agent upon receiving money from investors executed a note for the sum advanced and a note for twenty-five times the sum advanced as the investor's participating share in the profits to be gained from sale of a formula for treating cottonseed, each participating note was a "security" and each transaction was a "sale" of the participating note within the Corporate Securities Act, and where no permit was granted to sell the notes, the sales were violations of the act and accused was punishable for each sale. Gen.Laws 1937, Act 3814, §§ 2(a)6, 2(a)7, 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale" and "Security".

11. Licenses ⇐18½

If a writing issued by an individual creates a present right to a present or future participation in the profits of an enterprise undertaken for profit, the writing is a "security" within the Corporate Securities Act, prohibiting the issuance and sale of securities without a permit. Gen.Laws 1937, Act 3814, §§ 2(a)6, 2(a)7, 18.

12. Licenses ⇐18½

Before embarking upon any enterprise to collect moneys from the public, every person so undertaking must ascertain whether his scheme, business or enterprise has the sanction of law. Gen.Laws 1937, Act 3814, §§ 2(a)6, 2(a)7, 18.

13. Licenses ⇐7(1)

The Corporate Securities Act forbidding sale of securities without a permit is valid. Gen.Laws 1937, Act 3814, §§ 2(a)6, 2(a)7, 18.

14. Criminal law ⇐1169(11)

In prosecution for grand theft where record showed no allusions to accused's prior conviction except by witnesses who recited conversations with accused relative to his inability to sign notes for participating share in profits from alleged sale of secret formula to treat cottonseed or by those who testified as to representations of accused's agent, references to accused's former conviction were not prejudicial.

15. Criminal law ⇐699

Where accused acted as his own attorney at the trial of himself and his co-accused, trial court in its discretion was authorized to direct accused instead of his co-accused's counsel to follow the district attorney in argument.

16. Criminal law ⇐1130(2)

Accused had burden to specify the pages of the transcript where allegedly detrimental rulings were reported.

17. Criminal law ⇐641(1)

Accused's personal advocacy of his cause does not entitle him to any advantage over other convicts, and fact that he was serving a sentence did not confer upon him a right to which he was not entitled had he been represented by counsel.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Frank E. McCabe and another were convicted of grand theft and violation of the Corporate Securities Act, and Frank E. McCabe appeals.

Affirmed.

Robert Kenny, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., Jere J. Sullivan and Logan Lindley, Deputy Dist. Attys., all of Los Angeles, for plaintiff and respondent.

Frank E. McCabe, in pro. per.

MOORE, Presiding Justice.

With no assignments of error and with no substantial grounds for appeal, appellant asks a reversal of the judgments of his conviction of 38 felonies of which he was accused by the grand jury. Verdicts were returned on 19 counts of grand theft. Each

of such counts was followed by a count charging a violation of the Corporate Securities Act. Such violation was concomitant with and constituted a part of the device designed whereby to gain possession of the sums of money taken from the several prosecution witnesses and their fellows in folly. Appellant acted as his own attorney at the trial; he did not take the witness stand; and now without a single cogent reason demands that the 38 verdicts be set aside. In view of his former conviction and his criminal methods of operating it is not astonishing that appellant should have conceived and executed a hoax of such proportions. But that it should have proceeded over a period of three years and have victimized a number of adult men and women is amazing.

The worthy citizens who fell for appellant's bold scheme and intriguing promises at times foregathered to hear reassurances of their route to fortune. Surely, but for their own innocent cupidity and their shocking credulity, the pathway of appellant to an ignominious end would at least have been delayed. The crimes of McCabe constitute a junior edition of those successfully engineered in the same community by Hibbs and Hennessey (People v. Hennessey, 201 Cal. 568, 258 P. 49) for whose conviction of a series of grand thefts by trick and device those suave gentlemen still languish in confinement 16 years after the prison doors closed upon them. Shall the law hold Hibbs and Hennessey who then by their schemes and cunning plundered the rich, and now release McCabe who by artifice and fraud pilfered from the poor?

Appellant was released from San Quentin in February 1939. He was promptly employed to work in a parking lot in Los Angeles under one Carpenter who was soon informed by his new employee of a secret formula for treating cotton seed in order to improve the fiber and of his experiments with the process for over 20 years. He stated that the sale of the formula had been contracted for; that three groups were in the city to bid: viz., (1) the South American, (2) Washington-Richmond, and (3) New York; that the price was $35,000,000; that funds were required to pay experimental and other expenses. He made substantially the same statements to investor Williams whom he informed that Roether was his agent and that he could not himself sign the notes without violating his parole; that he would pay the notes; that Taylor represented the Dupont Company; that the sale was in escrow in Phoenix; that he needed only $26,000 to complete the deal.

Appellant repeated to his other investors substantially the same statements made to Williams and to some of them he said also (1) that he had money coming from an estate in the east out of which he could discharge the notes; (2) that the agent of one of the groups bidding for the purchase was then at the Biltmore Hotel; (3) that the money advanced would be used to pay the farmers and the cost of an income tax report and the expenses of the buyers to Los Angeles; (4) that he had been offered $25,000,000 by the South American group; $27,500,000 by Dupont, and $30,000,000 by the financiers of Washington and Richmond; (5) that the farmers who had grown the experimental cotton had to be paid before the escrow could be closed; (6) that it cost more to settle with the farmers than had been at first calculated.

Appellant had gained the confidence of Mr. Roether in May, 1939, when he induced that unfortunate man to assist him by soliciting funds and by signing the notes to the investors. He told Roether he had an annual income of $12,500 which was being used in the east to discharge obligations arising from experiments. Roether repeated to the investors such statements of McCabe to whom he delivered practically all the money he collected, $55,000 in cash. Roether worked under a verbal arrangement until the expiration of appellant's parole in February 1941. At that time appellant gave his agent a letter whereby he promised to pay all notes theretofore, and thereafter to be, signed by Roether. In the course of his activities on many occasions Roether conveyed appellant to the Roosevelt Hotel to visit one Taylor who, according to McCabe, was in the city to negotiate for the purchase of the formula on behalf of Dupont. At no time, however, did the eyes of the beguiled chauffeur light upon the form of the mythical Taylor.

With the aid of Roether and by means of his frauds, appellant obtained from some 12 or 14 different individuals one or more sums of money ranging from $250 to $1600. The victims of appellant's chicanery took the witness stand and detailed the transactions had with appellant or with his agent Roether who testified that his statements were conceived and directed by the author of the scheme.

The jury believed these witnesses. There was no contradiction of any one of them as to any material testimony. Moreover, the proof showed that there was no investigation of appellant's tax liability by the government; that Dupont had made no investigation of a process for treating cotton seed; that McCabe had never had but one bank account with the Security First National Bank, to wit: the Wilshire-La Brea branch, and that it was opened January 3, 1940, with $200; that the 41 deposits in it aggregating $12,135 were all made with cash except two.

[1-4] Such proof when believed by the jury establishes grand theft. Secs. 484, 487, Penal Code. There were 19 separate acts perpetrated. In each instance the sum obtained exceeded $200. Every sum taken was the result of the investor's reliance upon a false statement to the effect that the money would be used for specified purposes, made directly by appellant or conceived and put into circulation by him. Such crimes are catalogued under a special classification labeled theft by trick and device. People v. Hennessey, supra; People v. Fawver, 29 Cal.App.2d Supp. 775, 777, 77 P.2d 325; People v. Beilfuss, 59 Cal.App. 2d 83, 138 P.2d 332. Such crime usually results when the victim of a fraud intends not to pass complete title to his property but that it shall be applied to a special purpose while the recipient of the property intends to appropriate it to his own use. It is on a parallel with theft by false pretense. People v. Rabe, 202 Cal. 409, 261 P. 303. Both crimes are the fruitage of dishonesty, of a zeal wrongfully to gain possession of the property of another, of a criminal passion to cheat, swindle and defraud. The distinction between the two crimes is not important here. A discussion of the points of difference will be found in the Fawver case, supra. If McCabe gained possession of the moneys upon his representation that they would be applied to a described project which did not exist, as indeed he did, his thefts were by trick and device. Sec. 484, Penal Code; People v. White, 124 Cal. App. 548, 555, 12 P.2d 1078; Fawver, supra. To sustain a conviction for theft by trick and device no corroboration is required. People v. Rial, 23 Cal.App. 713, 719, 139 P. 661; People v. Edwards, 133 Cal.App. 335, 341, 24 P.2d 183.

[5-7] But if this cause had been tried on the theory of false pretense the record would support the judgment. The only corroboration required in the case of theft by false pretense is with reference to the pretense. Such requirement is met by proof of the same or similar statements to others. People v. Whiteside, 58 Cal. App. 33, 41, 208 P. 132. In such cases no other corroboration is required if the false pretense is accompanied by a false token or writing. Sec. 1110, Penal Code. There was not only parol evidence of the pretense in each theft but also there was abundant corroboration in the acts and words of appellant to the other investors. He outlined his entire scheme to his agent and instructed him to tell it to those persons from whom he solicited funds. Those statements were repeated by Roether to each of his victims. Also, appellant himself made his "pretense" separately to the witnesses Williams, Clark, Hurt, Johnson, Hudson, Chaffee, Runion and Tosh. Also, he addressed an assembly of 65 including some of his investors at the Y.W.C.A. of Long Beach where he repeated a number of his "pretense" statements. At the home of Mrs. Tosh he spoke before a gathering of one group to whom he repeated his fraudulent utterances. In addition to his own speech on each of the specified occasions, every representation by Roether was the act of McCabe. If they had formed a conspiracy to purloin, he was liable as co-conspirator for the acts of Roether. If the latter was a hired agent, appellant was equally liable with his agent for every act done in the execution of the agency. And withal, the testimony of each witness concerning his own conversations with appellant or Roether was corroborated not only by those had by his fellow sufferer with the two accused men but by the several statements made by McCabe to inquiring prospects as well as by the promissory notes executed by Roether and assumed by appellant in his letter to his agent on February 26, 1941. People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991; People v. Donaldson, 70 Cal. 116, 118, 11 P. 681. It follows that by reason of the corroboration the judgment is valid even though the theft might be deemed to have been accomplished by false representations only.

[8] Not only was appellant caught in the pincers formed by the testimony of the several witnesses on the one hand and by the testimony of Roether and the notes issued to the investors on the other, but after he had been thus submerged by the

cumulated evidence he dared not expose himself to the privilege of the witness stand. Such failure by him to explain or deny under oath the evidence so elaborately woven about him was itself a potent fact for the jury's consideration, Constitution, Art. I, Sec. 13, and constitutes additional support for the judgment.

[9] Furthermore, appellant is faced with the rule of convenience. If he had opened an escrow for a sale of his formula, out of the myriad of possible escrowees only he could have named the particular locus of such escrow as he might have opened. If he had negotiated with one Taylor or any other agent of the Dupont Company for their purchase of the process, he alone could furnish the name and whereabouts of the negotiator. If any farmer had grown cotton by use of appellant's "secret process," only McCabe could designate such farmer. The process of the court was available to import any of such persons whose existence and domicile lay peculiarly within appellant's knowledge, into the forum where appellent was on trial. It was therefore incumbent upon him to invoke the testimony of such persons. People v. Caldwell, 55 Cal.App.2d 238, 251, 130 P.2d 495.

[10, 11] At the time of receiving the moneys from the respective investors, appellant's agent executed and delivered two promissory notes, one for the sum advanced, the other in the sum of 25 times the sum advanced as the investor's participating share in the profits to be gained from the sale of the formula. The issuance and delivery of each of said participating notes was a violation of the Corporate Securities Act, St.1917, p. 673, Act 3814, Deering's General Laws, 1937. Each was a "security" as defined by the Act, being an evidence of indebtedness, a certificate of beneficial interest in the profits to be earned from the sale of the formula. Sec. 2, Subd. (a) 7. If such a writing so issued by an individual creates a present right to a present or a future participation in the profits of an enterprise undertaken for profit it is a security under the Act. The fact that the interest in the profits conveyed was not to be realized until the sale of the process does not make it any the less a security. People v. Oliver, 102 Cal.App. 29, 36, 282 P. 813; People v. Claggett, 130 Cal.App. 141, 143, 19 P.2d 805; People v. Shafer, 130 Cal. App. 74, 19 P.2d 861.

[12, 13] Each transaction was a sale of the participating note. The issuance and sale of such a note without a permit is inhibited. Sec. 2, Subd. (a) 6; Sec. 18. No permit to sell the notes so circulated and sold by appellant and his agent was ever granted by the commissioner of Corporations. Such sales were therefore violations of the Act and for each of such infractions appellant is punishable by imprisonment in the state prison. Sec. 18. Not only did he take part in making representations in order to raise the money but according to Roether who was believed by the jury, such funds were delivered to appellant. Before embarking upon any enterprise to collect moneys from the public, it is incumbent upon every person so undertaking to ascertain whether his scheme, business, or enterprise has the sanction of law. People v. Stowell, 45 Cal.App.2d 580, 583, 114 P.2d 614. The search for new frontiers too frequently leads the bold, the dishonest and the less discriminating to impose upon those who are susceptible and who are ambitious to improve their status. It is a proper exercise of the sovereignty to protect the latter class by such legislation as the Corporate Securities Act.

[14-16] Appellant declares that he was prejudiced (1) by the references to his former conviction, (2) by the unethical conduct of Roether's counsel, and (3) by adverse rulings of the court. So far as we have been able to explore the record we find no allusions to his prior conviction except by witnesses who recited the conversations had with appellant relative to his inability to sign the notes or by those who testified as to the representations of Roether. The assigned "unethical conduct" of Roether's counsel is a fantasy. From appellant's closing brief we learn that he deems himself aggrieved because the court directed appellant instead of Roether's counsel to follow the district attorney in the argument. Such procedure was within the court's discretion. The detrimental rulings of the court referred to by appellant have not been pointed out. We find none. If there be such, it was incumbent upon appellant to specify the pages of the transcript where they are reported. People v. Jenkins, 118 Cal.App. 115, 4 P.2d 799.

[17] It turns out that this appeal has neither points, (Rule 15 of this Court) nor assigned errors (People v. Schlosser, 99 Cal.App. 593, 278 P. 898) nor argument,

nor authority. Jenkins, supra. It appears to be merely a beseeching by the wretched man that he have special favor extended to him because he, in his own person, presents his own cause. Neither does his personal advocacy of his cause entitle him to any advantage over other convicts nor does the fact that he is serving his sentence confer upon him a right to which he were not entitled had be been represented by a Webster. Frey v. Superior Court, 5 Cal.App.2d 534, 536, 43 P.2d 342. It is the genius of our law that it be universally applied so far as the power of ascertaining the facts will enable the courts to determine the category into which the acts of an accused may fall. When a jury under proper guidance has determined that a prisoner has been guilty of grand theft by trick and device, it is the duty of the court to sentence such criminal to the state prison just as was done for Hibbs and Hennessey. The more constantly uniform the application of the criminal law, the more will it be dreaded by those dry land buccaneers who defy statutes if they can discern a course by which they may be evaded.

The judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concur.



CONTINENTAL CAR-NA-VAR CORPORATION v. MOSELEY et al.

Civ. 14070.

District Court of Appeal, Second District, Division 1, California.

Sept. 14, 1943.

Hearing Granted Nov. 8, 1943.

1. Trade-marks and trade-names and unfair competition ⇐77

The courts will protect employer against unfair competition which consists of use by employee to prejudice of his former employer of confidential information gained by employee during his prior employment as to business secrets of his former employer.

2. Trade-marks and trade-names and unfair competition ⇐77

If a person establishes a trade or business which depends for continuance upon keeping secret the names of customers, or other valuable information known to such persons, no agent or employee having been intrusted with such secrets in course of his employment can thereafter utilize his secret knowledge to prejudice of such person.

3. Trade-marks and trade-names and unfair competition ⇐93(3)

Evidence authorized granting of damages and injunctive relief enjoining defendants, two of whom were former employees of plaintiff, from soliciting as a customer any person within designated territory who was plaintiff's customer for specified goods on certain date, as against contention that "customers cards" utilized by defendants in making approach to plaintiff's customers did not constitute a confidential or "trade secret", and that customers were not the "exclusive" customers of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Secret".

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Continental Car-Na-Var Corporation against L. C. Moseley and others to enjoin unfair competition and for damages. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Loeb and Loeb, of Los Angeles (Norman Newmark, of Los Angeles, of counsel), for appellants.

Mills & Wood, of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff is an Indiana corporation engaged in a nation-wide business of manufacturing, producing, buying and selling compounds for finishing, cleaning and treatment of floors in buildings, and of tools and appliances designed for the same purposes. It has maintained an office and place of business in Los Angeles over a period of years. Prior to 1932 defendant L. C. Moseley had been employed by plain-

tiff in the states of Kentucky and Indiana. During the year just mentioned said defendant came to Los Angeles as the sales representative and district manager for plaintiff corporation. He terminated his employment with plaintiff on March 31, 1941.

During the course of defendant Moseley's employment by plaintiff and under date of April 7, 1937, a new contract was entered into between himself and plaintiff corporation. Under the terms of such contract plaintiff granted to defendant Moseley the right and privilege to solicit and submit orders for merchandise manufactured and sold or held for sale by plaintiff corporation in Southern California, subject to the approval of plaintiff and subject to the published sales price list and policies of the company as might from time to time be published or outlined by it. Under the contract defendant Moseley was without authority to complete any sale of plaintiff's products but was required to forward orders to the home office in the state of Indiana upon order blanks furnished him for such purpose. On his part defendant Moseley agreed to promptly forward various reports and copies of correspondence covering company business and to advise the latter on all matters of interest to it which might come to his attention. As full compensation for sales made by him under the agreement in question, defendant Moseley was to be paid a commission, fixed as to amount, by plaintiff corporation. The contract between them was to remain in full force and effect from year to year unless written notice was given by one party to the other at least ten days before the expiration date of any annual period. This contract was cancelled at the instance and request of defendant Moseley effective at the close of business March 31, 1941.

Defendant Edward S. Franzus had also been employed by plaintiff corporation at its home office in Indiana as a chemist, from September, 1934, to July, 1936. He came to Los Angeles about October, 1940, at which time he called upon defendant Moseley and they became mutually interested in the formation of the Gerson-Stewart Pacific Corporation, also named as a defendant in this action. In February, 1941, defendants Moseley and Franzus in conjunction with a Mr. Gerson, of Gerson-Stewart Corporation, an Ohio corporation, agreed to and did during the month of March, 1941, form the corporation named as defendant herein, and had commenced operations in the city of Los Angeles on April 1, 1941, the day after the cancellation of defendant Moseley's contract with plaintiff corporation became effective. Just prior to April 1, 1941, the corporation named as a defendant herein purchased the business of Bobrich Manufacturing Corporation, a California corporation engaged also in the manufacture and sale of compounds for the renovation of floor treatments and cleaners.

The record discloses that prior to the effective date of the termination of his contract with plaintiff corporation the defendant Moseley on March 20, 1941, prepared a circular letter which was addressed and mailed to some 250 to 300 of the customers appearing on the books of plaintiff corporation. In this letter defendant Moseley advised plaintiff's customers of the severance of his connection with plaintiff corporation and that on April 1, 1941, he would assume the position of sales manager of Gerson-Stewart Pacific Corporation. The closing paragraph of this letter read as follows: "As my business relations with you have been most pleasant during the past eleven years, I want to thank you sincerely for your kind patronage and assure you that in my new connection as Sales Manager of Gerson Stewart Pacific Corporation, I will bend every effort to assure you of the same conscientious treatment and careful attention to your future needs."

On and after April 1, 1941, defendant Moseley and the new corporation solicited 88 customers of plaintiff in an effort to sell them products in competition with those sold by plaintiff and the purposes of which products were the same as were the purposes of products manufactured and sold by plaintiff in the territory of Southern California referred to in defendant Moseley's contract with plaintiff. 39 of the customers so solicited purchased the products of the newly formed corporation.

By its complaint plaintiff corporation alleged that by and through its efforts jointly with those of defendant Moseley the firm had established a lucrative business and a large demand for its products in Southern California and had accumulated a large and confidential list of customers and had built up a good will toward plaintiff and its products. The complaint further alleged that the business and lists of customers heretofore referred to were in large part acquired by defendant Moseley while in the employ of plaintiff corporation at great ex-

pense to the latter; was in the former's possession and is a trade secret of great value. It was further alleged that by reason of his former employment by plaintiff corporation the defendant Edward S. Franzus became acquainted with the chemical composition and method of manufacture of plaintiff's products. The complaint further charged that defendants Moseley and Franzus "connived together to unlawfully interfere with and to deprive the plaintiff of its trade and customers, and to induce the patrons of plaintiff to cease dealing and trading with plaintiff" and to destroy plaintiff's good will and pursuant thereto said defendants "participated in the organization of the defendant Gerson-Stewart Pacific Corporation" as a corporation to deal in commodities and merchandise designed for like purposes as the products of plaintiff. It is then alleged that the defendants just mentioned and defendant Mrs. Edward S. Franzus agreed and confederated together to secure for themselves and defendant corporation confidential information and trade secrets of plaintiff corporation contained in the latter's private and confidential lists of customers, as well as letters, mailing lists and correspondence, and toward the accomplishment of such purpose the last named defendants "read, examined and copied the confidential records of plaintiff". Defendant Moseley is then charged with secretly removing such confidential files and lists of customers and retaining the same for several days "all for the purpose of carrying out the alleged conspiracy to alienate from plaintiff its business, good will, customers and prospective customers". Finally by its complaint plaintiff corporation charged that all of the defendants since April 1, 1941, have solicited the customers and prospective customers of plaintiff for the purpose of selling to them products similar to those manufactured by and dealt in by plaintiff and had succeeded in securing for defendants the business and good will of such customers to the injury and damage of plaintiff's business.

Defendants by their answer admitted the organization of the corporation named herein as a defendant; admitted that some of the commodities dealt in by defendant corporation are designed for like purposes as the products of plaintiff. It was admitted that defendants Moseley and Franzus and Mrs. Franzus visited plaintiff's office, read and examined various records and addressed envelopes in plaintiff's office. The removal of the record cards of customers and other office records from plaintiff's office by defendant Moseley was admitted, but the return thereof upon demand of plaintiff was asserted. The solicitation of some of plaintiff's customers was also admitted and the evidence showed that the letter heretofore referred to was mailed to a large number of plaintiff's customers. The answer of defendants, however, expressly denied all allegations of the complaint relative to the alleged private or confidential nature of the customer lists in question; denied that the same was a trade secret; denied any alleged unlawful combination or conspiracy; and denied that any of them had made use of any trade secrets or confidential information belonging to plaintiff corporation. It was also denied that any of the defendants had made use of any knowledge acquired by defendant Edward S. Franzus as to any formula used by plaintiff in the manufacture of its products.

By its findings of fact after trial, the court found that all of the allegations of the complaint, except the allegation that defendant Mrs. Franzus participated in the organization of the defendant corporation, were true. The court made a special finding in support of its conclusion that plaintiff had suffered damage in the sum of $344.34 by the acts of defendants in selling to 18 of plaintiff's customers merchandise of the amount of $3,433.42. This finding was based upon the conclusion reached by the trial court that the defendants' net profit averaged ten percent of the amount of its sales.

In addition to the award of damages as heretofore noted, the decree entered by the trial court permanently enjoined and restrained the defendants: (a) From soliciting as a customer of defendants any person, firm or corporation within a designated territory "who was, on or prior to March 31, 1941, a customer of plaintiff" for specified goods, wares and merchandise. (b) From using or continuing to use "any information or knowledge concerning plaintiff's customers, patrons, their addresses in connection with any plan, business or enterprise, and from in any manner soliciting, diverting or taking away any of such customers or patrons of plaintiff, or from in any manner attempting to induce any of said customers or patrons of plaintiff, either directly or indirectly, to withdraw any of their business or patronage from plaintiff,

"and from doing any acts detrimental to plaintiff's good will or likely to cause plaintiff's injury. (c) From divulging to any person, firm or corporation the names, addresses or other information concerning any customers of plaintiff who were such on or prior to the 31st day of March, 1941. (d) From using or divulging any of the trade secrets or other knowledge of the composition of any products manufactured by plaintiff. From such decree defendants prosecute this appeal.

Although it is contended by appellants that appellant Moseley was an independent contractor, nevertheless the evidence in the case at bar supports the conclusion that a relation of employer and employee or principal and agent existed between appellant Moseley and respondent corporation during the time he was associated with the latter throughout the pendency of his contract which was terminated as of March 31, 1941.

[1] Appellants concede that the courts will protect the employer against that unfair competition which consists of the use by the employee to the prejudice of his former employer, of the confidential information gained by the employee during his prior employment as to the business secrets of his former employer, but appellants urge that the "customers cards" utilized by appellants in making a business approach to respondent's customers did not constitute what is known as a "confidential" or "trade secret", because such customers were readily known to all of respondent's competitors as users of the particular products manufactured and sold by respondent; that the names of such customers and their addresses were listed in the telephone directory. It is further argued by appellants that the "customers" here in question were not the "exclusive" customers of respondent but dealt with other firms who were competitors of respondent; that therein the facts of the case at bar differ from the type of cases that have come before the courts and are known as the milk, ice, bread or laundry "route" cases, in which it would be difficult for anyone but a former route man or employee to know what particular homes are in the market for the particular commodity or service being offered, and wherein, nobody but a former employee of the ice, bread, milk or laundry concern could possibly know which homes within a given area are really potential customers. Although approximate examples are plentiful, nevertheless, whether the asserted acts and methods practiced by an individual engaging in competition with his former employer are fair and legitimate, within the application of the doctrines here involved, is not always easy to determine.

[2] In that connection it has been held that "if a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers, or other valuable information known to such person no agent or employé, having been intrusted with such secrets in the course of his employment, can thereafter utilize his secret knowledge against the interests or to the prejudice of such person." New Method Laundry Co. v. MacCann, 174 Cal. 26, 30, 161 P. 990, 991, Ann.Cas.1918C, 1022. And in the same case appears the following: "It cannot, indeed, be questioned that an employé, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade. But in such competition, he must act with utmost fairness, resolving every doubt rather in favor of the interests of the former employer than against them, and exercising, at all times, every precaution to avoid violating, in letter or spirit, the confidence reposed in him." Id. 174 Cal. at page 31, 161 P. at page 992, Ann.Cas.1918C, 1022. To the same effect see Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; also George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399.

[3] The situation presented in the case at bar appears to come squarely within the doctrines enunciated by the foregoing citation of authority, and in particular, the Burdusis case; and there can be no question but that the evidence supports the findings.

The judgment appealed from is therefore affirmed.

YORK, P. J., concurs.

WHITE, Justice (dissenting).

I find myself in accord with the claims urged by appellants when they challenge that portion of the decree which enjoins them from using or divulging any of the trade secrets or other knowledge of the composition of any product manufactured by respondent. The record herein discloses

no evidence that appellants had made or might make use of respondent's secret process. In fact both at the time of the hearing on the preliminary injunction and at the time of trial, appellants offered to permit a comparison between the formulas used by appellant Franzus for appellant Gerson-Stewart Company and the formulas used by respondent, but in each case the offer was rejected. Therefore the facts here present do not demand the relief provided for in this portion of the decree. There is nothing in the record with reference to the illicit use of respondent's secret formulas except the opportunity for such use and a suspicion in the mind of respondent's officers that wrong would be done them. Surely equity does not countenance the doctrine that when a man has worked for another and learned the latter's secret formulas or business secrets, and then goes to work for another or engages in a rival business for himself, he must be harnessed with the injunctive mandate of a court of equity because he possesses the opportunity to do evil. Equity will not assume human nature to be essentially and inherently evil. Until the presumption is controverted by other evidence, it is presumed in law that a person is innocent of crime or wrong. Subdivision 1, section 1963, Code of Civil Procedure. While it might be urged that this provision of the decree is harmless if appellants do not impinge upon respondent's secret formulas, I am impressed that under the facts here present appellants should not be stigmatized with the injunctive mandate and it should therefore have been omitted. That appellant Franzus was entitled to make use of his general knowledge of chemistry to manufacture floor wax and kindred commodities for appellant corporation so long as he did not transgress upon the "trade secrets" or "secret formulas" belonging to respondent can not be questioned. That he did any more than exactly that is not borne out by evidence of any character herein.

I am in accord with the statement made in the majority opinion to the effect that it is no easy task to draw the line between acts of a former employee engaging in business competition with his former employer, which are fair and legitimate, and those methods on his part which are denounced by law as unfair and illegitimate practices. From a reading of the cases it would seem that the distinction lies somewhere in the zone between "pirating" and "competing" for customers.

I take no issue with the holding by my associates that equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity shall also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life. Every individual possesses as a form of property the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted. New Method Laundry Co. v. MacCann, 174 Cal. 26, 33, 161 P. 990, Ann.Cas.1918C, 1022.

In consonance with the rule just announced, I think it must be held that appellant Moseley had the right to advise the customers of his former employer that he was severing his business relations with the latter and was engaging in business for himself. In Theodore v. Williams, 44 Cal.App. 34, 37, 185 P. 1014, it was held that a former employee of a laundry, who had associated himself with a rival employer, was justified in driving along the streets upon which customers of his prior employer resided, with his laundry wagon plainly labeled with a notice of his new business association, and also it was held that he had the right to advertise such fact in a newspaper.

Coming now to a consideration of the question whether appellants, and appellant Moseley in particular, were guilty of unfair competition in soliciting the customers of Moseley's former employer for business in competition with the latter. It is now settled law that equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. Pasadena Ice Co., v. Reeder, 206 Cal. 697, 702, 275 P. 944, 276 P. 995. The courts regard as unfair competition and will therefore enjoin the use by an employee to the prejudice of his former employer, of the confidential information gained by the employee during his prior employment as to the business secrets of such employer. Pasadena Ice Co., v. Reeder, supra, 206 Cal. at page 703, 275 P. 944, 276 P. 995.

But we are not here confronted with a situation such as existed in most, if not all, of the cases in which injunctive relief has been granted and in which cases it appeared that the business of selling and serving the various customers of the employer was chiefly a matter of friendly feeling between the customer and the employee on the route delivering the commodities sold or serviced. A reading of the record in the instant case impresses me that appellant Moseley while employed by respondent solicited its customers in competition with other firms engaged in the business of selling floor wax and other commodities for the treatment of floors; that such sales were made not because of the employee Moseley's "personal acquaintance with customers and knowledge of 'their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers'" (George v. Burdusis, 21 Cal.2d 153, 160, 130 P.2d 399, 403; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 346, 295 P. 10), but rather upon the ability of respondent, through its salesman Moseley, to meet or excel, in the judgment of the customers, the quality, price and adaptability of similar products offered for sale to such customers by competitors of respondent. In other words, there was nothing "exclusive" in the business relationship existing between such customers and either respondent or its sales representative, appellant Moseley. In New Method Laundry Co. v. MacCann, supra, 174 Cal. at page 33, 161 P. at page 993, Ann. Cas.1918C, 1022, our Supreme Court quotes with approval the language used in Boosing v. Dorman, 148 App.Div. 824, 133 N.Y.S. 910, where, as in the instant case, the names of plaintiff's customers, all potential buyers of compounds for finishing, cleaning and treating floors in buildings, were listed in public directories, and in which cited case it was said: "'The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated "trade secrets" which an employé is prohibited from using for his own benefit after the termination of his employment, in the absence of an express contract.'" I am therefore persuaded that the facts upon which the present action is based bring the appellants within the limitations of the rule promulgated in Avocado Sales Co., v. Wyse, 122 Cal.App. 627, 10 P.2d 485, as announced in George v. Burdusis, supra, and appellants were therefore free to solicit the former customers of respondent without restriction. The absence herein of those considerations present in the case of George v. Burdusis, supra, and cases therein cited, distinguished and reviewed in my opinion, takes this case out of the sphere of unfair competition and entitled appellants to solicit the customers of respondent by and through any legitimate means open to other competitors.

By reason of the foregoing, it is my opinion that the decree appealed from should be reversed and the cause remanded with directions to the court below to enter judgment for the defendants.



62 Cal.App.2d Supp. 983

SHAY v. RICHTER.

No. 1593.

Appellate Department, Superior Court in and for City and County of San Francisco, California.

Sept. 20, 1943.

1. Appeal and error ⇐348(1)

The provision that time for appeal from a judgment shall not expire until a specified number of days after entry of order determining motion for new trial may extend, but cannot reduce, the period within which an appeal may be taken in absence of service of notice of entry of judgment. Code Civ.Proc. §§ 939, 983a.

2. Appeal and error ⇐348(1)

In absence of service of notice of entry of judgment, notice of appeal filed more than 15 days after denial of motion for new trial but within 60 days after entry of judgment was timely. Code Civ.Proc. § 983a.

Action by Jesse Shay against Ernest J. Richter. Judgment for defendant, and plaintiff appeals. On defendant's motion to dismiss appeal.

Motion denied.

Edward T. Mancuso, of San Francisco, for appellant.

John B. Ehlen, of San Francisco, for respondent.

F. A. GRIFFIN, Presiding Judge.

It is our opinion that respondent's motion to dismiss this appeal should be denied.

Under the provisions of Section 983a, Code Civ.Proc., a party against whom judgment is rendered is given sixty days within which to take an appeal from such judgment where no notice of entry of judgment has been given by the adverse party. The language of the section is, in part, "but the time within which such appeal may be taken shall not in any event *exceed* sixty days after entry of the judgment or order, except that if proceedings on motion for a new trial *are pending,* the time for appeal from the judgment shall not expire until fifteen days after entry of an order determining such motion for a new trial * * *. The time for appeal is *also extended* in the manner, for the period, and under the circumstances prescribed in section 12*a* of this code". (Emphasis ours.)

In the instant case a motion for new trial was made and denied by the trial court before the expiration of the sixty day limitation on appeals from judgments. The order denying such motion was made more than fifteen days prior to the filing of appellant's notice of appeal and it is the contention of respondent that because thereof the appeal is too late. In support of his contention respondent has cited several cases in his brief and in a subsequent memorandum, but in none of these cases is the question involved herein decided. Whatever language found therein apparently favorable to respondent's position must be considered in relation to the situation before the respective courts and in none of them has it been decided that the time for appeal from a judgment (sixty days in the present case) has been curtailed. In most of the cases it appears that the primary limitation of time for appeal had expired and that the proceedings taken by the appellants there were in effect an attempt to enlarge the time of appeal beyond the statutory period, which the upper courts held could not so be accomplished. There is no case that we have been able to find which in its holding curtails the statutory time of appeal, and practically all of these cases construe the effect of the statutory language of Section 939, which deals with appeals from the Superior Court, as extending the time of appeal beyond the limitation of the statute to a period thirty days from the date of the termination of the motion for new trial. See Bates v. Ransome-Crummey Co., 42 Cal.App 699, 184 P. 39; Jackson v. Dolan, 202 Cal. 468, 261 P. 706; Deacon v. Deacon, 201 Cal. 190, 255 P. 798.

In Rainey v. Crowder, 131 Cal.App. 562, 21 P.2d 593, 594, a motion for new trial was heard and determined within the sixty day period provided for appeals from judgments. Notice of appeal was given by defendants after the primary time for appeal had expired but within the extension period provided by Section 939, Code Civ.Proc. The appellate court, holding that the appeal was timely, made the following observation: "We think that the statute as written reasonably allows a construction which will in all instances fully preserve the right of a party who promptly has made his motion for a new trial, to have the benefit of *the extension of time,* not exceeding thirty days, for taking his appeal". (Emphasis ours.)

[1] It is our opinion that, in enacting Sections 939 and 983a, Code Civ.Proc., which, though different in language, are similar in meaning, the legislature had no intention of curtailing or reducing the time within which an appeal from a judgment may be taken but were providing for an extension of such time under the conditions set forth in these sections.

[2] The notice of appeal having been given within the sixty-day limitation is timely and respondent's motion to dismiss should therefore be denied.

McWILLIAMS and FOLEY, JJ., concur.

McDONALD v. STATE BAR.
L. A. 18561.

Supreme Court of California.

Sept. 21, 1943.

Rehearing Denied Oct. 18, 1943.

1. Attorney and client ⇐7

A proceeding to review order of Committee of Bar Examiners denying application for admission to practice law in California was not "moot" on ground that petition showed that application had been withdrawn. St.1939, p. 354, § 6062.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Proceeding".

2. Attorney and client ⇐7

That Minnesota attorney did not seek admission to the California Bar did not preclude him from challenging order of Committee of Bar Examiners denying his application for admission to practice law in California, where the application had been withdrawn prior to the adverse action of the Committee. St.1939, p. 354, § 6062.

3. Attorney and client ⇐5

A Minnesota attorney was entitled to withdraw application pending before the Committee of Bar Examiners for admission to practice law in California, where the public interest would be effectively safeguarded thereby and attorney had abandoned his California residence and was therefore no longer qualified to practice law in California. St.1939, p. 354, § 6062.

4. Attorney and client ⇐7

Dismissal of application before the Committee of Bar Examiners for admission to practice law in California is not a matter of right when the adversary seeks affirmative relief. Code Civ.Proc. § 581.

Proceeding by Robert J. McDonald against the State Bar of California to review an order of the Committee of Bar Examiners denying petitioner's application to practice law. On demurrer to petition.

Demurrer overruled with direction.

Wolfson & Swetow, Burnett Wolfson, and Earl I. Swetow, all of Los Angeles, for petitioner.

Hewlings Mumper, of San Francisco, for respondent.

PER CURIAM.

On April 7, 1941, petitioner filed with the Committee of Bar Examiners of The State Bar of California an application for admission to practice law in this state. Prior to the filing of such application petitioner had been admitted to practice in Minnesota for a period of time in excess of that prescribed in section 6062 of the State Bar Act, St.1939, p. 354. He also satisfied the residence requirement designated in that section. In support of his application petitioner submitted documentary evidence as to his moral and legal qualifications, and thereafter testified before the Committee of Bar Examiners and a sub-committee thereof.

One year after filing the application for admission to practice and, while the same was pending and undetermined, petitioner forwarded to The State Bar a written notification that he had abandoned his residence in California and had returned to Minnesota to live. He also gave written notice of the withdrawal of his application for admission to practice law in this state. Eighteen days later the Committee of Bar Examiners by resolution denied petitioner's "request ... for permission to withdraw his application for admission to practice" and denied such application on the ground that petitioner had failed to establish that he possessed the necessary good moral character essential to admission. In response to a letter from petitioner directing attention to the fact that he had withdrawn his application for admission to practice prior to the purported action thereon, the committee reconsidered the matter and again concluded, adversely to petitioner's contention, that the prior written notice of withdrawal of the application did not prevent it from denying the same on the merits. Accordingly, and on September 4, 1942, the committee by formal resolution again purported to deny the application on the ground that petitioner had failed to establish that he possessed the necessary good moral character.

Petitioner here urges, among other things, that his application for admission had been withdrawn when the committee purported to pass upon its merits and that prior to the committee's determination he had abandoned his California residence and re-established his permanent domicile in Minnesota, and therefore was no longer eligible as an applicant for admission in

California. Respondent has demurred to the petition, contending that there is no justiciable controversy in that the sole effect of the committee's action was to deny admission to the petitioner who, by his petition here, admits that he is not now eligible or qualified for such admission. Respondent also argues that this proceeding is moot because the "petition shows on its face that the petitioner has withdrawn his application to practice law in the State of California. * * *"

[1, 2] We are not impressed by the latter argument, which places respondent in the position of justifying the committee's action by denying that petitioner had effectively withdrawn his application for admission to practice while recognizing the effective withdrawal of such application for the purpose of asserting the moot character of this proceeding. Nor can we accept respondent's argument that petitioner is not aggrieved by the committee's action in denying on the merits an application for admission to practice which had been withdrawn prior to such adverse action. Should petitioner at a future time seek admission to practice in some state other than Minnesota, where he is now admitted and in good standing, he should not be prejudiced by an adverse California determination on an application which had been withdrawn prior to such determination. The fact that petitioner does not presently seek admission in this state does not therefore preclude him from here challenging the committee's action.

[3] The committee should have recognized and accepted petitioner's written withdrawal of his application for admission In Jones v. Securities & Exchange Commission, 298 U.S. 1, 18-23, 56 S.Ct. 654, 660, 80 L.Ed. 1015, the petitioner had filed a registration statement covering a proposed issue of trust certificates, and after hearing, but prior to action on the application, the same was withdrawn by petitioner. The court held: "In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an ex parte application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. * * * The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned."

[4] Respondent quotes excerpts from Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 221, Sunshine Anthracite Coal Co. v. National B. C. Commission, 8 Cir., 105 F.2d 559, and Securities and Exchange Commission v. Hoover, D.C., 25 F.Supp. 484, as qualifying the rule announced in the Jones case, supra. The three cited cases involved situations varying from those presented in the Jones case and in the present proceeding. In the Ford case the National Labor Relations Board sought and was granted leave to withdraw its petition to enforce one of its orders. In making the declaration, relied on by respondent here, "that permission to withdraw must rest in the light of the circumstances of the particular case," the court had in mind that the company affected by the board's order had by its answer to the board's petition and by separate petition sought affirmative relief. It is settled that dismissal is not a matter of right when the adversary seeks affirmative relief. Jones v. Securities and Exchange Comm., supra, 298 U.S. 20, 56 S. Ct. 654, 80 L.Ed. 1015; sec. 581, Code Civ. Proc.; 9 Cal.Jur. 507, sec. 3.

It appears from the decision in the Sunshine Anthracite Coal Company case, supra, that the National Coal Commission, as required by the pertinent act, had commenced a proceeding to determine whether the coal produced in Arkansas did not come within the purview of a section of the act. Petitioner coal company thereafter filed its petition seeking exemption from the provisions of the act. After hearings and findings by the examiner that petitioner was not entitled to the claimed exemption, petitioner unsuccessfully sought to withdraw its petition. The decision, in approving the refusal to allow withdrawal, declares that "the real moving party seeking determination of the broad question as to the ap-

plicability of the Act to Arkansas coals was the Commission. The petitioner opposed the conclusion that all the coals in the area were within the Act. It could not by dismissing its petition prevent the Commission from making determination upon that question which was the subject matter of the hearing." [105 F.2d 566.]

In the Hoover case, supra [25 F.Supp. 486] unlike the Jones case quoted from above, the "notification of the stop order proceeding * * * was issued after the registration statement [sought to be withdrawn] had become effective." The court there also pointed out that "the most important distinction existing between this and the Jones case lies in the fact that various issues of the same stock which the registrant here proposed to issue had been placed upon the market and sold prior to the time the registration statement was filed. * * * Under these circumstances, a large number of investors exist and their rights are a matter of actuality. They are entitled to the information and protection which would result from an investigation of these securities by the Commission. Public interest and need for protection, which were non-existent in the Jones case, are matters of vital concern and reality here."

In the present proceeding it would appear that any public interest in the matter will be as effectively safeguarded by petitioner's voluntary withdrawal of his application for admission as it would be by a denial on the merits of such application.

Moreover, since by the demurrer it is admitted that petitioner had abandoned his residence in California and again established his domicile in Minnesota, it would be unreasonable to expect him to return to this state in support of an application for admission which not only had been withdrawn but which could not have been granted in any event because the applicant no longer satisfied the residence requirement of this state.

Respondent's demurrer to the petition is overruled and the Committee of Bar Examiners is directed to strike from its records the resolution and determination denying petitioner's application for admission to practice and to take appropriate action for a dismissal of the application.

60 Cal.App.2d 621

PAINE v. BANK OF CERES.

Civ. 12401.

District Court of Appeal, First District, Division 1, California.

Sept. 29, 1943.

1. Appeal and error ⇐1218

Where costs on appeal are improperly allowed, motion to recall remittitur is proper remedy.

2. Costs ⇐222

Code section 1032, providing that plaintiff shall not recover costs in superior court when judgment is one which could have been rendered by an inferior court within same county has no application to costs on appeal, which are governed by section 1034 and rule 26a. Code Civ.Proc. §§ 1032, 1034; Rules of the Supreme Court and District Courts of Appeal, rule 26a.

3. Costs ⇐230

Under statute and rules pertaining to costs, there is no denial of costs on appeal to prevailing plaintiff because his judgment is within jurisdictional limits of a municipal or justice's court. Code Civ. Proc. § 1034; Rules of the Supreme Court and District Courts of Appeal, rule 26a.

4. Costs ⇐18

The disallowance of trial costs, when judgment of superior court is within jurisdiction of an inferior court, is intended as a penalty against a plaintiff who prays for an amount in excess of inferior court's jurisdiction but secures judgment for an amount within such jurisdiction, so as to compel plaintiffs to bring doubtful cases in inferior courts. Code Civ.Proc. § 1032.

5. Costs ⇐230

Under court rule authorizing reviewing court, in interests of justice, to make any award or apportionment of costs which it deems proper, allowance of costs to prevailing party on appeal is within discretion of such court. Code Civ.Proc. § 1034; Rules of the Supreme Court and District Courts of Appeal, rule 26a.

6. Appeal and error ⇐1218

A remittitur will be recalled only where judgment of appellate court has been

secured by fraud or imposition, or where court has been led astray so as to decide case under a misapprehension of true facts, or where court had no jurisdiction to act.

7. Costs ⇐230

Normally, prevailing party is entitled to costs on appeal as of course. Code Civ. Proc. § 1034; Rules of the Supreme Court and District Courts of Appeal, rule 26a.

8. Appeal and error ⇐1218

A losing party desiring to urge that appellate court should exercise its inherent power and deny costs to prevailing party in interests of justice should normally urge point before appellate court has lost jurisdiction by issuance of remittitur. Rules of the Supreme Court and District Courts of Appeal, rule 26a.

Appeal from Superior Court, Stanislaus County; G. B. Hjeim, Judge.

Action by Joe Paine against Bank of Ceres for alleged conversion based upon sale by defendant of plaintiff's cattle under a chattel mortgage. A judgment for plaintiff on defendant's appeal was affirmed, 138 P.2d 396. On defendant's motion to recall remittitur for purpose of striking allowance of costs.

Motion denied.

Dennett & Paul and Herbert E. Paul, all of Modesto, for appellant.

Nat Brown and C. H. Hogan, both of Stockton, for respondent.

PETERS, Presiding Justice.

Motion to recall remittitur.

On June 17, 1943, this court filed its opinion in the above entitled case affirming the judgment of the trial court. Paine v. Bank of Ceres, 59 Cal.App.2d 242, 138 P.2d 396. The action had been brought by plaintiff for damages for the conversion of his cattle. Judgment was entered in favor of the plaintiff for $849.02. In the notice of motion filed herein it is stated that this judgment was one that could have been rendered by the Justice's Court in the county concerned. It is further averred, and not denied, that the superior court has denied plaintiff his trial costs.

[1] After this court had affirmed the judgment, and after the judgment had become final, the clerk of this court, on August 17, 1943, issued the remittitur. The remittitur is in the usual form and concludes with this sentence: "The respondent to recover costs of appeal." The defendant's present motion is to recall the remittitur for the purpose of striking therefrom the allowance of costs. If the costs were improperly allowed this is the proper remedy. San Joaquin, etc., Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021.

[2] An examination of the pertinent code section demonstrates that the costs on appeal were properly allowed the prevailing party. Section 1032 of the Code of Civil Procedure provides that: "In the superior court, except as otherwise expressly provided, costs are allowed of course" to the prevailing plaintiff, provided "that the plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or inferior court within the same county or city and county." This section, by its terms, is limited to costs in the trial court, and, acting pursuant thereto, the trial court has properly denied the prevailing plaintiff his trial costs. That section, however, has no application to costs on appeal. Such costs are governed by § 1034 of the Code of Civil Procedure. That section provides that: "The prevailing party on appeal shall be entitled to his costs" except in certain circumstances not here involved. There is no such exception as is contained in § 1032.

The rules announce the same rule. Under old Rule XXIII it was provided that: "In all cases in which the judgment or order appealed from is affirmed, the clerk will enter upon the record, and insert in the remittitur, a judgment that the respondent recover the costs of appeal." Rule 26(a) of the new Rules on Appeal, in restating the rule to accord with existing practice, provides: "Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal * * *. In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper."

[3] From these sections and rules it is apparent, first, that § 1032 of the Code of Civil Procedure has no application to the denial of costs on appeal; second, that under § 1034 and the old and new rules there is no denial of costs on appeal to the prevailing plaintiff because his judgment

is within the jurisdictional limits of an inferior court within the county. In fact, § 1034, old Rule XXIII, and new Rule 26(a) expressly provide for the recovery of costs on appeal by the plaintiff if he prevails on appeal.

[4] The reason for the distinction between the allowance of trial and appeal costs is apparent. The disallowance of trial costs, when the judgment is within the jurisdiction of an inferior court, was intended as penalty where the plaintiff prays for an amount in excess of the inferior court's jurisdiction but secures judgment for an amount within such jurisdiction. It was intended to compel plaintiffs to bring such doubtful cases in the inferior courts. But after the plaintiff prevails it is the defendant that prosecutes the appeal. The plaintiff is no longer the moving party. For that reason, if the plaintiff prevails on appeal, there is no sound reason why he should be further penalized by being denied his costs on appeal.

[5-8] Another complete answer to the contentions of defendant is found in Rule 26(a), above quoted. That section provides, as already pointed out, that: "In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper." As stated in the Draftsman's Notes to the new rules: "In the main this rule attempts to state and clarify existing practice, recognizing the power of the court, notwithstanding C.C.P. 1034, to exercise discretion in changing the normal award of costs." Thus, an allowance of costs to the prevailing party on appeal is within the discretion—i. e., the jurisdiction—of the appellate court. A remittitur will be recalled only where the judgment of the appellate court has been secured by fraud or imposition, or where the court has been led astray so as to decide the case under a misapprehension of the true facts, or where the court had no jurisdiction to act. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006; Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008. Normally, as already pointed out, the prevailing party is entitled to his costs on appeal as of course. If the losing party wants to urge that the appellate court should exercise its inherent power and deny costs to the prevailing party in the interests of justice he should normally urge such point before the appellate court has lost jurisdiction by the issuance of the remittitur. He should not be permitted to wait and see if the court exercises such power on its own motion, and, if it does not, secure, in effect, a second hearing on a motion to recall the remittitur.

The motion is denied.

WARD, J., and DOOLING, Justice pro tem., concur.



60 Cal.App.2d 326

KYNE v. KYNE.

Civ. 12351.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1943.

Hearing Denied Oct. 25, 1943.

On rehearing.

Rehearing denied.

Prior opinion, 140 P.2d 886.

PER CURIAM.

Rehearing denied.

KNIGHT, Justice (dissenting).

I dissent from the order denying a rehearing. It should have been granted, in my opinion, for two reasons: First, to consider certain facts and circumstances disclosed by the record but not referred to in the decision as filed, tending to show that the trial judge's refusal to allow additional attorneys' fees was not based solely on the question of the validity of the contingent fee contract, but that he concluded also, and irrespective of the question of the validity of the contract, that under all the circumstances and particularly in view of the facts stated in the letter written by the judge who granted the original allowance of $3,500, that said attorneys had already been amply compensated for all services performed; secondly, to consider the question of whether, under the 1939 amendment, St.1939, p. 1758, to section 196a of the Civil Code, and in view of the construction placed on that section as amended, by the Supreme Court in the recent case of Carbone v. Superior Court, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260, a trial court

may, unlike in divorce cases, in the absence of a previous application therefor, grant additional attorneys' fees for past services performed subsequent to the rendition of the judgment. The more recent case of Andrade v. Newhouse, 54 Cal.App. 2d 339, 128 P.2d 927, does not, in my opinion, determine that question.

Hearing denied; SCHAUER, J., dissenting.



60 Cal.App.2d 524

In re WESTER'S ESTATE.

LOWE et al. v. RUHLMAN.

Civ. 12506.

District Court of Appeal, First District. Division 2, California.

Sept. 23, 1943.

Rehearing Denied Oct. 23, 1943.

Hearing Denied Nov. 18, 1943.

1. Executors and administrators ⇐294

The superior court was justified in disregarding note, executed to testatrix solely by corporation in which she and specific legatee under will each owned about half of stock, as offset against legacy, particularly where no claim that legatee was personally liable on note was made until over three years after executor's appointment and after filing of legatee's petition for distribution.

2. Executors and administrators ⇐294

Where testatrix' money claim against corporation, in which she owned about half of stock, was stricken or written off corporation's books before testatrix' death, and no action was brought against anyone on such claim, it was properly disregarded as offset against specific legacy under will to owner of remaining stock, in absence of evidence warranting disregard of corporate entity in connection with claim.

3. Executors and administrators ⇐303(1)

Where amount of inheritance taxes due from specific legatee under will was estimated by inheritance tax appraisers, and amount of property withheld from such legatee by order decreeing partial distribution to him was ample to satisfy all such taxes which might be imposed on him under any theory suggested by residuary legatees, such order was proper, though no order fixing amount of such taxes had been made.

4. Executors and administrators ⇐303(1)

Inheritance taxes, due from specific legatee under will, need not be actually paid before distribution to him, and partial distribution of legacy may be made on withholding enough to satisfy such taxes on legatee's share of testatrix' estate.

5. Executors and administrators ⇐314(8)

In proceeding for distribution of specific legacy under will, evidence of certain data, reports, and information, concerning only possible claims of testatrix' estate against corporation in which testatrix and legatee owned all stock, was inadmissible in support of executor's items of counterclaim and offset against legacy, in absence of evidence warranting disregard of corporate entity.

6. Executors and administrators ⇐314(11)

In proceeding for distribution of specific legacy under will, denial of residuary legatees' request for continuance in order to produce evidence of bad financial condition of corporation, in which legatee and testatrix owned all stock, and low value of such stock at time of hearing, *held* not error, nor prejudicial to residuary legatees, in view of court's order distributing only portion of legacy and withholding ample amount to pay inheritance taxes due from specific legatee.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

In the matter of the estate of Josephine Wester, deceased. From an order decreeing partial distribution to Albert J. Ruhlman as specific legatee under deceased's will, Helen M. Lowe and another, residuary legatees, appeal.

Affirmed.

William T. Eckhoff, of San Francisco, for appellants.

Albert D. Elledge, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by two of the residuary legatees from the order of the trial court decreeing partial distribution in the sum of $2,500 to Albert J. Ruhlman.

The testatrix died in 1939. By her last will and the codicil thereto, the testatrix bequeathed to Albert J. Ruhlman the sum of $10,000, her stock in the Standard Oil Company of California and her stock in A. J. Ruhlman & Company. She devised her real property in San Francisco to her nieces Elsa K. Dernham and Helen M. Lowe, who are the appellants herein, and devised her real property in Monterey County to her niece Elsa K. Dernham. The residue of the estate was bequeathed to said nieces and others. Monte A. Dernham, the husband of Elsa K. Dernham, was named as executor and he qualified as such on October 5, 1939.

No inventory and appraisement was filed by the executor until January 7, 1943, although on April 3, 1942, the probate court had ordered the inventory filed. In response to that order, said executor had filed a purported inventory without an appraisement. It was not until after the petitioner had filed his petition for partial distribution and also his petition for removal of the executor that the executor filed the inventory and appraisement. It appears therefrom that the estate of the testatrix was appraised at $85,619.48. It consisted of cash in excess of $14,600, certain real estate and also stocks and other personal property. The 20 shares of the Standard Oil Company were appraised at $660 and the 376½ shares of A. J. Ruhlman & Co. were appraised at $12,294.47. A promissory note executed in favor of the testatrix by A. J. Ruhlman & Co. in the principal sum of $2,500 was appraised at $262.93 and a "debt due decedent from A. J. Ruhlman & Co. and/or A. J. Ruhlman" was appraised at "nil".

Objections to Albert J. Ruhlman's petition for distribution were filed by the executor and by the appellants herein. Hearings were had upon said petition but the hearing upon the petition for removal of the executor was continued and remained undetermined when the order for partial distribution was entered. The inventory and appraisement was filed after the hearings had been commenced upon said petition for distribution.

Upon said hearings, it appeared that all debts and claims against the estate had been paid except a balance due to the State of California for inheritance taxes, which taxes with respect to the petitioner amounted to $1,825.73 according to an estimate of the inheritance tax appraiser; that there remained in the hands of the executor cash in the sum of $9,318.96; and that there had been previously paid to petitioner on account of his legacy the sum of $4,670. The theory of the objectors was that there were certain unliquidated claims against the petitioner which were offsets against his legacy and that distribution should be denied until the validity and amount of such claims had been determined. It appeared however that any obligation upon these unliquidated claims was the obligation of A. J. Ruhlman & Co., a corporation, rather than the obligation of the petitioner, and it further appeared that it was not until December 31, 1942, and after the petition herein had been filed that any action against either the corporation or petitioner had been commenced. The action then commenced was one upon the promissory note of $2,500 above mentioned. The complaint however did not set up the promissory note in haec verba but did allege that "defendants", including the corporation and the petitioner, executed said note. The note was introduced in evidence on the hearings and showed upon its face that it was executed by "A. J. Ruhlman & Co. Inc." by "A. J. Ruhlman, President" and not by petitioner personally. At the time of the execution of the note and at the time of the death of the testatrix, petitioner owned 377 shares and the testatrix owned 376½ shares of the stock of said corporation. At the conclusion of the hearings, counsel for the executor apparently withdrew his objection to partial distribution but suggested the withholding of $2,500 from petitioner's legacy, saying "* * * by withholding $2500, that would still give Mr. Ruhlman a considerable distribution in cash here". It was conceded by all that a substantial amount of interest had accrued on said legacy by reason of the lapse of more than three years between the death of the testatrix and the hearing of the petition. The court ordered the distribution of the further sum of $2,500 upon said legacy, upon finding that there were sufficient assets to make such distribution without loss or injury to the estate or any person interested therein. This appeal is prosecuted solely by two of the residuary legatees, no appeal having been taken by the executor.

[1-4] Appellants contend that the evidence was insufficient to sustain the finding that there were sufficient assets to make the distribution without loss or injury to the estate or any person interested therein. In

support of this contention, they discuss certain alleged offsets against petitioner's legacy consisting of unliquidated claims. The first item discussed is the $2,500 promissory note above mentioned. As above indicated, this was a note executed solely by the corporation in which the testatrix owned approximately one-half the stock. The trial court was entirely justified in disregarding this item as an alleged offset against petitioner personally and particularly in view of the fact that no claim was made that petitioner was personally liable on the note until more than three years after the appointment of the executor and until after petitioner had filed his petition for distribution. The second item discussed is an alleged claim against petitioner for certain furniture in his possession alleged to have been the property of the deceased. There is not a word of testimony in the record concerning this item. Appellants state in the briefs that there is an action pending concerning the furniture but the executor testified on the hearing that the only action pending was the one on the $2,500 note. The third item discussed is an alleged claim for $4,800. This claim, if it has any validity at all, is admittedly a claim against the corporation. The testatrix kept no books of her own and the only information which the record furnishes concerning this claim is that found in the books of the corporation. According to the testimony, this claim was "stricken off" or "written off" the books of the corporation prior to the death of the testatrix and said books so showed. No action against anyone had been brought on this alleged claim. Appellants suggest the "disregard of the corporation fiction" in connection with this item but, assuming the validity of the claim against the corporation, we find no facts in the record which would warrant the disregard of the corporate entity. Appellants further discuss the inheritance tax situation. While it is true that no order had been made fixing the inheritance taxes and that a balance remained due to the State of California upon such taxes, it also appears that the amount due from petitioner had been estimated by the inheritance tax appraiser and that the amount of property withheld from petitioner is more than ample to satisfy all such taxes as might be imposed upon petitioner under any theory suggested by appellants. It seems settled that it is not necessary that such inheritance taxes be actually paid before distribution and that partial distribution of a legacy may be made upon withholding sufficient to satisfy such inheritance taxes upon the legatee's share. In re Estate of Fletcher, 36 Cal.App.2d 567, 97 P.2d 1039.

[5] Appellants also contend that certain evidence was improperly excluded. The objections and rulings are not specifically set forth, but appellants state that the excluded evidence consisted of certain "data, reports and information coming to the possession of the executor and upon which he predicates, to some extent, several of his items of counterclaim and offset." It is a sufficient answer to this contention to state that said data, reports and information concerned only possible claims against the corporation. As above indicated, we find nothing in the record which would warrant the disregard of the corporate entity and we find no error in the rulings of the trial court excluding the evidence concerning possible claims against the corporation.

[6] The final contention of appellants is that the trial court erred in denying their request for a continuance for the purpose of producing evidence of the financial condition of the corporation and of the value of its stock at the time of the hearing. We find no error in this ruling. The hearings on the petition started on December 21, 1942, and were continued from time to time. On January 8, 1943, the trial judge warned the parties to be prepared to conclude the matter at the next session. It is interesting to note that on January 11, 1943, when counsel for appellants suggested a further continuance, counsel for the executor objected to such continuance. We find no error in the denial of a continuance under the circumstances and, in any event, in view of the order distributing only a portion of the legacy and withholding ample to pay the inheritance taxes, we find no prejudice in denying to appellants the opportunity to produce evidence which they claim would have shown that the corporation was in bad financial condition and that its stock had little, if any, value.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

PEOPLE v. TRUMBO.

Cr. 1825.

District Court of Appeal, Third District, California.

Sept. 30, 1943.

Rehearing Denied Oct. 15, 1943.

Hearing Denied Oct. 28, 1943.

1. Criminal law ⇐1134(1)

Where evidence that violation of statute dealing with crimes against children was committed consisted of uncertain testimony of seven-year-old prosecutrix and her nine-year-old playmate, it was duty of District Court of Appeal to give critical attention to all rulings of trial court and to manner in which jury was instructed, to determine whether errors were committed that were prejudicial to defendant's rights. Pen.Code, § 288.

2. Criminal law ⇐824(1)

It is incumbent upon trial court in criminal case to instruct jury on its own motion charging them fully and fairly upon the law relating to facts in the case.

3. Criminal law ⇐1172(2)

In prosecution for violating statute relating to crimes against children, where evidence that crime was committed consisted of uncertain testimony of seven-year-old prosecutrix and her nine-year-old playmate, failure to give adequate cautionary instruction as requested by defendant constituted prejudicial error. Pen.Code, § 288.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Leland H. Trumbo was convicted of violating section 288 of the Penal Code, and he appeals.

Reversed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The defendant appeals from a judgment wherein he was found guilty on one of three counts in an indictment charging violation of section 288 of the Penal Code. To each of the three counts he entered a plea of not guilty. At the conclusion of the trial the jury returned its verdict of guilty on count 1, not guilty on count 2, but hopelessly disagreed as to count 3. Thereafter, on motion of the district attorney, count 3 of the indictment was dismissed. It is from the verdict of the jury and the judgment thereon by the court, as well as from the order of the court denying defendant's motion for a new trial, that this appeal is prosecuted.

Defendant alleges five grounds of error as the basis of his appeal. The first being that the court committed prejudicial error in advising the jurors that he wished they would agree upon a verdict in the case. Second, that error was committed by the court in the giving and failing to give certain instructions, in particular a so-called cautionary instruction. Third, that the verdict is unsupported by the evidence, and that the evidence of the prosecuting witness is so inherently improbable as to challenge one's credulity. Fourth, that the evidence of the prosecuting witness and that of the youthful eyewitness to the acts alleged to have been committed by appellant was unworthy of belief, obviously false, and as a matter of law failed to sustain the conviction of the defendant on count 1, and lastly, that the case as a whole, by reason of erroneous rulings of the trial court in its failure to properly instruct the jury regarding the law of the case, the highly unsatisfactory and improbable testimony of the witnesses and the conviction of the defendant, resulted in a miscarriage of justice.

The defendant, at the outset, strenuously urged that he was at a disadvantage, not alone because of the kind of offense alleged to have been committed but also because it was admitted that the minor child involved had a venereal disease which was claimed by the prosecution to have been transmitted to her by him. In the early case of People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, wherein the defendant was charged with rape, a crime not wholly unlike the one charged in the present case, the court stated: "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance." Under such circumstances it is only proper and just that the defendant is entitled to the benefit of every right and privilege granted him by virtue of the laws of this state to the end that he be not convicted unjustly of such a crime.

There is considerable merit in the contentions made by defendant, but to exhaustively review all of the issues raised would appear to be immaterial in view of the disposition made herein of defendant's second point of alleged error, the failure of the trial court to give a proper cautionary instruction. Two instructions were requested, one was given and one was refused. The first one requested was that: "A charge of this nature is particularly difficult for defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. In the nature of the case, complaining witness and defendant are generally the only witnesses who can testify as to the existence or nonexistence of the facts in issue. Unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant is guilty, it is your duty to find a verdict in favor of the defendant." This was refused, and instead the court gave defendant's instruction Number 21, as follows: "The testimony of a child of tender years, such as the prosecuting witness here, ought to be viewed with care and caution, and the evidence in a case of this kind is to be weighed by you with the utmost care without bias or prejudice."

Cautionary instructions had their inception in the oft quoted remark of Sir Matthew Hale, that rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Pleas of the Crown, 634. The case of People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, 370, added the further observation that: "The rule permitting a conviction on the uncorroborated testimony of the prosecuting witness is necessary to protect the public but it needs a counterweight to protect the accused." It also has been observed "that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt." People v. Adams, 14 Cal.2d 154, 167, 93 P.2d 146, 152.

Respondent, however, argues that when the testimony of a complaining witness is corroborated by another, the defendant is not entitled to a cautionary instruction, and cites as authority for such statement the case of People v. Roberts, 50 Cal.App.2d 558, 123 P.2d 628, 634. We believe ample justification existed for not giving such an instruction, for the court stated that due to the fact the "testimony of the prosecutrix in both counts of the information before us was credibly and impressively corroborated, we would not be justified in directing a reversal herein because of the refusal of the trial court to give the requested instructions of a cautionary nature." No other case has been cited by respondent in substantiation of its contention, and we must therefore assume that sole reliance is placed thereon to defeat defendant's charge of error.

If the position taken by defendant in this regard is sound, then it can only be so by virtue of the particular type of crime charged and the peculiarly vulnerable position in which the defendant usually is placed. Otherwise he would not be entitled to such an instruction. With this in mind the complete record has been carefully examined.

The entire transcript with the exception of the testimony of the father, whose only observation was in regard to a particular roadway, the engineer, who drafted a map of the community, and the physician, who testified solely to certain medical facts, is replete with inconsistencies and contradictions. Some of which are harmless and similar to those which can always be found in contested matters, and are therefore of no particular import, but such cannot be said of the testimony as a whole.

The mother of the child was called first. She testified that the daughter was given money by the defendant. This was completely contradicted by the daughter who emphatically denied ever receiving anything from the defendant. She also admitted going to relatives of the defendant in the company of an old friend of the family, a barkeeper, designated only as "Tom"—she did not know his last name—and demanding $2,000 telling the relative her husband "wouldn't settle for anything less." The relative amplified this statement by adding that she also stated that if the money was

not forthcoming it would "cost a lot more." She further admitted that on one occasion during the time involved herein she had desired the defendant to go to a dance with her but he had refused. On the afternoon when the offense charged in the first count was alleged to have occurred, she stated she was away from home for not more than a half hour, and that upon her return she saw the defendant and the two girls returning home, all of which was contradicted by another witness, who testified she was not at home when the children returned, but arrived later. She also testified that her immediate reaction to knowledge that her daughter was infected was that the defendant was the only one who could have done it, although the child had made no complaint to her.

The testimony of the seven year old prosecutrix was to the effect that the defendant, her playmate and herself walked to her grandmother's where they all sat in a swing. Then she later stated she was lying down and her playmate was climbing a tree. This in turn was contradicted by her playmate. To direct questions as to what happened in the swing she had no answer, and finally stated that she did not remember. Her answers to the leading and suggestive questions asked her by the district attorney appeared to be ready and prompt. However, on cross-examination she either could not or would not answer the questions asked. Yet, when the cross-examiner worded his queries in the same or similar language as was used by the district attorney, the same replies were immediately forthcoming.

The nine year old playmate of the prosecutrix testified before the grand jury that she and the prosecutrix went to the grandmother's alone—the defendant's arrival was not brought out. She further testified that during the course of the alleged act the defendant held onto both of the girls—that he held her by her left hand and her friend by her right; that he also tried to do the same to her but she got loose and climbed a tree; that the defendant chased her up the tree and tried to climb the tree after her but could not; that she did not call for help although her father was just on the other side of the hedge, nor did she later tell her father or mother; that she did not get down until after the defendant left; that she went home and then went back to the home of the prosecutrix, and while going to feed a horse the defendant asked her again; that it was around six o'clock, and that she was just having supper at the time.

Upon her direct examination she testified that the defendant did not try to do anything to her; that just as her father called, the defendant started to leave and she went home; then she stated that the defendant was in the street—she thought he had left. Concerning her father calling her for dinner, she later stated that her father came to the home of the prosecutrix and asked her to come home and eat; after eating she washed the dishes and returned.

On cross-examination at the trial she stated that the three of them were all in the swing together, with the prosecutrix lying down, but later she stated she was in the tree; she then stated that after the defendant and prosecutrix got in the swing her father called her and she went home for supper, and that afterwards she went back to her friend to play. She emphatically insisted that the act occurred on October 6th, more than three months after June 25, 1942, the date alleged in the indictment, and in fact after the act alleged in the third count on August 6, 1942. She also insisted that it was on a school day and not during vacation; that she specifically recalled a young girl with whom she had walked home; that her teacher had placed certain things on the blackboard that day which was the reason for her definiteness; she also stated that it was on a Tuesday, and that her mother had told her it was two days before she saw the doctor, which was definitely September 11th; also that it could not have been in June because she and her family were living some place else at that time, and then later she stated she had lived in the same house for five years, while on cross-examination she testified her mother had told her that she had known the prosecutrix for only three weeks.

This court is well aware that before it is authorized to say that the testimony herein bears upon its face the brand of inherent improbability and is unbelievable per se, we must be warranted in concluding that what was testified to seemed impossible to have taken place under the circumstances.

[1] However, in view of the facts of the case it would not seem necessary to so decide. We are confronted with a type of case that "arouses in the public mind an intense indignation against the supposed culprit; and it is not surprising that the

same feeling sometimes finds its way into the jury box." People v. Hamilton, 46 Cal. 540, 544. Nor is it necessary in the present case for this court to either directly or indirectly invade the province of the jury by substituting our conclusions on the evidence for those of the jury, by a determination that the evidence per se is improbable or incredible. Rather we feel that under the particular circumstances presented by the uncertain testimony of the two young girls it is the duty of this court "to give critical attention to all of the rulings of the court during the trial and to the manner in which the jury was instructed, in order to satisfy our minds whether errors were committed that were prejudicial to the rights of the defendant." People v. Hubbell, 54 Cal.App.2d 49, 128 P.2d 579, 583. It is because of this that we have summarized the evidence at some length.

In the case of People v. Watrous, 7 Cal.App.2d 7, 11, 45 P.2d 380, 382, this court reversed a judgment of conviction of a violation of section 288 of the Penal Code, where substantially the same situation developed during the examination of the youthful witnesses as did in the present case. There it was held that "the testimony taken before the grand jury was the result of leading and suggestive questions and only then was it possible to bring out a narration of what was alleged to have occurred. On the other hand their testimony at the trial was quite direct and connected, indicating at least some preparation, and the language and expressions used by each of the children were almost identical as that employed by the other."

In many respects we find direct analogy between the case above cited and the one now before this court. Here we find two young girls testifying in detail and at length on direct examination and before the grand jury concerning the commission of the alleged offense, but who, on cross-examination, particularly in the case of the prosecutrix, refused or could answer to nothing but what was asked in the same or similar words as used by the district attorney; while the testimony of the corroborating witness reveals so many discrepancies or what might well be termed pure flights of make believe, or at best, something which could happen only within the realm of fancied possibilities.

Such a record does not present a case wherein the testimony of the complaining witness was so credibly and impressively corroborated so as not to justify a reversal because of the failure of the trial court to give the requested cautionary instruction. People v. Roberts, supra. For the same reason it presents a case wherein there is an evident necessity of giving critical attention to all of the rulings of the court and possible errors which otherwise might be considered as trivial and of no material consequence from a standpoint of adverse effect upon the rights of the defendant, but which may become of great importance when committed in a case of the character of that here involved. People v. Adams, supra; People v. Hubbell, supra.

In the Putnam case, supra, the trial court therein refused to instruct the jury in substantially the same words as included in the instruction given in the present case; "You are hereby instructed to view with great care and caution the testimony of a child of immature years." The Supreme Court, in passing upon the instruction, stated, 20 Cal.2d at page 889, 129 P.2d at page 369, that the trial court properly refused to give the instruction, for it would have failed to instruct the jurors of the difficulty of defending against the charges made. It said: "Although ordinarily the jury need not be advised as to the reasons for the rule of law in an instruction, the facility with which charges of the kind here involved may be invented places the defendant in a peculiarly vulnerable position, usually with no defense except his own denial of the asserted misconduct. * * * A simple admonition to view the testimony of the complaining witness with caution would be inadequate and misleading, for it would convey the impression that for undisclosed reasons the trial judge distrusts the testimony of the particular witness."

[2, 3] The trial court herein, therefore, might not have erred by virtue of the fact that it gave an instruction, yet it was error to give an instruction inferring distrust of a particular witness, and it was further error not to give an appropriate instruction. It is incumbent upon a court in a criminal case to instruct the jury on its own motion charging them fully and fairly upon the law relating to the facts of the case, for, as stated in the case of People v. Putnam, supra: "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury." Upon the record of the case and the authority of the cases cited there can be no doubt

but that an adequate cautionary instruction was vital to a proper consideration of the evidence.

Each case must be determined upon its own particular circumstances as to whether or not failure to so instruct a jury constitutes prejudicial error. It is apparent from an examination of the record in the present case that the failure to give a cautionary instruction was prejudicial and that a different verdict would not have been improbable had the error not occurred; or, as stated in People v. Putnam, supra, "In view of the circumscribed extent of the acts alleged and the inconsistencies in the witness' testimony, it is doubtful whether the same verdict would have been rendered had the cautionary instruction been given."

The judgment and order denying a motion for new trial are reversed.

ADAMS, P. J., and THOMPSON, J., concur.



JONES v. INDEPENDENT TITLE CO. et al.
Civ. 3108.

District Court of Appeal, Fourth District, California.

Sept. 27, 1943.

Hearing Granted Nov. 18, 1943.

1. Mortgages ⇐174

Vendee of deed given as a mortgage for value without notice of prior unrecorded trust deed on same property, who promptly recorded his deed, *held* prior incumbrance.

2. Mortgages ⇐244(2)

Beneficiary of trust deed, which was executed but not recorded prior to execution and recordation of deed given as a mortgage, had prior lien as against donee of gift of interest of grantee named in deed where gift was made after recordation of trust deed. Civ.Code, §§ 1214, 1217.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Edward M. Jones against Independent Title Company and others for a judgment decreeing the plaintiff had a first lien against certain realty. Defendant Rae L. Sinclair cross-complained. Judgment for plaintiff, and cross-complainant appeals.

Reversed.

William G. Condron, of Los Angeles, for appellant.

Albert L. Larsen, of National City, and Harry H. Parsons, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment decreeing that plaintiff had a first lien, and Rae L. Sinclair, to whom we will hereafter refer as the defendant, had a second lien, on real property in San Bernardino County.

The property was formerly owned by William C. Simpson, now deceased, who conveyed it to M. H. Collins by a grant deed dated May 5, 1939, and recorded September 9, 1939. Collins conveyed the property to plaintiff by grant deed dated November 6, 1940, and recorded on November 25, 1940.

Defendant claims a lien on the same real property by virtue of a deed of trust securing a promissory note for $1,000 dated December 21, 1936, payable one day after date, signed by W. C. Simpson and Mrs. May Simpson. The deed of trust bore the same date and was recorded on March 15, 1940.

The trial court found that the deed from Simpson to Collins was a mortgage given to secure the repayment of $1,000 which Collins had loaned Simpson; that Collins had no notice or knowledge of the unrecorded deed of trust held by defendant; that the deed from Collins to plaintiff assigned to him the interest Collins acquired under his deed. The evidence supports these findings. The conclusion was drawn from them that the lien created by that deed was prior and superior to the deed of trust held by defendant. There is no finding on the question of Jones giving Collins any consideration for the deed. The evidence shows this transfer to have been a gift without consideration passing for it.

Thus we have presented the question of priority of the two liens created on the same property by a deed which was in ef-

fect a mortgage executed to secure a debt, which deed was executed and delivered subsequent to the execution of defendant's security but was recorded prior to the recordation of the deed of trust held by defendant. The considerations paid and the good faith and lack of notice of both Collins and defendant are not questioned. Defendant's deed of trust was recorded prior to the recordation of the deed from Collins to Jones, so Jones had constructive notice of this incumbrance prior to the time he received the deed from Collins.

[1] Collins was a bona fide encumbrancer for value without notice of defendant's claim of security on the same property and his deed was recorded prior to defendant's deed of trust. Between the two, Collins held the prior encumbrance. 25 Cal.Juris. 822, and cases cited. It remains to consider the rights of Jones who took without paying any consideration for the transfer to him and with constructive notice of defendant's deed of trust.

Section 1217 of the Civil Code provides that: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

Section 1214 of the Civil Code provides in part as follows: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, * * *."

[2] The case of Beattie v. Crewdson, 124 Cal. 577, 57 P. 463, 464, is decisive of the question presented here. The defendant there purchased the property involved, but lost his deed and it was never recorded. The plaintiff claimed title to the same property through recorded mesne conveyances from the same grantor. Plaintiff claimed to have satisfied a debt of $200 as consideration for the conveyance to him but knew or should have known that defendant was in possession of the property, living in a house he had built upon it prior to the time the plaintiff received his deed. In holding that plaintiff was not an innocent purchaser for value, it was said: "One who purchases real estate is bound to know who is in possession thereof, and is chargeable with notice of the occupant's title (Scheerer v. Cuddy, 85 Cal. 270, 24 P. 713); and if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser (Eversdon v. Mayhew, 65 Cal. 163, 3 P. 641); and the burden is upon such purchaser to show that he had not such notice. (Wilhoit v. Lyons, 98 Cal. 409, 33 P. 325.)" See also, Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am.St.Rep. 61; Shurtleff v. Kehrer, 163 Cal. 24, 124 P. 724; Ocean Shore R. Co. v. Spring Valley Water Co., 218 Cal. 86, 21 P.2d 588.

As it was not found, and the evidence fails to show, that plaintiff gave any consideration for the conveyance to him, and as he had constructive notice of defendant's deed of trust which was recorded prior to the conveyance by Collins to plaintiff, the judgment cannot be supported.

The judgment is reversed.

GRIFFIN, Acting P. J., concurs.



60 Cal.App.2d 539

PEOPLE v. SULLIVAN.

Cr. 479.

District Court of Appeal, Fourth District, California.

Sept. 23, 1943.

Hearing Denied Oct. 21, 1943.

1. Constitutional law ⇐81

Those vocations which minister to and feed upon human weaknesses, appetites, and passions come within the police powers of the states, and the reasonable regulation or prohibition thereof is constitutional.

2. Constitutional law ⇐81

When the subject of legislation is within police power of state, activities within such subject may be prohibited, limited as to place and location, or, where operation is permitted, may be regulated by rules of conduct.

3. Constitutional law ⇐208(1)

The laws enacted under the police power must apply to all alike who come within a

reasonable classification of persons or property.

4. Constitutional law ⇐208(1)

The fact that because of classification a statute exercising the police power does not apply to every person alike is no valid objection to its constitutionality, and courts may only inquire if classification is reasonable and founded upon some logical, natural, intrinsic, or constitutional distinction between people composing a class and others not embraced within it.

5. Gaming ⇐63(1)

Betting on horse races is a form of "gambling", and its regulation or prohibition is within the "police power" of the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Gambling" and "Police Power".

6. Gaming ⇐63(1)

It is the public policy of the state under the police power, to prohibit commercial gambling.

7. Gaming ⇐63(3)

Horse Racing Act, as approved by constitutional amendment permitting betting on horse races by means of pari-mutuel machines situated within inclosure of duly licensed race tracks, did not repeal Penal Code provision prohibiting commercial gambling including bookmaking on horse races except insofar as betting through pari-mutuel machines was permitted. Pen. Code, § 337a; St.1933, p. 2046; Const. art. 4, § 25a, adopted in 1933.

8. Constitutional law ⇐239
Gaming ⇐63(1)

Penal Code provision prohibiting commercial gambling including bookmaking on horse races, when construed in connection with Horse Racing Act authorizing betting on horse races by means of pari-mutuel machines at licensed race tracks, is not violative of constitutional guaranty of "equal protection of the law" as applied to a bookmaker on ground that it discriminates against him. Pen.Code, § 337a; St.1933, p. 2046; Const.Cal. art. 1; art. 4, § 25a, adopted in 1933; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

9. Constitutional law ⇐48

All presumptions are in favor of validity of legislative enactments, and classification made by Legislature will not be disturbed unless actually and palpably unreasonable and arbitrary.

10. Constitutional law ⇐239

The ease of supervision of licensed race track and mathematical certainty with which odds are determined by pari-mutuel machines is a reasonable basis for classification for enactment of Horse Racing Act, by which betting on horse races is only permitted through pari-mutuel machines at licensed race tracks without lifting general prohibition against bookmaking on horse races. Pen.Code, § 337a; St.1933, p. 2046; Const.Cal. art. 1; art. 4, § 25a, adopted in 1933; U.S.C.A.Const. Amend. 14.

11. Constitutional law ⇐211

A statute adopted under police power is general and constitutional when it applies uniform rules of conduct for all those coming within scope of its application and may not be challenged because of any denial of "equal protection of the law" to those on whom it operates because others differently situated and within a different legal classification may not be affected by its terms. Const.Cal. art. 1; U.S.C.A.Const. Amend. 14.

12. Gaming ⇐73

Where commercial gambling, including bookmaking on horse races, had been prohibited for years and subsequently betting on horse races through pari-mutuel machines at licensed race tracks was legalized by Horse Racing Act, defendant accused of operating a bookmaking establishment could not rely on latter statute to escape prosecution. Pen.Code, § 337a, subd. 3; St.1933, p. 2046.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Frank Sullivan was charged in an information with conducting a bookmaking establishment by accepting and placing bets on horse races. From a judgment and order dismissing the information, the People appeal.

Reversed.

Robert W. Kenney, Atty. Gen., T. G. Negrich, Deputy Atty. Gen., Thomas Whe-

lan, Dist. Atty., of San Diego, and F. H. Nottbusch, Deputy Dist. Atty., of Chula Vista, for appellant.

C. Lew Byers, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment and order dismissing an information charging defendant in three counts with violations of the provisions of subdivision 3 of section 337a of the Penal Code in conducting a bookmaking establishment by accepting and placing bets on horse races.

The ruling in the court below was made on the ground that the California law violated the provisions of the Fourteenth Amendment to the Federal Constitution and of Article One of the State Constitution by permitting the placing of bets on horse races only in legally operated parimutuel betting machines in duly licensed race tracks, while prohibiting all other forms of betting on horse races no matter where the bets were placed. It is argued that this results in unlawful discrimination against all those desiring to conduct bookmaking establishments and also against all those who desire to bet on horse races but are precluded from doing so because of lack of funds to pay the cost of transportation and admission to race tracks, or who, because of distance of residence from race tracks, are unable to visit them.

[1] The constitutional limitations imposed by the Fourteenth Amendment to the Federal Constitution and the First Article of the State Constitution or similar enactments have been construed in practically every jurisdiction in the country, including the Supreme Courts of the United States and of the State of California. Under rules firmly established by many decisions it would seem to be unnecessary to do more than cite a few of the many authorities establishing the proper rules to be applied here under which it is clear that the judgment must be reversed. However, the Attorney General of the State and the District Attorney of San Diego County regard the case one of importance so we will extend this opinion by considering the application of the law guaranteeing to every citizen the equal protection of the laws as limited by the police powers of the State to legislate to protect the people in their health, safety, morals and general welfare "in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions", the reasonable regulation or prohibition of which come within the police powers of the States and are not prohibited by any clause of the Constitution. L'Hote v. City of New Orleans, 177 U.S. 587, 20 S.Ct. 788, 44 L.Ed. 899; Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

[2, 3] When the subject of legislation falls under the police powers of the State, activities may be prohibited altogether, limited as to place and location, or, where operation is permitted, may be regulated by rules of conduct. These laws enacted under the police powers must be subject to the restriction that the prohibition, limitation or regulation, must apply to all alike who come within a reasonable classification of persons or property. L'Hote v. City of New Orleans, supra; Patterson v. State of Kentucky, 97 U.S. 501, 24 L.Ed. 1115; Plumley v. Commonwealth of Massachusetts, 155 U. S. 461, 15 S.Ct. 154, 39 L.Ed. 223.

[4] The fact that because of classification the statute does not apply to every person alike is no valid objection to its constitutionality, for classification itself presupposes inequality of application and the courts may only inquire if the classification is reasonable and founded upon some logical, natural, intrinsic or constitutional distinction between people composing a class and others not embraced within it. In re Weisberg, 215 Cal. 624, 12 P.2d 446; In re Sumida, 177 Cal. 388, 170 P. 823; In re Stoltenberg, 165 Cal. 789, 134 P. 971; Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909; Coelho v. Truckell, 9 Cal.App.2d 47, 48 P.2d 697; Soares v. City of Santa Maria, 38 Cal.App. 2d 215, 100 P.2d 1108.

Applying these rules to the facts before us, it is clear that we have but two questions to answer: 1. Does the power of prohibiting or regulating betting on horse races fall within the police powers of the State? 2. Is the classification made by the statute reasonable?

[5, 6] The first question does not seem to be open for debate. Betting on horse races is one form of gambling. Since the adoption of the Codes various forms of gambling have been prohibited by State laws while others have had no such restrictions placed upon them. See, Secs. 319, 320, 330, 331, 332, Penal Code. As early as 1857 a statute was passed which prohibited dealing the game of faro. Its constitutionality

was upheld in People v. Beatty, 14 Cal. 566. The State and some of its political subdivisions have firmly adhered to the public policy of prohibiting commercial gambling under the police powers. See, Ex parte Chin Yan, 60 Cal. 78; Ex parte Tuttle, 91 Cal. 589, 27 P. 933; In re Murphy, 128 Cal. 29, 60 P. 465; In re Ah Cheung, 136 Cal. 678, 69 P. 492; In re McKelvey, 19 Cal.App. 2d 94, 64 P.2d 1002; In re Walker, 11 Cal. 2d 464, 80 P.2d 990, 117 A.L.R. 825; Kyne v. Kyne, 16 Cal.2d 436, 106 P.2d 620; People v. Haughey, 48 Cal.App.2d 506, 120 P.2d 121. The Supreme Court of the United States recognizes the right of the State to prohibit or regulate gambling and other acts which may affect public morals. Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142; Murphy v. State of California, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153.

In Ex parte Tuttle, supra, the court considered the constitutionality of an ordinance of the City and County of San Francisco which prohibited wagering on horse races other than within the enclosure of the track where the races were being held. In upholding the ordinance the Supreme Court said [91 Cal. 589, 27 P. 934]:

"Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, is a legitimate subject for regulation or prohibition by the state; and that gambling, in the various modes in which it is practiced, is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure, is no longer an open question.

"The measures needful or appropriate to be taken in the exercise of this police power are determined by legislative policy, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit, or only regulate by confining such practices within prescribed limits; whether the law shall apply to every kind of gambling, or only to those games or wagers in which evil effects appear with greatest prominence,—must be determined primarily by the legislative department of the state or of the municipality authorized to exercise this great power, which is conferred for the purpose of securing the public safety and welfare; and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive. Mugler v. State [of Kansas], 123 U.S. [623] 661, 8 S. Ct. 273 [31 L.Ed. 205]; Matter of Jacobs, 98 N.Y. 98 [50 Am.Rep. 636]; [Inhabitants of] Watertown v. Mayo, 109 Mass. 315 [12 Am.Rep. 694]; Ex parte Keating, 38 Cal. 702. It is manifest, we think, under this rule, that the ordinance in question cannot be declared invalid."

There are many other cases in California and other jurisdictions to the same effect. See, Ex parte Brown, 156 Cal. 632, 105 P. 739; People v. Torrey, 16 Cal.App.2d 470, 60 P.2d 900; In re McKelvey, 19 Cal.App. 2d 94, 64 P.2d 1002; In re Goddard, 24 Cal. App.2d 132, 74 P.2d 818; People v. Wilson, 19 Cal.App.2d 340, 65 P.2d 834; Murphy v. State of California, supra. In the case of People v. Haughey, supra [48 Cal.App.2d 506, 120 P.2d 123], it was said: "However, 'The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years. * * * There is nothing in the Horse Racing Act indicating the slightest intention to depart from the public policy of the state condemning commercial gambling. To the contrary, a determination to adhere to such policy is obvious.' In re Goddard, 24 Cal.App.2d 132, 140, 141, 74 P.2d 818, 823. If the legislature had intended to reject this long established policy of the state prohibiting commercial gambling such an intention would have been indicated in the act and the subsequent amendment; the statute, however, when read in its entirety, shows a specific intention to retain the general prohibitions."

There can be no question of the right of the legislature under the police power to regulate gambling, which includes betting on horse racing. We must next consider the reasonableness of the classification made by the statute.

As we have observed, commercial gambling, including bookmaking on horse races, has been prohibited in California for many years. Section 337a of the Penal Code, which prohibited this class of gambling, was enacted in 1909, p. 21, and though amended

is still in effect. In 1933 the legislature passed what is commonly known as the Horse Racing Act. Stats.1933, c. 769, p. 2046. By the provisions of this act it was not to become effective until the people ratified a constitutional amendment approving it. This was done at an election held June 27, 1933. Sec. 25a, Art. IV, Constitution.

[7, 8] The Horse Racing Act permitted betting on horse races by means of pari-mutuel machines situated within the enclosure of duly licensed race tracks. No other form of gambling on horse races was authorized and section 337a of the Penal Code was not repealed but continued in full force and effect except as modified by the provision permitting betting through pari-mutuel machines. In re Walker, supra; People v. Torrey, supra; In re McKelvey, supra; People v. Haughey, supra. Thus at no time since 1909 has bookmaking on horse races been lawful in California. Under the law defendant was and is prohibited from conducting his business of bookmaking at every place in California. No one could place a bet with him lawfully, whether at a race track or elsewhere. Thus the argument that he was discriminated against and denied the equal protection of the law seems untenable.

[9] However, we will briefly consider the question of the reasonableness of the classification which permits the operation of pari-mutuel machines in duly licensed race tracks while prohibiting bookmaking there and elsewhere in the State. In approaching this question we must bear in mind the rules guiding us which are thus stated in In re McKelvey, supra, [19 Cal. App.2d 94, 64 P.2d 1004]: "All presumptions are in favor of the validity of acts passed by the Legislature and the classification made by the Legislature will not be disturbed by the courts unless they are 'actually and palpably unreasonable and arbitrary.' Radice v. [People of State of] New York, 264 U.S. 292, 44 S.Ct. 325, 327, 68 L.Ed. 690; Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148."

[10] Many reasons suggest themselves which support the reasonableness of the classification made by the legislature. Pari-mutuel machines are only permitted at licensed race tracks where supervision, regulation and police inspection and control is a very simple matter. These machines are mechanical devices in which the odds are determined with mathematical certainty and pay-offs to the lucky are assured. On the other hand bookmaking establishments were conducted in any place where the operators might believe patrons would collect. Odds were established by the bookmakers and any reasonable police supervision was difficult. Those desiring to pursue the subject further will find ample discussion in the following cases, setting forth many reasons for upholding the same or similar classifications as reasonable: Ex parte Tuttle, supra; In re Goddard, supra; In re Walker, supra; In re McKelvey, supra; People v. Haughey, supra; Smith v. Commonwealth of Kentucky, 275 U.S. 509, 48 S.Ct. 158, 72 L.Ed. 398; People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785; People v. Bennett, C.C., 113 F. 515; Levy v. Kansas City, 8 Cir., 168 F. 524, 22 L.R.A., N.S., 862; People v. Monroe, 349 Ill. 270, 182 N.E. 439, 85 A.L.R. 605; Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W.2d 987; Erlanger Kennel Club v. Daugherty, 213 Ky. 648, 281 S.W. 826; In re Stewart, 174 Misc. 902, 22 N.Y.S.2d 164; Missouri v. Thompson, 160 Mo. 333, 60 S.W. 1077, 54 L.R.A. 950, 83 Am.St.Rep. 468; City of Shreveport v. Schulsinger, 113 La. 9, 36 So. 870, 2 Ann.Cas. 69; L'Hote v. City of New Orleans, supra.

[11] Under the foregoing authorities we are required to conclude that the classification made by the legislature is reasonable and was made on constitutional grounds and that it may not be disturbed here. It is clear that a law adopted under the police powers is general in effect when it affects all those within a specified class but not all within the jurisdiction. The question of its being general in its application does not depend on the number within the class it purports to regulate nor the number without that class. It is general and not unconstitutional when, as here, it applies uniform rules of conduct for all those coming within the scope of its application and may not be challenged because of any denial of equal protection of the law to those on whom it operates because others differently situated and within a different legal classification may not be affected by its terms.

[12] Defendant presents an ingenious if unconvincing argument in attempting to escape the foregoing conclusions. He says that from 1909 to 1933 all forms of betting on horse races were prohibited; that in 1933 betting on horse races was legalized. From

this he draws the conclusion that since betting on horse races is now legalized he may not be prohibited from conducting his business of bookmaking. The premise on which the argument rests is not sound. Counsel overlooks the fact that bookmaking on horse races has been prohibited since 1909 and still is contrary to law. The only legalized betting on such races is through pari-mutuel machines operated in legally licensed race tracks. As defendant is not charged with operating such a machine at a place within the permission of the statute, but with operating a bookmaking establishment which is prohibited by law, he cannot escape prosecution for the illegal acts charged against him.

It is not necessary to further extend this opinion by considering the cases cited by defendant. It is sufficient to say that they do not conflict with the conclusions we have reached.

The judgment and order dismissing the information against defendant are reversed.

GRIFFIN, Acting P. J., concurs.



60 Cal.App.2d 846

PEOPLE v. SULLIVAN.

Cr. 480.

District Court of Appeal, Fourth District, California.

Sept. 23, 1943.

Hearing Denied Oct. 21, 1943.

Constitutional law ⇐239
Gaming ⇐63(1)

Penal Code provision prohibiting commercial gambling, including bookmaking on horse races, when construed in connection with Horse Racing Act authorizing betting on horse races through pari-mutuel machines at licensed race tracks, is not violative of constitutional guaranty of "equal protection of the law" as applied to a bookmaker. Pen.Code, § 337a, subd. 3; St.1933, p. 2046; Const.Cal. art. 1; art. 4, § 25a, adopted in 1933; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Emmett Sullivan, also known as Robert E. Sullivan, was accused in an information of bookmaking on horse races. From a judgment and order dismissing information, the People appeal.

Reversed.

Robert W. Kenney, Atty. Gen., T. G. Negrich, Deputy Atty. Gen., Thomas Whelan, Dist. Atty., of San Diego, and F. H. Nottbusch, Deputy Dist. Atty., of Chula Vista, for appellant.

C. Lew Byers, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment and order dismissing an information charging defendant in two counts with violating the provisions of subdivision 3 of section 337a of the Penal Code.

The information was dismissed on the ground that this subdivision of section 337a of the Penal Code was unconstitutional because it, in connection with the Horse Racing Act, Stats.1933, Ch. 769, p. 2046; Sec. 25a, Art. IV, Const., violated the provisions of the Fourteenth Amendment to the Constitution of the United States and Article One of the State Constitution.

The identical issues were presented and decided in People v. Sullivan, 141 P.2d 230, which furnish us the authority for our ruling here. There is no need of repeating the arguments used and the authorities cited in that case.

For the reasons and upon the authorities there set forth the judgment and order are reversed.

GRIFFIN, Acting P. J., concurs.

60 Cal.App.2d 659

LAUNER v. GRIFFIN et al.
Civ. 6945; Sac. 5598.

District Court of Appeal, Third District, California.

Sept. 30, 1943.

1. Husband and wife ⇐249

When property is conveyed to a husband and wife as joint tenants, the form of the conveyance destroys the statutory presumption that the property is community and that thereby such deed creates a joint tenancy in which the interests of husband and wife are separate property.

2. Husband and wife ⇐249

A conveyance to a husband and wife as joint tenants does not necessarily preclude the idea of their holding the realty as community property.

8. Divorce ⇐331

Husband's Arizona divorce complaint separately describing the community and joint tenancy property, and prayer of wife's answer asking solely for division of community property, were not an agreement to terminate joint tenancy in California realty acquired by the parties as joint tenants with right of survivorship, and, where time had passed for appeal from Arizona decree dividing California realty between the parties, decree was not a "contract" and did not operate as an "estoppel" against wife in action to quiet title against husband's administrator.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract" and "Estoppel".

4. Equity ⇐36

Equity courts may compel the parties to act in relation to property not within their jurisdiction, but their decrees do not affect the title, and their orders are only made effectual through coercion of the parties.

5. Courts ⇐23

Parties cannot vest a court with jurisdiction to which it is a stranger.

6. Judgment ⇐818(1)

Without proper jurisdiction, the enforcement of a judgment in one state attempting to operate upon realty in another would not be compelled by the "full faith and credit" clause of the Constitution.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

7. Judgment ⇐822(4)

A foreign decree directing a conveyance may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated and is entitled in such court to the effect of record evidence of the equities therein determined, unless it be impeached for fraud.

8. Divorce ⇐331

Arizona divorce decree was not effective to divide between the parties California realty acquired as joint tenants with right of survivorship, notwithstanding that decree was a judgment in personam directing action by a party in regard to property outside the forum. Code Ariz.1939, § 21-1222.

9. Courts ⇐18

Where the subject matter is situated within another state, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly operate upon the person of defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and defendant is ordered to do or to refrain from certain acts toward it.

10. Divorce ⇐331

Notwithstanding Arizona statute providing that judgment for conveyance of realty may pass title without an act by defendants, Arizona divorce decree purporting to divide between the parties California realty acquired as joint tenants with right of survivorship was void, and hence, where Arizona probate court decree ordering wife to execute to husband's estate a deed of a one-half undivided interest in such realty was based upon the divorce decree, the probate court decree was a nullity and wife was the sole owner of the realty, unaffected by cloud created by deed of probate court. Code Ariz.1939, § 21-1222.

11. Courts ⇐18

Generally, the local sovereignty, by itself or its judicial agencies, can alone adjudicate the status of immovable property within its borders, and neither the laws of another sovereignty, nor the judical proceedings, decrees, and judgments of its courts, can affect such property.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Hannah Launer against F. W. Griffin, as administrator of the estate of Adolph Launer, also known as Adolph Lauener, deceased, and another, to quiet title to realty, wherein defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Affirmed.

Henderson Stockton, of Phœnix, Ariz., and Gerald M. Desmond and Frank C. Bottaro, Asst. Dist. Atty., both of Sacramento, for appellants.

Elliott, Atkinson & Sitton, of Sacramento, for respondent.

PEEK, Justice.

Defendants, the California and Arizona administrators of the estate of plaintiff's deceased husband, appeal from a judgment quieting plaintiff's title to certain real property situated in the county of Sacramento, and denying similar relief on their cross-complaint. The property in question was acquired in 1926 by plaintiff and her deceased husband as joint tenants with right of survivorship.

Subsequently plaintiff and her husband moved to the State of Arizona where, during the fall of 1938, Adolph Launer instituted an action for divorce. His complaint alleged, among other things, "that the parties are possessed of certain [described] community property". Within the same paragraph he alleged, "the following real estate held by the parties to this action as joint tenants with right of survivorship, to-wit: The South half (S½) of the Southwest Quarter (SW¼) of Section 21, Township 7 North, Range 5 East, and North Quarter (N¼) of Northwest Quarter (NW¼) of Section 28, Township 7 North, Range 5 East, M. D. B. & M., in the County of Sacramento, State of California", should be divided equally between the parties. The prayer to said complaint prayed "for a division of said community property * * *."

The answer and cross-complaint of the defendant, the plaintiff herein, admitted the allegations of plaintiff's complaint relative to the property, and as a part of the prayer to her cross-complaint she requested "that the community property of the parties be determined and divided equally between them."

Thereafter on March 6, 1939, the court made its order granting a decree of divorce to the plaintiff and further ordered that the real property situated in Sacramento county "be and the same is hereby divided between plaintiff and defendant, and said plaintiff and said defendant are hereby awarded each an undivided one-half (½) interest therein and thereto."

During the month of November, 1939, Adolph Launer was killed as the result of an automobile accident. Thereafter Hannah Launer filed a petition in Pinal County, Arizona, for letters of administration of his estate, in which she alleged "that your petitioner is a co-owner of real estate with and a creditor of said deceased." During the month of January of the following year an order appointing petitioner as administratrix was issued. Shortly after her qualification as administratrix she returned to Sacramento from the state of Arizona, and ever since has continued to make her home in said city. Upon her return she filed her petition to terminate the joint tenancy in the real property situated in Sacramento county, and on April 1, 1940, the court made its order terminating said joint tenancy and decreeing that she was the sole owner thereof.

She did nothing further in regard to the estate until the month of November, 1940, when her counsel herein prepared and forwarded to her counsel in Arizona her final account and report as administratrix of the Estate of Adolph Launer. Included therein was a personal claim "for rent due on land in Sacramento County, California, $250.00."

F. W. Griffin, one of the defendants in the present action, filed objections to said account, his objection being primarily predicated upon that part of the decree entered in the divorce action wherein the Arizona court ordered the joint tenancy property in Sacramento county divided equally between the parties. He also alleged that the proceedings to terminate the joint tenancy were a fraud upon the Superior Court of Sacramento County, and a violation of her trust and duties as administratrix of the estate in that she failed to disclose the decree of divorce as previously entered by the Arizona court, and that also the claim of $250.00 was not valid by reason of the said divorce decree.

After a hearing upon the objections to said account the Superior Court of Pinal

County, Arizona, made and entered its decree and found "that the real property * * * situated in the County of Sacramento * * * was * * * the community property of the deceased Adolph Launer and administratrix Hannah Launer on the 6th. day of March, 1939 * * *", and that on the 6th day of March, 1939, the divorce court duly made and entered an order accordingly, dividing said community property equally between said deceased Adolph Launer and said administratrix Hannah Launer. The court further found at all times thereafter said real property was owned by said deceased and said Hannah Launer as tenants in common; that said Hannah Launer has removed herself permanently from the State of Arizona and has refused and still refuses to return. Thereupon the court ordered "that Hannah Launer shall, within ten days from and after the date hereof, make and execute to the Estate of Adolph Launer, Deceased, a good and sufficient deed of conveyance conveying to said estate an undivided one-half interest" in the Sacramento county property.

The court further ordered that should Hannah Launer fail to make and execute the conveyance as directed, the Clerk of the Superior Court of Pinal County should "execute and deliver" a deed conveying the real property in question. Hannah Launer did not comply with the order, and T. J. Marks, Clerk of said Pinal County Superior Court, acting as the Commissioner appointed by the court and in accordance with its decree, executed a deed covering the property in question. Thereafter said deed was recorded in the office of the County Recorder of Sacramento County on September 2, 1941, thereby becoming a cloud upon the title to the property, and the basis of the present quiet title action.

At the conclusion of the hearing of the present action the trial court found that Adolph and Hannah Launer acquired title to the property in question as joint tenants with right of survivorship and not as tenants in common, and that to the date of his death they continued to hold the property as joint tenants; that during that period no act was done by them to change or modify the joint tenancy, and that upon his death the property vested in her as the surviving joint tenant, and that ever since she has been and now is the owner thereof in fee simple; that the decree of divorce "did not in any wise affect, change or modify the said joint tenancy title * * *; that said Hannah Launer had no knowledge of the proceedings for her removal [as administratrix] or of said objections to her account * * *; that she was not a party to any proceedings thereafter had in the said Superior Court of Pinal County relative to said account or the objections thereto, and that none of the proceedings in probate in the said State of Arizona, nor any orders made therein * * *, in any wise affected, changed or modified the joint tenancy title." The court then concluded that plaintiff was the owner in fee simple of the described real property, and as such was entitled to have her title quieted as against the claims of defendants, and forever barred and restrained said defendants from claiming any interest adverse to her in the real property. Judgment was entered accordingly.

It is contended by appellants in this appeal that (1) the allegations of the parties in the divorce proceeding amounted to an agreement that the joint tenancy be dissolved; that (2) the decree of divorce entered by the Superior Court of Pinal County, Arizona, divided the Sacramento county real property equally between them, and (3) the decree of the Probate Court in the same county of Pinal is conclusive upon the parties that the joint tenancy estate had been terminated by the actions and intent of the parties in said divorce proceeding.

[1-3] It is appellants' further contention that inasmuch as a joint tenancy may be terminated by an agreement of the parties the allegations of both parties to the divorce proceedings amounted to such an agreement, or in any event, when the decree was entered by the court and the time for appeal had passed, such judgment then became a binding contract between them and now operates as an estoppel in the present case. Of course to reach such a conclusion it must be accepted that the parties had a definite intent in mind to terminate the joint tenancy. In this we cannot agree. When property is conveyed to a husband and wife as joint tenants, the form of the conveyance is such as to destroy the statutory presumption that the property is community (Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003), and that thereby such deed creates a joint tenancy in which the interests of husband and wife are separate property. Young v. Young, 126 Cal.App. 306, 14 P.2d 580. Appellants have shown

nothing to take the present case out of this rule or to bring it within the rule stated by this court in Cummins v. Cummins, 7 Cal. App.2d 294, 46 P.2d 284, 289, that "a conveyance * * * to a husband and wife as joint tenants does not necessarily * * * preclude the idea of their holding the same as community property." Therefore, to hold that the allegations of the complaint which separately set forth and described the community and joint tenancy property, and the prayer of the answer which asked solely for a division of the community property amounted to an intent of the parties to divide the joint tenancy property would indeed be a strained construction to place upon such acts.

[4, 5] The case of Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 759, 51 A.L.R. 1074, which factually is very similar to the present case, would seem to be a complete answer to appellants' second contention. There a husband procured a Nevada decree in which the wife, a California resident, appeared. In her answer she admitted the allegations of the complaint that there was no community property and entered into a written agreement providing, in consideration of the payment of a certain sum, she would release the husband from further obligations of support, and also would relinquish all of her community property rights. The Nevada decree found that there was no community property. Subsequently she brought an action in California seeking partition and an accounting in respect to certain California real property. The defendant there, as here, urged the estoppel of the Nevada decree on the basis that her answer to the divorce action admitted the allegation that there was no community property; that when the judgment was rendered upon such complaint and answer it became, in effect, a contract between the parties (the same conditions as are urged by appellants here), and that therefore the judgment was final in respect to the matters embraced in such allegations. But the court held "the allegation of the complaint and the answer thereto that there was no community property should be construed only as an allegation and an admission that there was no community property within the state of Nevada, because that was the extent to which such issue could be submitted to the jurisdiction of that state." The court, however, expressly recognized that by means of its power over the person of the parties before it, a court in equity may compel the parties to act in relation to property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect the title, and significantly added: "They [orders] are only made effectual through the coercion of the parties." And further held that the Nevada court "had no power to settle the title to lands in California; and a general order, finding, or decree made by it, purporting to bar the rights of the wife in the real property of the parties, or either of them, was ineffectual, so far as the property in this state is concerned. * * * The appearance of the parties in the Nevada court, and the allegation and admission as to there being no community property, added nothing to the effect of the Nevada decree on property in this state. Neither a party, nor both parties, can vest a court with a jurisdiction to which it is a stranger."

Then if such allegations did not constitute such an agreement it is difficult to understand how an order not in personam would have the effect of dividing the property equally between them as maintained by appellants, for, as the Taylor case held, the power of a court of one state over property situated in another state can be effective only when the parties are before the court. Such a decree does not, of itself, act directly upon the property nor affect the title but finds its only efficacy in the coercive effect which may be applied to the parties.

The appellants, nevertheless, contend that by virtue of section 21-1222, Arizona Code Annotated 1939, no order in personam was necessary, as the divorce decree in effect was a conveyance by the parties. The section provides: "When the judgment is for the conveyance of real property, or for the delivery of personal property, the judgment may pass the title to such property without any act to be done by the party against whom the judgment is rendered."

In substantiation of this argument appellants cite the case of Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, 23 L.R.A., N.S., 924, 17 Ann.Cas. 853, but we do not so understand that case. There, the United States Supreme Court, in passing upon a Washington decree of divorce wherein the court had jurisdiction of the parties and the subject matter, determined the equities in real property situated in Nebraska, and ordered the defendant to convey said

Nebraska property to plaintiff. The plaintiff then sought to enforce the judgment in Nebraska against persons who had succeeded to the property with full knowledge of the Washington judgment, and without consideration. Such facts indicate a much stronger case than is presented on this appeal. Nevertheless, the Nebraska court refused to directly enforce the Washington judgment and the Supreme Court sustained its action. If appellants' concept of the law is correct, then it would follow that the Supreme Court would be compelled to give effect to the Washington decree. However, the court held that a court of equity, acting upon the person, may decree a conveyance of land in another state and enforce the execution of the decree by process against the person; that neither the decree nor any conveyance under it except by the party in whom title is vested is of any efficacy beyond the jurisdiction of the court, and that to concede such power would be to attribute to such a decree the force and effect of a judgment in rem by a court having no jurisdiction of the res.

[6] The Arizona court had neither power nor jurisdiction to directly affect lands situated in California, and no act of the Arizona legislature could confer territorial jurisdiction broader than the jurisdiction already lodged in the court. Nor could the parties to the divorce action invest a court with jurisdiction to which it is a stranger. King v. Kutner-Goldstein Co., 135 Cal. 65, 67 P. 10; Taylor v. Taylor, supra. Without proper jurisdiction the enforcement of a judgment in one state, attempting to operate, upon real property in another, would not be compelled by the full faith and credit clause of the Constitution. Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366; Fall v. Eastin, supra.

[7, 8] Likewise we find no assistance for appellants from the cited case of Redwood Investment Co. v. Exley, 64 Cal.App. 455, 221 P. 973, 975, wherein plaintiff in a quiet title action plead to a Kentucky decree of specific performance against defendant on his contract to convey to plaintiff. It was held he could rely on the Kentucky decree of specific performance, ordering defendants to convey to plaintiff according to the terms of their contract although "Judgments or decrees, therefore, which are rendered in one state cannot of themselves affect title to lands in another", and that it was error to sustain the demurrer to the complaint. But this does not mean that a decree directing a conveyance is without its effect per se. It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated, and is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." The present case does not come within such exception, that is, where a judgment in personam is entered directing certain action by a party in regard to property outside the forum.

[9] The courts of Arizona have not attempted extra-territorial jurisdiction but have followed the general rule enunciated in the cited cases, that: "Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted." Butterfield v. Nogales Copper Co., 9 Ariz. 212, 80 P. 345, 347.

[10] Since the operation of every judgment must depend upon the power of the court to render it, and since the jurisdiction to render a judgment in rem is lodged solely in the courts of the state wherein the real property is situated, then, by attempting to determine the title of California real property by the issuance of an order operating directly upon such title and not upon the person, the Arizona court assumed jurisdiction it did not have, and such order was void. Hence the subsequent action of the probate court, which of necessity had to be based solely on said decree of divorce, was likewise a nullity. Consequently, Hannah Launer, upon the death of Adolph Launer, became the surviving joint tenant, and by virtue of California law was the sole owner of the real property, unaffected by the cloud created by the deed of the probate court.

[11] As was stated in Taylor v. Taylor, supra: "No principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and deter-

mine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



60 Cal.App.2d 603

HEWINS et ux. v. WALBECK et ux.

Civ. 3235.

District Court of Appeal, Fourth District, California.

Sept. 27, 1943.

1. Appeal and error ⇐982(1)
Judgment ⇐363

The granting or refusing of an application to vacate a judgment on ground of mistake or excusable neglect is a matter resting in the broad discretion of the court, and an abuse thereof must clearly be made to appear to warrant a reviewing court in disturbing trial court's action. Code Civ.Proc. § 473.

2. Judgment ⇐363

A party seeking relief under statute relating to vacating judgment on ground of mistake or excusable neglect must make a showing that due to some mistake, either of fact or of law, of himself or of his counsel, or through some inadvertence, surprise, or neglect which may properly be considered excusable, the judgment from which he seeks relief should be reversed. Code Civ.Proc. § 473.

3. Judgment ⇐363

The statute relating to the vacating of judgments or orders on ground of mistake or excusable neglect is a remedial provision and is to be liberally construed so as to dispose of cases upon their merits and to give the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present his case. Code Civ.Proc. § 473.

4. Appeal and error ⇐982(1)

Generally, it is the policy of the law to favor a hearing on the merits, and appellate courts are much more disposed to affirm an order where the result is to compel a trial upon the merits than they are where a judgment is allowed to stand and it appears that a substantial defense could be made. Code Civ.Proc. § 473.

5. Judgment ⇐363, 379(1), 386(1)

To obtain relief under statute relating to vacating judgments on ground of "mistake or excusable neglect," it must not only appear that defendants had a meritorious defense, that they acted within a reasonable time, that the facts related constitute excusable neglect, surprise, inadvertence or mistake, but that the defendants seek such relief in good faith, and that no injustice will result from a trial on the merits and that plaintiffs will not suffer any prejudice thereby. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake or Excusable Neglect".

6. Judgment ⇐138(1)

Where one of the defendants, in forcible entry and detainer action seeking restitution of property and damages, had been convicted of larceny in connection with the taking and trial court could have found that defendants had no meritorious defense to the action, that defendants attempted to convey their property after it was levied upon, and that plaintiffs would suffer prejudice by setting aside default judgment obtained, refusal to set aside default judgments was not an abuse of discretion. Code Civ.Proc. § 473.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by C. O. Hewins and Lucille Hewins, his wife, against Edward H. Walbeck and Laura B. Walbeck, his wife, in forcible entry and detainer, for restitution and damages. A default judgment was entered which defendants moved to vacate and set aside on ground of mistake and excusable neglect. From an order denying the motion, defendants appeal.

Order affirmed.

Charleville & Weddell, W. H. Weddell, and Harry H. Parsons, all of San Bernardino, for appellants.

Swing & Swing by Ralph E. Swing, all of San Bernardino, for respondents.

GRIFFIN, Acting Presiding Justice.

On November 10, 1942, plaintiffs and respondents filed this action in forcible entry and detainer against defendants and appellants alleging that for more than five years they had been in peaceable possession of a certain mine, mining claim, and furnished dwelling house in San Bernardino County; that about August 25, 1941, during the absence of plaintiffs, defendants entered upon said property, broke open the doors and windows, entered, took, and retained possession thereof to the damage of plaintiffs in the sum of $2,000, and that the reasonable rental value of the property was $150 per month. The prayer is for restitution and damages.

On November 10, 1942, summons was issued directed to the defendants to appear and answer within three days. It was duly served upon defendants in San Bernardino County on the same day. They failed to appear within the time therein prescribed. Their default was entered on November 14, 1942. Judgment against defendants was ordered by the court and entered on November 16, 1942, which fixed the actual damages at $1600 and determined that plaintiffs were entitled to treble damages totaling $4,800. It awarded immediate possession of the property to plaintiffs. On January 5, 1943, defendants filed a notice of motion that on January 18, 1943, they would move the court to vacate and set aside the default judgment as entered on the ground of mistake and excusable neglect. On motion of counsel for defendants the matter was continued to January 23, 1943. Laura Walbeck filed her affidavit in support of the motion. It alleged that on October 27, 1942, she was incarcerated in the San Bernardino County jail (in connection with a charge of grand theft of the furniture in the house involved, see People v. Walbeck, 59 Cal.App.2d 277, 138 P.2d 405); that she had been ill and under the care of a physician prior to that time; that after her incarceration her asthmatic condition became worse; that on November 9, 1942, she contracted a severe cold and carried a high fever; that on November 10, 1942, while in such condition, she was handed some papers in the jail by a man; that due to the fact that she did not have her glasses with her she was unable to read; that one of the inmates looked at the papers for her and she advised her it was "some sort of a law suit"; that she arranged to and did forward the papers to her minor daughter for her attention; that she did not know that the time to answer was only three days; that she advised her daughter to obtain an attorney; that the next thing she knew a judgment by default had been obtained against her.

Alice Burns, aged 17, minor daughter of defendant Laura B. Walbeck, filed her affidavit and alleged that on November 11, 1942, her mother sent the copy of the summons and complaint to her with the notation to obtain an attorney to handle the case; that on November 12 she went to an attorney who had previously represented her mother but that he was not in; that three or four days later she called again and showed him the papers and the attorney told her that it was too late to file an answer as the attorney for the plaintiff had taken a default judgment.

An affidavit of the physician was filed alleging that the physician called upon Mrs. Walbeck on November 12, 1942, while she was in the jail and found her "suffering from a cold and asthma". A physician from the county hospital made an affidavit that defendant Edward H. Walbeck was, on November 10, 1942, under treatment in the San Bernardino County Hospital suffering from a cancer; that several operations had been performed and that on December 28, 1942, the date of the affidavit, it was a "hopeless case".

The affidavit of defendant E. H. Walbeck shows that on November 10, 1942, he obtained permission from the county hospital authorities to appear at the courthouse; that he immediately returned to the hospital and that on November 11, 1942, while he was sick and ill, he was served with summons and complaint and was unable to appreciate the effect of such service and was unable to do anything until November 24, 1942, when he called at his attorney's office and explained the situation to him. Affidavits of merit were filed by each defendant alleging that a full and fair statement of all the facts were made to their attorney and that defendants were advised by their counsel that each had a good and valid defense to the cause of action set forth in the complaint.

In opposition to these affidavits plaintiff C. O. Hewins filed his affidavit alleging generally the nature of the cause of action; that defendants at all times knew that the dwelling house was constructed and owned by plaintiffs and was occupied and used by them as their home; that prior to the month of August, 1941, plaintiffs were required to go temporarily to Arizona for the purpose of carrying out a contract, and temporarily left their home, but before so doing caused it and all buildings thereon to be securely locked and the gate to the premises also locked; that during their absence, defendants, without the knowledge of the plaintiffs and without any right, forcibly entered the premises and took possession of the dwelling house and buildings on the mining claim and forcibly obtained possession, and while in possession stole all of plaintiffs' furniture and furnishings, sold and disposed of them without any right whatever, and forced plaintiffs to take action to replevin the same; that plaintiffs secured a portion of such furniture as a result of the replevin action, but sufferec the loss of more than $4,000 in furniture and equipment and mining machinery taken and removed by defendants from the premises during the plaintiffs' absence; that defendant Laura B. Walbeck was arrested for the stealing and removal of the property and was convicted of such offense and is now under sentence in the state prison for women; that plaintiffs served written notice upon defendants demanding the possession of the buildings and the premises but they refused to surrender the same and that Laura B. Walbeck threatened to inflict bodily harm and kill the affiant if he attempted to enter the premises; that soon thereafter, on May 4, 1942, plaintiffs brought an action in the justice's court to regain possession of the premises; that defendants appeared in the action by their attorney, Mr. Hilliard; that thereafter Mr. Hilliard withdrew from the action and an answer was filed by another attorney by the name of Miller, which alleged that the title to the real property was involved and asked that the matter be transferred to the Superior Court for trial; and that the action was transferred accordingly and placed upon the calendar of the Superior Court for trial on July 7, 1942. Prior thereto, Mr. Miller, at his own request, was relieved of being attorney for the defendants and Mr. Parsons was substituted in place of Mr. Miller; that Mr. Parsons gave notice that he was unable to try the case on the day on which it was set and said action was again set for September 29, 1942; that on that date Mr. Parsons failed to appear for trial and in lieu of appearing filed an affidavit that he was sick and unable to participate, at which time another attorney, Mr. Larson, appeared for the defendants and on his motion the action was continued to October 16, 1942. On the 14th day of October, 1942, another attorney, Mr. Holcomb, and also attorney Reid, were substituted as attorneys for defendants in lieu of Mr. Parsons, and when the action came on for trial the cause was continued to November 9, 1942, on the ground that Laura B. Walbeck was ill; on that date, instead of trying the action, the attorneys for the defendants moved to remand the action to the Justice's Court on the ground that the Superior Court had no jurisdiction; that the motion was granted and the case was remanded accordingly; that prior to the making of the motion, plaintiffs had caused the complaint in that action to be amended insofar as damages were concerned, to show that the rental value of the property and damages suffered exceeded the jurisdiction of the Justice's Court; that thereafter plaintiffs caused the action to be dismissed in the Justice's Court and immediately filed the instant action in the Superior Court predicated on the same acts, for possession and damages sustained. The affidavit further alleges that from May 5, 1942, to and including November 9, 1942, the defendants remained in possession of the premises and deprived plaintiffs thereof and inflicted damages on them, and it was during such time that the defendant stole the furniture belonging to plaintiffs from the premises; that the instant action was commenced on November 10, 1942, in the Superior Court predicated upon the same facts; that summons was duly issued and regularly served, and that defendants failed and neglected to appear and that thereafter, on November 23, 1942, judgment was entered as above mentioned (record shows entry of judgment on November 16, 1942); that execution was issued upon the judgment and certain real property of the defendants was levied upon and advertised for sale; that notice of the sale was regularly given by publication and posting in the manner and form provided by law and the property was sold at public auction on December 21, 1942; that the sum of $3,000 was bid and a certificate of sale was issued to plaintiffs as purchasers thereof; that

such certificate of sale was duly and regularly recorded. It is then alleged, upon information and belief, that the defendants were properly notified of their rights and had notice of the entry of the judgment and of the issuance of the execution and of the fact that the property was advertised to be sold under the execution prior to the 2nd day of December, 1942; that notice of motion to set aside the judgment was not given until January 5, 1943; that on January 18, 1943, the defendants executed a deed conveying away all of the aforesaid real property so levied upon by plaintiffs and recorded the same, and at the same time they conveyed away all other property of any kind which they then possessed, so that in the event the judgment was set aside plaintiffs would lose their lien upon the property and there would be nothing from which they could satisfy their claim against the defendants for their damages. It then alleged that there was no defense to the action on the merits thereof; that affiant was present and heard the testimony of the defendants in the criminal case that was presented at the time of the taking of the deposition of the defendant Edward H. Walbeck, at which time the defendants admitted that they had taken possession of the plaintiffs' dwelling house and property during their absence, from which testimony it conclusively appears that there is no defense to this action on the merits; that if the judgment should be set aside and the sale of the property vacated, plaintiffs would lose their lien upon the property and never be able to recover anything from the defendants; that to set aside the judgment would result in the plaintiffs suffering great loss and injury in that they would lose the use and possession of their dwelling house and property without any possibility of recovering any damages therefor and they would suffer damages because of the action of the defendants in taking and disposing of the furniture while it was unlawfully in their possession.

This affidavit is corroborated by the affidavit of the attorney for the plaintiffs in which he alleges that from May 4, 1942, until November 9, 1942, he took every ethical action which could be taken to have the case brought to trial upon its merits; that in the action in the Justice's Court the defendants appeared and filed an answer quite similar to the answer sought to be filed in this action; that at the time the action was remanded to the Justice's Court, attorney Reid appeared for defendants and after that action had been so remanded he advised Mr. Reid that he was going to dismiss the Justice's Court action and bring a new action predicated upon the same facts, with additional damages, in the Superior Court; that said Reid informed him that he would no longer represent the defendants and did not intend to appear in the action in the Superior Court on behalf of them; that prior thereto the defendants had changed attorneys on numerous occasions and affiant had no way of ascertaining who might perhaps represent them in the new action in the Superior Court. He then alleged that the defendants were not only served with a summons and complaint in the present action and had notice of the purposes of the action, but likewise had notice that judgment was entered in this action against them at the time it was entered, and had notice and knowledge that execution was issued thereon and that the property of the defendants had been levied upon and that the same had been advertised for sale and would be sold; that defendants took no action or gave no notice that they wished to have the action tried upon its merits or that they were dissatisfied with the judgment which had been rendered in the action; that defendants have since deeded away all of their property, real and personal, and have become judgment proof, and that if the judgment and default are set aside plaintiffs would not be able to realize upon a judgment which might be later obtained in this action; and that there is no meritorious defense to this action.

Upon these affidavits and the evidence presented to the trial court, it denied the motion to set aside the judgment and default. The only question here presented on this appeal is whether or not that court abused its discretion in so doing.

[1-3] It is well settled in this state that the granting or refusing of relief under the provisions of section 473 of the Code of Civil Procedure is a matter which rests in the discretion of the court to which the application is presented; that the court's discretion in such matter is broad, and that an abuse thereof must clearly be made to appear to warrant a reviewing court in disturbing the trial court's action. It is obvious that a party who seeks relief under that section must make a showing that due to some mistake, either of fact

or of law, of himself or of his counsel, or through some inadvertence, surprise or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed. In other words, a burden is imposed upon the party seeking relief to show why he is entitled to it, and the assumption of this burden necessarily requires the production of evidence. Bruskey v. Bruskey, 4 Cal. App.2d 472, 41 P.2d 203; Williams v. Reed, 43 Cal.App. 425, 185 P. 515. Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present his case. Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979.

[4] In considering this general rule, we are likewise familiar with the cases relied on by appellants to the effect that it is the policy of the law to favor, whereever possible, a hearing on the merits, and that appellate courts are much more disposed to affirm an order where the result is to compel a trial upon the merits than they are where a judgment is allowed to stand and it appears that a substantial defense could be made, such as Porter v. Bryson, 35 Cal.App. 688, 170 P. 1068; O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St.Rep. 105; and Stub v. Harrison, supra.

[5] It now affirmatively appears, and has been established, that the defendant Mrs. Walbeck has been convicted of grand theft of the furniture above mentioned. It has been fairly well established that the main defense in the criminal action, i.e., that legal title to that property was in her at the time of the alleged taking, had little merit. Defendants' claim of title to the real property in the present action is more or less based upon the same theory. It is clear that plaintiffs have been endeavoring, ever since May, 1942, to dispossess defendants from said property. Defendants surely have employed a sufficient number of lawyers between that date and the date of service of summons in the present action to become fairly familiar with the necessary steps that should be taken to protect their interests by seeking advice of counsel. All actions taken by defendants in the proceedings since May, 1942, indicate an effort for delay rather than an effort to have their claimed rights adjudicated. While this showing, in and of itself, may not be sufficient to offset the reasons advanced by defendants for their failure to act immediately in seeking relief under section 473 of the Code of Civil Procedure, nevertheless the relief sought under that section is in its nature an equitable proceeding addressed to the sound discretion of the trial court, in which it must not only appear that defendants have a meritorious defense to the action, that they acted within a reasonable time after such judgment was taken, that the facts related constitute excusable neglect, surprise, inadvertence or mistake, but it must also appear that the defendants seek such relief in good faith, that no injustice will result from a trial on its merits, and that plaintiffs will not suffer any prejudice thereby.

[6] Had title to defendants' real property remained subject to their control rather than being disposed of before the hearing on the motion, the trial court might well, as a condition for granting the motion, have ordered defendants to subject their property to the satisfaction of any judgment plaintiff might later obtain. Douglass v. Todd, 96 Cal. 655, 660, 31 P. 623, 31 Am.St.Rep. 247; Berri v. Rogero, 168 Cal. 736, 145 P. 95. In this action it appears, and the trial court might well have determined, that defendants were not entitled to the relief sought because plaintiffs would suffer prejudice and that an injustice would result because of the fact that after the judgment was obtained and a levy had been made on their property, they immediately deeded all of their property to a third party for the avowed purpose of defeating defendants' lien thereon, or of an opportunity to realize upon any judgment that might thereafter be obtained in the action by reason of their insolvency, should the default and judgment heretofore entered be set aside. Under the circumstances, we do not feel disposed to interfere with the conclusions of the trial court.

Order affirmed.

MARKS, J., concurs.

60 Cal.App.2d 595

ALBERTSON v. WARNER et al.

Civ. No. 6947.

District Court of Appeal, Third District, California.

Sept. 27, 1943.

1. Brokers ⇐43(2)

Statutes requiring agency contracts for sale of realty to be in writing do not preclude recovery of broker's commission under oral agreement authorizing or employing broker to lease realty for compensation or commission. Civ.Code, § 1624(5); Code Civ.Proc. § 1973(5).

2. Brokers ⇐43(2)

Agreement, by which landowners employed broker to procure a lessee of realty for mining and prospecting purposes on a royalty basis, without specifying length of term for which lessee should agree to take property, was not invalid because oral, and fact that lease subsequently entered into with lessee procured by broker may have had the effect of conveying real estate could not deprive broker of his right to compensation for services performed in securing lessee. Civ.Code, § 1624(5); Code Civ. Proc. § 1973(5).

3. Pleading ⇐205(1)

Trial court erred in sustaining general demurrers to a complaint which upon its face stated a cause of action.

4. Brokers ⇐82(1)

A complaint, alleging that landowners orally employed broker to procure a lessee for mining and prospecting purposes on a royalty basis, and that broker produced such a lessee, stated a cause of action for recovery of broker's commission regardless of whether lease for an indefinite term actually entered into with lessee procured by broker effected a sale of realty within statute requiring agency contracts for such sale to be in writing. Civ.Code, § 1624(5); Code Civ.Proc. § 1973(5).

5. Brokers ⇐43(2)

Contract, by which landowners employed broker to procure a lessee of land to prospect and mine thereon for gold and other metals upon a royalty basis, was not an agency contract for the "sale of land" within statute requiring such contracts to be in writing, though it contemplated removal of mineral substances from leased premises. Civ.Code, § 1624(5); Code Civ. Proc. § 1973(5).

See Words and Phrases, Permanent Edition, for all other definitions of "Sale of Land".

6. Brokers ⇐43(2)

Statute requiring an agreement authorizing or employing an agent or broker to sell land for compensation or a commission to be in writing does not apply to the sale of an interest in real estate. Civ.Code, § 1624(5).

7. Brokers ⇐82(1)

Complaint, alleging that after broker acting under contract of employment with landowners had procured a lessee of land, mortgagee promised that if lease was executed, it would pay broker's commission out of any royalties received, without alleging that broker performed or agreed to perform any further service, or that services performed were rendered at request of mortgagee, showed a lack of "consideration" for mortgagee's promise and failed to state a cause of action either on contract or on quantum meruit for recovery of broker's compensation out of royalties received by mortgagee.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

8. Brokers ⇐82(1)

Complaint, alleging that, at special instance and request of owners and mortgagee of land, plaintiff within two years preceding commencement of action rendered services as real estate broker consisting in securing a lessee of the land, and containing allegations as to reasonable value of such services, and refusal of owners and mortgagee to pay on demand, was sufficient as against general demurrer to state a cause of action on quantum meruit against owners and mortgagee.

9. Sales ⇐353(1)
Work and labor ⇐22

In an action on the common counts for goods sold and delivered and for services rendered, consideration is implied and it is not necessary to allege it specifically.

10. Brokers ⇐82(1)

Counts of complaint seeking recovery on quantum meruit for services rendered by broker in procuring a lessee of land were

not insufficient because of failure to allege that services were performed under written contract of employment such as is required by statute for agency contract to sell realty. Civ.Code, § 1624(5); Code Civ.Proc. § 1973(5).

11. Pleading ⇐53(1)

Each count of complaint stands on its own allegations.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by W. E. Albertson against Tular E. Warner and others to recover compensation for services rendered by plaintiff as a real estate broker in procuring a lessee of certain realty for prospecting and mining purposes upon a royalty basis. Demurrers to the complaint were sustained without leave to amend, and, from the judgment for defendants thereafter entered, the plaintiff appeals.

Judgment reversed.

Wm. F. Rose, John Ralph Wilson, and Carl E. Day, all of San Francisco, for appellant.

Hawkins & Hawkins & Cardozo, of Modesto, for respondents Tular E. Warner and Mabel Warner.

Jackson Maddux, of San Francisco, for respondent San Francisco Bank.

ADAMS, Presiding Justice.

Appeal from a judgment for defendants after the sustaining of demurrers to plaintiff's second amended complaint without leave to amend.

Said complaint was in four counts. In the first, plaintiff alleged that he was, and is, a duly licensed real estate broker; that the defendants Warner, husband and wife, were the record owners of certain parcels of land in Stanislaus County, "particularly described in the mineral lease dated June 16, 1939, between Tular E. Warner and Mabel Warner as lessors, and Yuba Consolidated Gold Fields as lessee, a copy of which is hereto attached and marked Exhibit A, and made a part hereof"; that on June 28, 1938, said Warners had executed a deed of trust of the lands described in Exhibit A to certain named trustees, for the benefit of defendant The San Francisco Bank, to secure payment of a promissory note for $146,000. In subsequent paragraphs he alleged "that shortly prior to the 16th day of June, 1939, defendants Tular E. Warner and Mabel Warner orally employed plaintiff to procure a lessee of the property described in the mineral lease, * * * to prospect and mine thereon for gold and other precious metals upon a royalty basis satisfactory to said defendants" and orally agreed that if plaintiff procured such a lessee that said defendants would pay to plaintiff when and as received 10% of the royalties received by them from such lessee; that pursuant to and in reliance upon said agreements and promises, plaintiff contacted Yuba Consolidated Gold Fields, a corporation, and procured and produced said corporation to the Warners as a lessee of said property "for the purpose of prospecting and mining thereon for gold and other precious metals upon the basis of a royalty of 10% of the amount of the gross recovery from said property * *"; that thereafter the matter of the execution of a lease by defendants to said Yuba Consolidated Gold Fields was submitted by plaintiff to the officers of defendant The San Francisco Bank and approved by it, and that said Bank recognized the services performed by plaintiff in procuring said lessee and orally agreed with plaintiff that if the lease was entered into and royalties thereunder were paid to it pursuant to any assignment to it by defendants Warner or pursuant to the terms of the trust deed, the Bank would pay to plaintiff 10% of said royalties when and as received by it. It was further alleged that on June 16, 1939, a lease in writing was entered into between the Warners and the Yuba Consolidated Gold Fields (Exhibit A attached to the complaint), under the terms of which said lessee agreed to pay the Warners as rent and royalty 10% of their gross recovery. On information and belief it was alleged that the Bank had given its approval of the lease on the condition that defendants Warner assign to it all royalties payable under said lease, and that such assignment was thereafter made; also, on information and belief, that within two years prior to the commencement of this action said Bank had received royalties amounting to $7,000 under said lease and assignment. And it was further alleged that by reason of the premises plaintiff was entitled to 10% of said $7,000 and 10% of all other royalties paid or which might thereafter be paid to said defendant Bank and/or to the defendants Warner. Failure and refusal to make such payments on demand was asserted.

The allegations of the second count are similar to those in the first count except that it is alleged that the agreements were to pay plaintiff the reasonable and customary compensation for his services, and that such reasonable and customary compensation is 10% of the royalties received.

The third and fourth counts are common counts for the reasonable value of services rendered by plaintiff, at the request of defendants, in obtaining a lessee of the property for prospecting and mining purposes upon a royalty basis, the third count alleging the reasonable value of such services to be 10% of the royalties, and the fourth alleging such reasonable value to be $25,000.

The prayer of the complaint is for the sum of $25,000, or such other amount as may be determined to be due and payable to plaintiff; that it be adjudged that under the oral contract of the parties plaintiff is entitled to 10% of all royalties heretofore paid and to be paid in the future by Yuba Consolidated Gold Fields under said lease to any of defendants; for general relief and for costs.

Exhibit A attached to said complaint and made a part thereof is entitled "Mineral Lease", and thereunder the Warners, as lessors, lease and demise to the lessee for the purpose of prospecting and mining for gold and other precious metals, the lands therein described. Under its terms said lease is to commence on the date thereof and continue until all gold and other precious metals which are recoverable at a profit have been recovered from said lands, or unless sooner terminated under the terms thereof, and when terminated lessee is to execute to lessors a quitclaim deed conveying all of its interest in said lands. Lessee agrees to pay "as rent and royalty for the use and mining of said property," 10% of gross recovery. Lessors reserve the right to use said lands for such agricultural purposes as will not interfere with the prospecting and mining activities of lessee.

To plaintiff's said second amended complaint defendant The San Francisco Bank demurred generally to each count. Defendants Warner demurred generally to each count. They also demurred to same on the ground that each such count contains a cause of action against defendants Warner and a cause of action against defendant Bank, which causes were not separately stated, but this ground of demurrer is not urged upon this appeal.

The said demurrers were sustained without leave to amend, and judgment for defendants was thereafter entered.

The contention of respondents, which was apparently accepted by the trial court, is that the complaint is fatally defective in that it appears upon its face that the oral agreement relied upon by plaintiff is one authorizing an agent or broker to sell real estate for compensation or a commission, and that because of Civil Code, Section 1624 (5) and Code of Civil Procedure, Section 1973 (5) no recovery can be had thereon either on the express promise or on a quantum meruit. This contention is based upon the decision in Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822, wherein it was held that a contract by a broker to sell oil leases, which leases provided that they were to continue as long as oil and gas were produced in paying quantities, was a contract for the sale of real estate, and that an oral contract to sell same was, therefore, invalid, within the provisions of the foregoing code sections. Respondents argue from this that as the lease which was executed by the Warners with Yuba Consolidated Gold Fields provides that it shall commence on the date thereof and "shall continue until all gold and other precious metals which are recoverable at a profit from the said lands (of which the Lessee shall be the sole judge) have been recovered therefrom, or unless sooner terminated, as herein provided", the said lease was, in effect, a sale of real estate, and that although the complaint does not allege that the plaintiff was employed to secure a lessee under the terms of the lease eventually entered into, it must be concluded that the agreement between plaintiff and the Warners was that he was to secure a lessee upon those terms, and that, therefore, the agreement is invalid because it was oral; that the complaint alleges that plaintiff was to procure a lessee upon a royalty basis satisfactory to the Warners, that the lease was executed shortly after the employment of plaintiff, and that this "compels the conclusion that a mining lease for an indefinite term, and not any other kind of lease" was what plaintiff's employment contemplated.

Appellant contends that the agreement alleged is purely an agreement to lease real property which is not required to be in writing; that it is merely one to procure a lessee and not a lessee of a particular kind nor a lessee for an indefinite term; that he

procured a lessee, and the fact that the lease subsequently executed by the parties, after plaintiff had performed his part of the agreement, was a lease for an indefinite term or even a lease under which a portion of the real property was to be extracted, could not have the effect of depriving plaintiff of his right to compensation; and that defendants could not, by effecting such a lease, deprive him of his right to compensation for services already rendered in securing a lessee.

[1] It is apparently conceded by respondents that an agreement authorizing or employing an agent or broker to lease real property for compensation or a commission, need not be in writing. The authorities so hold. Lind v. Huene, 205 Cal. 569, 271 P. 1087; Spalding v. Bennett, 93 Cal.App. 577, 269 P. 948; Edgecomb v. Callahan, 132 Cal.App. 248, 22 P.2d 521.

[2] The agreement alleged in each count of plaintiff's complaint is that plaintiff was to procure a lessee of the property described, "to prospect and mine thereon for gold and other precious metals upon a royalty basis satisfactory to said defendants"; that said defendants "agreed that if plaintiff procured such a lessee that said defendants * * * would pay to plaintiff when and as received 10% of the royalties received by them from such lessee"; and that plaintiff contacted the Yuba Consolidated Gold Fields and procured and produced said corporation to defendants as a lessee of said property "for the purpose of prospecting and mining thereon for gold and other precious metals upon the basis of a royalty of 10% of the amount of the gross recovery from said property"; that thereafter a lease was entered into between the parties under the terms of which the lessee agreed to pay a royalty of 10%. It is nowhere alleged that the Warners desired or required or that the plaintiff agreed with the Warners to procure a lessee for an indefinite term or a lessee who would take the property under the terms of the lease which was subsequently entered into, or that it was the intention or within the contemplation of the Warners or plainiff that a lease for an indefinite term should result from plaintiff's efforts, or that Yuba Consolidated Gold Fields when produced was willing to become a lessee only on condition that an indefinite term be agreed upon with lessors. In this respect the agreement alleged by plaintiff differs materially from the agreement sought to be enforced in the Dabney case, for there the agreement was, specifically, an agreement to sell leases already in existence, which leases—the things agreed to be sold—were held to be real property. If plaintiff's agreement was merely an agreement to secure a lessee of the property, without any provision as to the length of the term for which such lessee should agree to take the property, then it cannot be said that such agreement was invalid because oral; and the fact that the lease subsequently entered into may have had the effect of conveying real estate could not deprive plaintiff of his right to compensation for the services performed in securing a lessee.

[3, 4] The question before the court is whether, upon its face, plaintiff's complaint states a cause of action. If it does, the trial court erred in sustaining the general demurrers thereto. And, without determining whether, under the decision in Dabney v. Edwards, supra, the lease actually entered into effected a sale of real estate within the meaning of such terms as used in subdivision 5 of section 1624 of the Civil Code, we are of the opinion that it cannot be said that plaintiff's complaint does not state a cause of action so as to be subject to a general demurrer, at least in so far as a case is made out against the defendants Warner.

[5, 6] Respondents make a further contention, towit, that in Stone v. City of Los Angeles, 114 Cal.App. 192, 299 P. 838, the court held that an oil lease is a sale of a part of the freehold; that, therefore, any mineral lease which contemplates a removal of oil or other mineral substance from the land leased constitutes a sale of a portion of the real estate of the lessor, and that any broker's agreement to procure such a lease must be in writing. This contention is apparently disposed of by the court in Dabney v. Edwards, supra, where the court points out (5 Cal.2d at page 5, 53 P.2d at page 963, 103 A.L.R. 822) that subdivision 5 of section 1624 of the Civil Code does not apply to the sale of "an interest in real estate." And in that very case the oil leases providing for a definite term were held to be chattels real—personal property—and it was decided that the broker's oral agreement to sell these leases was enforceable if said agreement was severable.

[7] Coming now to the allegations of plaintiff's complaint in reference to defend-

ant The San Francisco Bank, it is contended by this defendant that the complaint does not contain any allegations showing that the alleged promise was supported by a good and valid consideration, and that it therefore fails to state a cause of action against said Bank. The allegations of the first and second counts are that after plaintiff had procured Yuba Consolidated as a lessee the matter of the execution of a lease by the Warners was submitted by plaintiff to the officers of the Bank, for its approval, and said Bank expressed its satisfaction over the prospect of obtaining Yuba Consolidated as a lessee, "approved the execution of said lease, recognized the services performed by plaintiff in endeavoring to procure, and procuring, said Yuba Consolidated Gold Fields as a lessee of said property and orally promised and agreed to and with plaintiff that if a lease of said property was executed and entered into" between defendants Warner and Yuba Consolidated and any royalties under said lease were paid over to said defendant The San Francisco Bank, pursuant to any assignment thereof by the Warners, then it would, out of the royalties thereafter paid to it, pay plaintiff, "for his services rendered and which might thereafter be rendered," 10% of said royalties as and when received. It is then alleged on information and belief that an assignment was made by the Warners to the Bank, and that the Bank had received $7,000 in royalties which had been applied by it to the reduction of the indebtedness of the Warners. It is not alleged in these counts that plaintiff agreed to perform or did perform any further services, and in view of his contention that he was merely employed to procure a lessee and that he became entitled to his commission when he had produced Yuba Consolidated as lessee, the conclusion follows that he did not perform further services in the matter, nor promise the performance of further service; and there is no allegation that the services which he had already performed were rendered pursuant to any request by the Bank. These counts, therefore, fail to state a cause of action against said defendant Bank. Royer v. Kelly, 174 Cal. 70, 161 P. 1148; Ryan v. Walker, 35 Cal.App. 116, 169 P. 417; In re Estate of McConnell, 6 Cal.2d 493, 58 P.2d 639.

[8, 9] The third and fourth counts of plaintiff's complaint, however, differ from the first two, in that they allege that within two years preceding the commencement of the action plaintiff rendered services as broker and real estate agent to defendants Warner and the Bank "at their and each of their, special instance and request," which services consisted of securing a lessee of the property owned by the Warners. Then follow allegations as to the reasonable value of said services and defendants' refusal, on demand, to pay for same. Such allegations are sufficient as against a general demurrer. Cusick v. Boyne, 1 Cal. App. 643, 645, 82 P. 985; Aydelotte v. Billing, 8 Cal.App. 673, 675, 97 P. 698. As stated in 6 California Jurisprudence 206: "In an action on the common counts for goods sold and delivered, and for services rendered, the consideration is implied and it is not necessary to allege it specifically in the complaint." Citing McFarland v. Holcomb, 123 Cal. 84, 55 P. 761; Krieger v. Feeny, 14 Cal.App. 538, 112 P. 901, etc.

[10, 11] Respondent Bank, in its brief does not question the sufficiency of such common counts as pleadings, but asserts that where a brokerage contract is involved, and is unenforceable because not in writing, the device of a common count cannot be employed to evade the bar of the statute. Citing McCarthy v. Loupe, 62 Cal. 299, and Gould v. Otto, 81 Cal.App. 409, 254 P. 272. Those cases hold that an oral contract to sell real estate is invalid because of the statute of frauds, and that in the absence of proof of a written contract a broker cannot recover on a quantum meruit for services rendered in making such a sale. But the common counts in this complaint do not allege services rendered in making a sale, but in securing a lessee; and as an agreement employing a broker to lease real property is not, as hereinbefore stated, within the statute of frauds, it cannot be said that these counts fail to allege a cause of action as against a general demurrer. Each count stands on its own allegations, unaffected by those contained in other counts. Penziner v. West American Finance Co., 133 Cal.App. 578, 582, 24 P.2d 501.

We conclude that each count of plaintiff's complaint states a cause of action against the defendants Warner, and that the third and fourth counts state causes of action against the defendant Bank. Accordingly, the judgment is reversed.

PEEK and THOMPSON, JJ., concur.

22 Cal.2d 867

PEOPLE v. BAUTISTA.

Cr. 4511.

Supreme Court of California.

Sept. 30, 1943.

1. Homicide ⇐253(6)

Evidence sustained conviction of murders of first degree committed in the perpetration of robbery. Pen.Code, §§ 189, 190.

2. Homicide ⇐18(5), 347

Degree of murders, since they were committed in perpetration of robbery, was properly fixed as of first, and determination of death penalty could not therefore be disturbed by Supreme Court. Pen.Code, §§ 189, 190.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Marcelino Bautista was convicted of murders of first degree in two separate counts committed in the perpetration of robbery, and appeal was automatically taken under Pen.Code, § 1239.

Affirmed.

J. A. Chase, of Visalia, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PER CURIAM.

In an information filed by the District Attorney of Tulare County the defendant was charged in separate counts with having murdered Telesforo Tadino Villanueva and Macario Bucsit. On arraignment the defendant pleaded guilty to each count. Evidence directed to the determination of the degree of the murders was heard. The court below found that each homicide was wilful, deliberate, and premeditated, with malice aforethought, and that the murders were of the first degree, committed in the perpetration of robbery. The defendant was sentenced to death. This automatic appeal from the judgment comes before us by virtue of the provisions of section 1239 of the Penal Code. No briefs were filed, and neither counsel who represented the defendant in the court below nor any other counsel appeared herein on his behalf. Therefore it has been necessary for this court to examine carefully the entire record of the proceedings. After such examination of the record, we are of the opinion that the judgment appealed from should be affirmed.

[1] The evidence discloses the following facts:

The defendant and his two victims had been working under the same foreman in the asparagus fields near Stockton since March, 1943. On May 28 the workers were paid. At that time, in the presence of the foreman, the two victims counted the money which they had saved from their earnings. Villanueva had saved about $950 and Bucsit had saved about $1,200.

On May 29 the defendant and his two fellow-workers left Stockton in Villanueva's car to drive to Porterville. The defendant requested Bucsit to loan him money. When Bucsit refused, the defendant determined to commit the crimes. The defendant, who was driving, stopped the car; Villanueva took the wheel; and the defendant got in the back seat of the car. From this position, the defendant struck Villanueva on the head with a hammer, rendering him unconscious. He then struck Bucsit, who was attempting to flee. Bucsit ran from the car; the defendant followed him and struck him again, dragged him back, placed him in the car, and drove to an isolated spot. There he robbed the two victims of their savings, changed his blood-stained outer garments, set fire to the car, and left.

The smoldering car and the two charred bodies were discovered on May 30. The defendant was apprehended on the same day. Large spots of blood were found on his underwear. The defendant at that time stated that he could not explain the presence of the blood stains, but thereafter voluntarily confessed to the authorities, both orally and in writing, that he had killed the two men in order to rob them.

The defendant went with the officers to his home, and directed them to the closet where he had hidden the proceeds of his crimes; $1,575 was there recovered by the authorities. The officers also found in the closet a revolver which the defendant had previously said he had with him, but which he did not use, at the time of the commission of the crimes.

The record discloses that the defendant was of sound mind, and there is ample evidence to support the findings of the court below that the homicides were committed with malice aforethought and in the

perpetration of robbery. From reading the transcript it appears that the proceedings were regular in all respects, and that the defendant was accorded a fair trial.

[2] The degree of the murders, since they were committed in the perpetration of robbery, was properly fixed as of the first (Pen.Code, sec. 189; see also People v. Vaiz, 55 Cal.App.2d 714, 715, 131 P.2d 407); and the determination of the trial court that the defendant should suffer the death penalty (Pen.Code, sec. 190) cannot, under the circumstances depicted, be disturbed by us.

The judgment is therefore affirmed.



22 Cal.2d 863

PEOPLE v. HILL.

Cr. 4501.

Supreme Court of California.

Sept. 30, 1943.

1. Homicide ⇐250

Expert testimony that bullets which killed deceased were fired from a pistol found in defendant's possession, together with defendant's own admissions and testimony, sustained conviction for murder.

2. Criminal law ⇐53

Voluntary intoxication is neither an excuse for, nor a defense to, crime.

3. Homicide ⇐237

In murder prosecution, testimony of psychiatrists, appointed by the court to examine defendant, established that defendant was sane and was fully aware of the nature and character of his act.

4. Homicide ⇐18(5), 332(1)

Murder committed in the perpetration of a robbery was properly fixed as of the first degree, and Supreme Court would not disturb trial court's determination that defendant should suffer the death penalty. Pen.Code, §§ 189, 190.

In Bank.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Farrington Graham Hill was convicted for murder, and an appeal was automatically taken under Penal Code, § 1239.

Affirmed.

S. Ward Sullivan, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

PER CURIAM.

The Grand Jury of Los Angeles County returned an indictment charging defendant with murder and with nine counts of robbery. Later, the indictment was amended to charge three prior felony convictions. Upon arraignment defendant entered pleas of not guilty and not guilty by reason of insanity to each of the several charges. He admitted the prior convictions. Subsequently, defendant withdrew his dual pleas to counts one, two, and ten, and entered pleas of guilty thereto. Evidence was thereupon taken to assist the court in fixing the degree of the crimes charged in those three counts. The murder, perpetrated in the commission of the robbery charged in count two, was found to be of the first degree. The robberies charged in counts two and ten, to which defendant also pleaded guilty, were likewise found to be of the first degree. The trial court imposed the death penalty for the homicide and the cause is before us on the automatic appeal.

[1] The evidence adduced upon the arraignment for judgment and sentence unfolds a sordid story reaching back into defendant's early youth. Defendant testified that his career of crime started when he was ten years of age at which time he was arrested for the theft of a bicycle. Thereafter his infractions of the law were periodic in occurrence and included theft, burglary, robbery, possession of weapons, jail breaking, and finally, the series of robberies and the murder here charged.

Defendant further testified that early on the morning of July 19, 1942, he entered the lobby of the Garden of Allah Hotel, in Hollywood, with the intention of committing robbery. He approached the desk clerk, Carl Aldinger, and asked for change of a five-dollar bill. As the clerk was counting out the money defendant produced a .32 caliber Smith and Wesson revolver and "demanded that he hand over the cash." Defendant further testified: "At

this time I thought I heard somebody coming through the lobby and also noticed that the desk clerk was looking at me suspiciously. I became frightened and fired four shots at the man, after which I turned and ran from the hotel. * * * All I got from this robbery was the * * * $3.00 which the clerk had counted out. The next morning I read in the newspaper that the man had died instantly. This is the first time I ever fired a shot at any person and I had no intention whatsoever of killing or harming the man. I fired because I believed the man was getting a gun to shoot me." It is for the murder of Aldinger that defendant has been sentenced to suffer the death penalty.

When on the witness stand defendant freely narrated the details of other robberies in and about Los Angeles during this period, stating that: "In all of the above mentioned robberies my motive was money." At or about the time of the commission of these several robberies defendant discovered that the Federal Bureau of Investigation was investigating his draft status, whereupon he left this state and went to Las Vegas, Nevada, arriving there on August 22, 1942, a little more than a month after the murder of Aldinger. He testified herein that on the day following his arrival there he attempted a holdup of the "Frontier Club" in Las Vegas and when the cashier "reached underneath for what I believed to be a gun * * * I fired three shots. I saw [the cashier] fall to the floor and * * * I ran from the club. * * *" This victim also died.

Defendant was apprehended in his hotel shortly after the Las Vegas shooting. He freely admitted to Nevada and federal officers his many crimes and the two homicides. Upon his return to this state defendant admitted the commission of the hotel robbery and homicide as well as his many other crimes. Police officers testified as to defendant's voluntary admission of the several crimes. A ballistic expert testified that the bullets which killed the hotel clerk were fired from the pistol found in defendant's possession upon his arrest in Las Vegas. There is, therefore, evidence other than defendant's own admissions and testimony tending to connect him with the homicide perpetrated in Los Angeles County.

[2] Defendant offered the explanation that he had resorted to crime only after he had indulged in intoxicants. Other than defendant's own statement that he had been drinking, the record fails to disclose any evidence of intoxication at the time he shot and killed Aldinger. Moreover, it is settled that voluntary intoxication is neither an excuse for nor a defense to crime.

[3] There is evidence in the record that two of defendant's cousins had been confined for insanity and that his mother had been confined for a part of the year 1940 in the Camarillo State Hospital while suffering from a nervous breakdown and delusions of persecution. Three psychiatrists, appointed by the court to examine defendant upon his original plea, reported that he was sane at all times and was fully aware of the nature and character of his acts. It was stipulated that the court might consider their report in fixing the degree and sentence upon defendant's subsequent plea of guilty.

[4] The murder having been committed in the perpetration of robbery was properly fixed as of the first degree, Pen.Code, sec. 189, and we may not disturb the determination of the trial court that the defendant should suffer the death penalty, Pen.Code, sec. 190.

The judgment is affirmed.



22 Cal.2d 781

MATHERS v. RIVERSIDE COUNTY et al.

L. A. 18645.

Supreme Court of California.

Sept. 28, 1943.

1. Automobiles ⇦170(2)

Statutory rule of the road that upon all roadways of sufficient width a vehicle shall be driven upon right half thereof as close as practicable to the right edge thereof was designed for benefit of vehicles traveling in same direction as one upon whom duty rests and for benefit of pedestrians, but is not applicable to automobiles traveling in opposite direction, which are governed by other statutes. Vehicle Code, § 525, St.1937, p. 619.

2. Automobiles ⇐245(3)

Statutory rule of the road that upon all roadways of sufficient width vehicles shall be driven upon right half as close as practicable to right edge thereof is not a rigid rule, the violation of which under all circumstances constitutes negligence as a matter of law. Vehicle Code, § 525, St. 1937, p. 619.

3. Negligence ⇐6, 136(28)

The standard fixed by criminal statute is not necessarily under all circumstances the standard in a civil action for negligence, and its violation may not constitute negligence as a matter of law where such violation occurs as result of an act in an emergency.

4. Trial ⇐194(16)

Where automobiles involved in collision were traveling in opposite direction and defendant's automobile had encroached upon plaintiff's side of highway preparatory to making a left-hand turn, instruction advising jury that plaintiff was required to drive her automobile as close as practicable to right edge of road, as required by penal statute, and that, if she did not do so, she was negligent as a matter of law which, if proximately contributing to cause of accident, precluded recovery, was erroneous as invading province of jury. Vehicle Code, § 525, St.1937, p. 619.

5. Automobiles ⇐245(89)

Where there was a dispute as to whether defendant's automobile was less than one and a half feet over center line or three or four feet over center line when plaintiff's automobile was approaching from opposite direction, whether plaintiff was guilty of contributory negligence in swerving her automobile toward center line just before collision was for jury. Vehicle Code, §§ 540, 544, 551, St.1935 pp. 184–186; Vehicle Code, § 525, St.1937, p. 619.

6. Appeal and error ⇐978(1)
New trial ⇐39

The granting of a new trial for erroneous instructions rests in sound discretion of trial court and will not be reversed unless an abuse of discretion is shown.

7. Appeal and error ⇐978(1)

Where, from circumstances, trial court might have concluded that jury was misled by erroneous instruction, the granting of a new trial was not an abuse of discretion which would authorize a reversal.

In Bank.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by Alice C. Mathers against County of Riverside and another for damages arising out of collision between automobile driven by plaintiff and another owned by named defendant. Verdict for defendants, and, from an order granting a new trial, defendants appeal.

Affirmed.

Prior opinion 132 P.2d 38.

Earl Redwine, Sarau & Thompson, and H. L. Thompson, all of Riverside, for appellants.

Irving E. Read, of Los Angeles, for respondent.

CARTER, Justice.

Defendants appeal from an order granting plaintiff's motion for a new trial after judgment on the verdict for defendants in an action for damages for personal injuries suffered in an automobile collision.

Orange Street, a dirt road, extending in an easterly and westerly direction intersects a surfaced two lane state highway divided by a white line and extending northerly and southerly. The paved portion of the highway extends about 13 feet east of the white line and 15 feet west of that line, there being an 8 or 9 foot gravel shoulder beyond the west edge of the pavement. The collision occurred in the day time. The sun was shining and the pavement was dry. There were no buttons in the intersection indicating the proper course to follow in making a left hand turn. Plaintiff was driving south on the highway at a speed of 40 to 45 miles per hour and approached the intersection about 2 feet west of the white line. Defendant Witbeck was driving north on the highway on the east side thereof. Intending to turn left or west down Orange Street he slowed down and stopped his car when, according to the evidence, the left front wheel of his car was about 1 to 1½ feet west of the white line, his car facing in a northwesterly direction. Plaintiff testified that the front of defendant's car was 3 or 4 feet west of the white line. Plaintiff saw defendant approaching when he was several

hundred feet away. She testified that she was about two car lengths from the intersection when defendant stopped therein as above-mentioned. Defendant Witbeck testified that plaintiff's car was 240 feet away when he stopped. Although defendant Witbeck testified that he gave the customary arm signal for a left hand turn, other evidence indicated that he did not. Although plaintiff testified that her car was at all times up to the time of the collision about 2 feet from the white line, the skid marks and other evidence indicated that it swerved from that position to less than 1 foot west of the white line at the point of impact. One skid mark extended for a distance of about 78 feet. The left front portion of plaintiff's car collided with left front portion of defendant's car.

Plaintiff's motion for a new trial based upon numerous grounds including that the judgment was against the law, was granted by the court on the ground that "there was error at law in giving defendants' instruction Number 28, when applied to the evidence produced at the trial." Instruction 28, based upon section 525 of the Vehicle Code, St.1937, p. 619 reads:

"You are instructed that at the time and place of the happening of this accident, it was the duty of plaintiff Alice C. Mathers to drive her automobile on the right-hand side of the highway, and as close as practicable to the right-hand edge of said highway.

"Therefor, if you should find from the evidence in this case that said plaintiff violated her said duty, then said plaintiff was guilty of negligence per se, and if you further find that such negligence, if any, on the part of said plaintiff Alice C. Mathers, contributed proximately to the happening of said accident, then your verdict must be against said plaintiff Alice C. Mathers, and in favor of said defendants, and each of them." At plaintiff's request the court gave the following instruction: "Plaintiff Alice C. Mathers was not required by law to drive on the right shoulder where an oiled or macadam or other substantial shoulder was constructed adjacent to the paved portion of the highway. She was entitled to travel on the paved portion designed and ordinarily used for vehicular travel.

"If you find that she was driving her motor vehicle on her right half of the paved portion of the highway and that the width of said paved portion was not sufficient to make it practicable for her to drive close to the right-hand edge of said highway, but that it was more practicable for her to drive on the paved portion such as she was driving on prior to and at the time of the accident, then your verdict should be in her favor on such issue."

Section 525 of the Vehicle Code provided in part at the time of the accident: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and *as close as practicable to the right-hand curb or edge of, such roadway,* except as follows: (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement. (b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn. (c) When the right half of a roadway is closed to traffic while under construction or repair. (d) Upon a roadway designated and signposted for one-way traffic." (Emphasis added.)

[1-3] It has been held that the foregoing rule of the road, particularly the portion thereof in italics, was designed for the benefit of vehicles traveling in the same direction as the one upon whom the duty rests. Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Arundel v. Turk, 6 Cal. App.2d 162, 44 P.2d 383; Matsuda v. Luond, 52 Cal.App.2d 453, 126 P.2d 359; Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747; but see McLellan v. Cocola, 133 Cal.App. 9, 24 P.2d 200; Kellner v. Witte, 133 Cal. App. 231, 23 P.2d 1045; Nitta v. Haslam, 138 Cal.App. 736, 33 P.2d 678; Kingston v. Hardt, 18 Cal.App.2d 61, 62 P.2d 1376. In Whitfield v. Debrincat, 50 Cal.App.2d 389, 123 P.2d 591, it was held not applicable to cars traveling in opposite directions; the provision with relation to passing to the right of vehicles coming from the opposite direction was declared pertinent. It has been determined that it is for the benefit of pedestrians. See Sartori v. Granucci, 204 Cal. 28, 266 P. 280; Skulte v. Ahern, 22 Cal.App.2d 460, 71 P.2d 340; Casalegno v. Leonard, 40 Cal.App.2d 575, 105 P.2d 125. And to a car passing a car parked at the curb. Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723. The rule is elastic. It is not a rigid rule the violation of which under all circumstances constitutes negligence as a matter of law. See Mauchle v. Panama-Pacific Int. Exp. Co.,

37 Cal.App. 715, 174 P. 400; Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963; Stohlman v. Martin, 28 Cal.App. 338, 152 P. 319; Lawrence v. Goodwill, 44 Cal.App. 440, 186 P. 781; Hagenah v. Bidwell, 46 Cal.App. 556, 189 P. 799; Waxman v. Jennings, 72 Cal.App. 671, 238 P. 98; Kellner v. Witte, supra; Langford v. San Diego Elec. R. Co., 174 Cal. 729, 164 P. 398; Freitas v. Passerino, 131 Cal.App. 585, 21 P.2d 993; Hill v. Peres, 136 Cal.App. 144, 28 P.2d 944; Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25; Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143. A court may or may not accept the standard of conduct prescribed in a criminal statute as a basis of a civil suit for negligence, and if it does not, the trier of fact must determine whether the actor has conducted himself as a man of ordinary prudence. Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777. The standard fixed by a criminal statute is not necessarily under all circumstances the standard in a civil action for negligence. Its violation may not constitute negligence as a matter of law where such violation occurs as the result of acts in emergencies under the proper circumstances. Finney v. Wierman, supra; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51; Freitas v. Passerino, supra; Hill v. Peres, supra.

[4, 5] In the instant case the instruction in question advised the jury that at the *time and place* of the collision plaintiff was required to drive her car as close as practicable to the right side edge of the road; that if she had not done so she was negligent as a matter of law, and if that negligence contributed proximately to the cause of the accident then the verdict must be for defendants. Under the circumstances of the case that instruction was erroneous. It invaded the province of the jury. If the jury believed plaintiff's testimony that defendants' car was 3 or 4 feet west of the white line while making a left hand turn, that he gave no signal and that she was 50 to 75 feet away from him when he reached that point, she would not necessarily be negligent as a matter of law for veering toward the white line on her left. Defendant would then have been in a position he should not have been in inasmuch as plaintiff would have had the right of way. Vehicle Code, secs. 540, 544, 551, St. 1935, pp. 184–186. Plaintiff testified:

"Q. Mrs. Mathers, when did you first sense any danger of an accident? * * * A. When this approaching car made a sudden left-hand turn in my path, without making any signal.

"Q. (Mr. Read) At that time how far was this automobile from you? A. My best judgment would be that my car was about two car-lengths or a little more from the north side of the intersection when this sudden turn was made."

She stated in her deposition:

"A. I was driving, as we said, south from Riverside toward Hemet, and I observed this car, just as we observe as we are going along the highway at any time, cars approaching, cars coming and going; in looking ahead, we observe them. I observed this car, and my impression was that there was some vehicle rather close behind that car; and as I approached Orange Street, and possibly was within a couple of car-lengths of the intersection, this car that was approaching made a sudden turn, left-hand turn, without signalling; and as it came westward, of course, I was terrified because I was so near.

"Q. Let us not speak about your conduct; just what you did and what you observed. A. When I observed the car turn, to make a left turn, I naturally saw that a collision was going to be inevitable unless I made a stop there; so I threw on my footbrake as hard as I could and tried to stop my car."

It could have been inferred that she was confronted by an emergency, the presence of defendant's car 3 or 4 feet on her side of the highway. Under all of the circumstances of the case it should have been left to the jury whether or not the position of her car with reference to the white line constituted contributory negligence.

[6, 7] It is true that the jury was generally instructed on the doctrine of eminent peril, but we cannot say that the error was cured or was not prejudicial (see Finney v. Wierman, supra) in light of the established rule that the granting of a new trial for erroneous instructions rests in the sound discretion of the trial court and it will not be reversed unless an abuse of discretion is shown. Finney v. Wierman, supra; Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814; 20 Cal.Jur. 140. It cannot be said that the trial court

abused its discretion. There was evidence upon which it could have been determined that defendant Witbeck was negligent, and that plaintiff was not guilty of contributory negligence. Hence, the trial court might have concluded that the jury was misled.

Plaintiff also appealed but inasmuch as she has expressly abandoned her appeal, it need not be considered. The order granting the new trial is affirmed.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.



22 Cal.2d 759

CAMINETTI, Insurance Com'r, v. GUARANTY UNION LIFE INS. CO. (SHERMAN, Intervener), and three other cases.
L. A. 18666–18669.

Supreme Court of California.
Sept. 20, 1943.

1. Insurance ⇐44

An appeal from order approving a rehabilitation and reinsurance agreement, which was self-executing in that it required no process of court to carry it into effect, did not stay effectiveness of the order. Code Civ.Proc. § 949.

2. Appeal and error ⇐485(1)

The writ of "supersedeas" acts only on proceedings to enforce judgment in the court below, not on the judgment itself. Code Civ.Proc. § 949.

See Words and Phrases, Permanent Edition, for all other definitions of "Supersedeas".

3. Insurance ⇐44

The state insurance commissioner who took over assets of insurance corporations was a statutory officer subject to judicial supervision, and his order approving rehabilitation and reinsurance agreement was not subject to stay pending appeal on ground that commissioner was an "officer of the court" and that performance of the agreement constituted such other proceedings that might be stayed. Code Civ.Proc. § 949.

See Words and Phrases, Permanent Edition, for all other definitions of "Officer of the Court".

4. Insurance ⇐44

The statutes regarding stay of proceedings on appeal are inapplicable to special proceedings under insurance code and under such code supersedeas should not be automatic but is within the court's sound discretion. Code Civ. Proc. §§ 946, 949; St. 1935, p. 540, §§ 1011, 1012.

5. Appeal and error ⇐460(1)

An appeal does not automatically stay enforcement of order, but does suspend force of order as a conclusive determination of rights of the parties, since finality is not accorded a judgment until affirmance in event of an appeal.

6. Insurance ⇐44

In absence of contrary showing, it is to be assumed that insurance commissioner will perform his official duties in accordance with rights of all concerned, and that, with due consideration for suspended force of order approving the rehabilitation and reinsurance agreement, from which appeal was taken, he would not go forward with performance except to extent necessary to preserve equities formalized by the agreement and order.

7. Insurance ⇐44

Intervenors who appealed from order approving rehabilitation and reinsurance agreement were not entitled to writ of supersedeas to stay, pending appeal, the force and effect of the order. Code Civ. Proc. §§ 946, 949; St. 1935, p. 540, §§ 1011, 1012.

EDMONDS, J., dissenting.

In Bank.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against Guaranty Union Life Insurance Company and against the National Guaranty Life Insurance Company, wherein Austin Sherman intervened, and against Benjamin Franklin Life Assurance Company and the Physicians Life Insurance Company, wherein Chas. R. Thompson intervened. From an order approving a rehabilitation and reinsurance agreement, the intervenors appeal. On motion for writ of supersedeas to stay, pending appeal, the force and effect of the order approving rehabilitation and reinsurance agreement.

Application denied and order to show cause discharged.

See, also, 52 Cal.App.2d 330, 126 P.2d 159; 52 Cal.App.2d 835, 126 P.2d 170; 52 Cal.App.2d 838, 126 P.2d 171; 52 Cal.App. 2d 838, 126 P.2d 172.

Chas. R. Thompson, of Los Angeles, in pro. per., and Sherman & Sherman, of Los Angeles, for interveners and appellants.

Robert W. Kenny, Atty. Gen., Neil Cunningham, of San Francisco, and Perry Price, of Los Angeles, for applicant and respondent.

SHENK, Justice.

Interveners seek a writ of supersedeas to stay, pending appeal, the force and effect of an order approving a rehabilitation and reinsurance agreement affecting the twelve mutual life insurance companies involved in these cases. The matter is submitted on the petition and the Insurance Commissioner's demurrer and answer.

In 1940, commencing in August, the Insurance Commissioner took possession of the assets of the corporations. His action was pursuant to section 1011 of the Insurance Code, St. 1935, p. 540, and was taken on the ground that the companies were in such condition that further transaction of business would be hazardous to policyholders, creditors, and the public. The seizures by the commissioner were challenged by appropriate proceedings and were upheld by the superior court. Appeals were taken from orders of that court which approved the conservatorship and which denied the applications of the companies to resume title and possession of property and the conduct of business (sec. 1012, Ins. Code, St. 1935, p. 540). The orders were affirmed in the following cases: Caminetti v. State Mutual Ins. Co., 52 Cal.App.2d 321, 126 P.2d 165; Caminetti v. Guaranty Union Life Ins. Co., 52 Cal.App.2d 330, 126 P.2d 159; Caminetti v. National Guaranty Life Co., 52 Cal.App.2d 835, 126 P.2d 170. In other cases the appeals were abandoned. Subsequently, in December, 1942, the Insurance Commissioner presented to the superior court for approval a proposed rehabilitation and reinsurance agreement. By that instrument Guaranty Union Life Insurance Company is required to reinsure and assume all liability of the other eleven companies under policies outstanding on the effective date of the agreement, which is to be "at six o'clock P. M. Pacific War Time of the day upon which a formal order of the Court approving this agreement shall be filed with the Clerk of the Court." On February 15, 1943, the court made an order approving the agreement and caused it to be duly filed.

Austin Sherman, a policyholder in Guaranty Union Life Insurance Company and National Guaranty Life Company, and Chas. R. Thompson, a policyholder in Benjamin Franklin and Physician's Life Insurance Company, interveners on behalf of themselves and all policyholders of the respective companies, appealed from the order. They applied to the superior court for, but were denied, a stay pending appeal. The trial court granted a ten day stay to enable them to make application to this court. An order to show cause was issued with a temporary stay pending a hearing and determination of the application.

By its order the trial court decreed that adequate provision had been made in the agreement for all classes of policyholders, creditors, and other persons; that the plan fairly and equitably protected and adjusted the rights, obligations and liabilities of all concerned; that a fair and reasonable method had been provided for the removal of the causes which made it necessary to take over the business and property; that the plan was feasible, just and equitable, and that it was to the best interests of the policyholders and of all other persons concerned that the plan and agreement be approved. The Insurance Commissioner was authorized, without further order of court, fully to perform the terms of the agreement, and to do anything deemed necessary or desirable to effectuate the purposes thereof.

The petitioners have indulged in some discussion of the facts going to the merits in order to show that substantial questions are involved on the appeals. It is pointed out that the twelve companies, parties to the rehabilitation and reinsurance agreement, are divided into three general groups of four each. Equitable Insurance Company of California, Master Life Insurance Company, Southwestern Life Insurance Company and Sunset Mutual Life Insurance Company, are insolvent and could not properly continue in business. Alliance Mutual Life Insurance Company, Great States Life Insurance Company, Mount Moriah Life Insurance Company, and State Mutual Life Insurance Company are solvent, but due to their small size, inadequate rates of insurance, and other factors, have

but little chance of successful operation. The third group consists of the four companies directly involved in the appeals and all these proceedings. These companies, it appears, would have a fair chance for successful separate operation if certain inadequacies, and hazardous, extravagant and other practices amounting to proprietary control by the management were obviated. National Guaranty is the largest, with slightly over a million dollars in assets and $106,000 surplus. Guaranty Union Life Insurance Company, second largest, is asserted to be in the best financial condition, with $573,000 in assets, and over $350,000 surplus. The petitioners state that the questions presented on appeal have never been decided and are of first impression in this state. It is their contention that where, as they here assert, reasons for the conservatorship have been removed, and a company is in sound condition, the necessity for the remedy of rehabilitation pursuant to section 1043 of the Insurance Code has been obviated, and that the commissioner must, pursuant to section 1012 of that code, return the business and assets to the company. The important question here is whether the reviewing court will grant a writ of supersedeas to stay the force and effect of the order approving the rehabilitation and reinsurance agreement, and thus the performance of the agreement, pending appeal.

[1, 2] The order appealed from is self-executing in that it requires no process of the court to carry it into effect. The appeal does not stay the effectiveness of such a judgment. The writ of supersedeas acts only upon proceedings to enforce the judgment in the court below—not on the judgment itself. Sec. 949, Code Civ.Proc.; Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123; In re Imperial Water Co. No. 3, 199 Cal. 556, 250 P. 394. In the Dulin case it was pointed out that the writ of supersedeas "cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment * * *." [98 Cal. 304, 33 P. 124.]

In the Imperial Water Company case it was said: "It has been repeatedly held by this court that a supersedeas will issue only to restrain the court below or its officers from proceeding to enforce a judgment pending appeal and that such writ is limited to restraining any action under the authority of the court upon the judgment appealed from; in other words, a writ of supersedeas will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been duly taken where no process of or action by the court below is involved." [199 Cal. 556, 250 P. 395.]

[3] The petitioners contend that the Insurance Commissioner is an officer of the court by virtue of his receivership of the assets of the insurance companies and that performance of the agreement approved by the court constitutes such further proceedings as may be stayed by an appropriate writ. But the Insurance Commissioner is not an officer appointed by the court to enforce its judgment. He does not derive his power from the court, but from the statute. He has been called a receiver of the assets of the corporation (Anderson v. Great Republic Life Insurance Co., 41 Cal.App.2d 181, 188, 189, 106 P.2d 75), but he is such not by appointment of the court, but by virtue of legislative enactment. His office is not to perform functions in aid of the court's jurisdiction to decide a controversy between litigants, but he acts as a statutory officer, subject, however, to judicial supervision to prevent an arbitrary exercise of power or neglect of duty. A somewhat similar contention was made with respect to directors acting as trustees pending distribution of corporate assets in the Imperial Water Company case, supra, where the appellant sought to stay the distribution of assets pending appeal from the order authorizing distribution. This court rejected the contention that such trustees were amenable to the writ of supersedeas, saying: "But they are not officers of the court. They are mere statutory liquidators," citing Relfe v. Rundle, 103 U.S. 222, 225, 26 L.Ed. 337. The analogy is apparent.

[4] The petitioners nevertheless urge that the court may exercise its constitutional power in these cases to issue the writ of supersedeas when it appears that a stay is necessary in aid of its appellate jurisdiction, and that some restraint upon the commissioner is required in order to preserve to the appellants the fruits of the appeal in the event of a reversal. It is assumed that the court has power to issue the writ in a proper case. However, in Carpenter v. Pacific Mutual Life Insurance Co., 13 Cal.2d 306, 89 P.2d 637, this court called attention to the fact that sections 946 and 949 of the Code of Civil Procedure

do not apply to special proceedings under the Insurance Code; that under the latter code supersedeas should not be automatic, but that the question whether the writ should issue rested in the sound discretion of the court.

The petitioners invoke that discretion in their favor, and argue that the entire matter should be held in statu quo until this court has passed upon the legality of the plan of rehabilitation; that the plan should not be put into effect until after final court approval; that otherwise a cloud will be placed on the title of the property and the validity of the conservatorship proceedings which it is asserted would cause untold confusion and uncertainty, and result in irreparable injury in case the order should be reversed. They also point out that the companies have been operating under the conservatorship for over two and one-half years. They contend that injury has not resulted from such operation and that the companies will not suffer by continuing in conservatorship until the final sanction of the courts on any proposed plan; that in the event of affirmance of the order of approval, adjustments can be made which will balance the equities arising between the "effective date" of the agreement and the date of affirmance of the order.

On the other hand the commissioner urges that the proper test in determining the appellants' right to supersedeas is a consideration of the respective rights of the litigants, which contemplates the possibility of affirmance as well as reversal; that the reviewing court will not issue the writ to secure to the appellants the fruits of a successful appeal unless it can be done without depriving the respondent of a substantial right. Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 177, 114 P.2d 579; Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591; Hulbert v. California, Etc., Cement Co., 161 Cal. 239, 255, 256, 118 P. 928, 38 L.R.A.,N.S., 436.

The commissioner calls attention to the fact that the reorganization involves the affixing of liens on the policies of certain of the companies to compensate for insolvencies and to equalize the financial burden under the reinsurance and assumption of liability features; that policyholders who have held insurance contracts with inadequate rates must make certain elections between reduced insurance and increased rates; that if the effective date be postponed the financial equations and inter-company adjustments will be disturbed; that aged policyholders who die in the meantime will obtain preferences; that policyholders not on the point of death who can obtain cash values will do so before further reduction becomes effective; that the liens on policies computed as of the date of the judgment would be lost to that extent; that increases in rates, where increases are required, or reductions in face values would be lost for the interim period; and that readjustments to any extent may well be considered to be a new agreement or plan which in turn would entail hearings and result in appeals. It is urged that insurance business is one of risks and chances; that insurance companies can survive only by the application of the law of averages; that since the selection of risks is against the company, speed is a necessary element in any rehabilitation and reorganization; that substantial extension of the effective date of the agreement may cause serious threat to the solvency of the entire enterprise, and in any event the financial loss would be great and would become increasingly greater with the continued extension of the effective date.

[5] As noted, the appeals do not automatically stay enforcement of the order. But they do suspend the force of the order as a conclusive determination of the rights of the parties. Dulin v. Pacific W. & C. Co., supra, 98 Cal. at page 308, 33 P. 123. This is so since finality is not accorded a judgment until affirmance in the event of an appeal.

[6] The fact that the conservatorship has continued for a period of more than two and one-half years would not justify the conclusion that conservatorship can continue indefinitely without injury or hazard. It may well be that the intervening period was necessary for the development of the plan of reorganization, and that at this time the usefulness of the conservatorship, except to put the plan into operation, is exhausted. In the absence of a showing to the contrary it is to be assumed that the commissioner will perform his official duties in accordance with the rights of all concerned, and that, with due consideration for the suspended force of the order as a conclusive determination, he will not go forward with performance except to the extent necessary to preserve the equities which have been formalized by the agreement and the order.

[7] It is therefore concluded that a case is not presented requiring the issuance of the writ of supersedeas to maintain the status quo or to protect appellate jurisdiction.

The application is denied, and the order to show cause is discharged.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, J., did not participate herein.

EDMONDS, Justice (dissenting.)

I do not join in the opinion of my associates for two reasons.

If the decision is based upon the ground that the order appealed from is self-executing and not subject to supersedeas, that determination is directly contrary, I believe, to the holding of Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 89 P.2d 637. If, on the contrary, their conclusion is that, upon the facts shown, the petitioning policyholders are not entitled to the writ to maintain the status quo or to protect appellate jurisdiction, then I disagree and point to evidence which, to me, compels the exercise of the court's discretion in their behalf.

Ordinarily, a writ of supersedeas will be granted only where the judgment or order may be enforced pending the appeal by process for that purpose. But in the recent litigation concerning the Pacific Mutual Life Insurance Co., it was expressly held, upon the authority of Carpenter v. Pacific Mut. L. Ins. Co., 10 Cal.2d 307, 74 P.2d 761, that the procedural provisions of part II of the Code of Civil Procedure have no application to a proceeding under the Insurance Code. For that reason, the court declared, "We must presume that the Legislature intended that upon appeal from orders or judgments made under the Insurance Code the supersedeas should not be automatic, but whether one should be granted should rest in the sound discretion of the court in the exercise of its power to grant supersedeas where no statutory stay exists." Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 312, 89 P.2d 637, 640.

Considering the application in the present proceeding upon the merits, the order for which supersedeas is now sought is substantially the same in form as the one made for rehabilitating the Pacific Mutual Life Insurance Company except that it authorizes the Insurance Commissioner to merge the assets of insolvent companies with those of solvent ones. Four of the twelve insurance companies are insolvent, four of them are solvent but cannot properly continue in business, and the others are solvent with a fair chance for successful separate operation. By the rehabilitation agreement, the second largest of the latter group, which is asserted to be in the best financial condition, is required to reinsure and assume all of the liability of the other eleven companies.

Do not these facts show, beyond the possibility of successful contradiction, that if the commissioner proceeds to merge the assets of the twelve corporations and administer them as the property of Guaranty Union Life Insurance Company, subject to the liabilities of each one of them, the interests of the policyholders in the solvent companies may be seriously jeopardized in the event of a reversal upon determination of the appeal? And if the commissioner fixes "liens on the policies of certain of the companies to compensate for insolvencies and to equalize the financial burden under the reinsurance and assumption of liability features" or requires "that policyholders who have held insurance with inadequate rates must make certain elections between reduced insurance and increased rates" as he asserts must be done now, and the order is reversed, will it not be practically impossible to return the companies to their present position? Moreover, if I read the opinion of my associates correctly, the commissioner intends to pay death claims and cash values upon the basis of the reinsurance agreement and also to make readjustment of rates effective immediately. How might such steps be retraced in the event of a reversal.

These facts, in my judgment, present compelling reasons why the discretion of the court should be exercised in favor of granting the writ of supersedeas to maintain the status quo. And certainly the writ should not be denied upon the assumption that the commissioner "will not go forward with performance except to the extent necessary to preserve the equities which have been formalized by the agreement and the order." Under that qualification of the decision, how will the commissioner, or any of the insurance companies, know to what extent he may go in carrying out the agreement and order pending a determination of the appeal?

60 Cal.App.2d 637

BROWNE v. BROWNE.

Civ. 14014.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1943.

Rehearing Denied Oct. 14, 1943.

Hearing Denied Nov. 22, 1943.

1. Marriage ⇐64

Where court in annulling marriage found that both parents were fit and proper parties to have the custody of minor children and in judgment of annullment and subsequent orders modifying judgment left the matter of custody open and continued it until a later date, it must be presumed in the absence of a finding to the contrary that court's conclusion as to fitness of parents remained unchanged.

2. Divorce ⇐296, 312
Marriage ⇐64

In awarding the custody of minor children whose parents have been divorced or whose marriage has been annulled, trial court has extensive discretion with a view to the conservation of best interests of the children and trial court's conclusion will not be set aside in the absence of a clear abuse of discretion.

3. Divorce ⇐298(6)
Marriage ⇐64

Presumptively the mother is entitled to the custody and care of minor children of tender years.

4. Divorce ⇐298(1)
Marriage ⇐64

In awarding the custody of minor children of parents who have been divorced or whose marriage has been annulled, controlling consideration is the children's welfare.

5. Divorce ⇐312
Marriage ⇐64

Where record contains credible evidence to support a rational inference that order awarding custody of minor child is for the best interests of the child and there is nothing to impeach the fairness or good faith of such decision, appellate court has no jurisdiction to disturb the order.

6. Marriage ⇐64

Trial court had no jurisdiction to modify judgment of annulment as to custody of minor children pending appeal from order modifying judgment in such respect, though appeal was not disposed of until after date to which matter was continued by trial court.

7. Marriage ⇐64

Where parents of young children were both fit persons to have their custody but mother was not in a position to maintain them without assistance of their maternal grandmother, though father pursuant to judgment of annulment paid $12.50 per week for their support, and maintenance in grandmother's home did not appear to be to the best interests of children, trial court did not abuse its discretion in modifying judgment by taking children from mother's custody and placing them for six months in custody of neutral third person and wife.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Virginia Browne against Dale Browne for annulment of marriage. From an order modifying judgment of annulment with respect to custody of minor children, plaintiff appeals.

Order affirmed.

Jones & Hoyt and George A. Elstein, all of Los Angeles, for appellant.

David C. Marcus, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a minute order dated September 1, 1942, modifying a judgment of annulment of marriage respecting the custody of minor children.

Said judgment of annulment was entered on December 11, 1941, nunc pro tunc, as of October 10, 1941, awarding the custody of said children, aged 2 and 3 years, to the plaintiff mother, provided "she shall and she is hereby ordered to move forthwith from the home of her mother, Mrs. Beulah Strickland Ingram, and establish a separate home for said children away from said Mrs. Beulah Strickland Ingram, so that said children shall not be in the custody or under the influence of said Beulah Strickland Ingram." The defendant father was ordered to pay $6.25 per week for the care and support of each child, and was awarded all reasonable rights of visitation with said children.

On April 21, 1942, said judgment was modified permitting plaintiff mother "to reside with the maternal grandmother and the children at the residence of the mater-

nal grandmother, Beulah Strickland, until the further order of the court. The matter of the modification is continued to September 1, 1942."

On July 15, 1942, an order to show cause in re contempt issued at the instance of defendant father directed against plaintiff mother, apparently because of the maternal grandmother's refusal to permit the father to take the children when he called for them at the beginning of a weekend in June.

At the hearing on September 1, 1942, on the motion of plaintiff in re modification and for attorney's fees, and on the motion of defendant for modification and on the order to show cause in re contempt, the court discharged the order to show cause and placed the children in the custody of a neutral third party, one Sam Berznak and his wife, and continued the matter of custody to March 1, 1943. Sam Berznak appears to be a friend of defendant and the order of modification was made with the latter's approval and consent.

The material facts adduced from the evidence presented at the hearing of September 1, 1942, appear to be as follows: From the entry of the judgment of annulment on October 10, 1941, prohibiting her from residing with her mother, until April 21, 1942, when the judgment was modified permitting her to do so, appellant and her two minor children lived in several nursery homes; that during this period both children fell ill, one with measles which terminated in pneumonia, and it became necessary to place them in the Children's Hospital where they were operated upon for mastoiditis. In explanation of her action in refusing to permit respondent father to take the children during a weekend in June, the maternal grandmother testified that the children had only recently returned from the hospital, were frail and needed care, and appellant gave as her reason for her absence from her children for a period of two months, the fact that she was boarding in Los Angeles and was going to school studying "key punch and switchboard" in order to prepare herself to take care of and support her children. It also appears that the maternal grandmother had provided a home for her daughter and the two children from the time the younger was six months old, except for the six month period when she was prohibited from doing so by the order of October 10, 1941. At the hearing of September 1st it was developed that the grandmother was employed and hired a 21-year old girl named Irene to care for one child at a wage of $40 per month, and that the other child upon the advice of a physician had been taken to Banning to recuperate from the mastoiditis operation, and that the grandmother was paying $40 a month for his maintenance there, she testifying that it cost her $140 per month for the care of the children and their maintenance in her home, in excess of the $12.50 per week furnished by respondent for their support.

At the hearing when the court took the custody of the children from the mother and grandmother, and placed them in the custody of Sam Berznak, he made the following comments:

"I do not think the arrangement has been very successful * * * about having the children out there. I can understand the almost fierce affection that the grandmother has for these children, but I do not think that it is a good thing for the children and I do not think it is a good thing for the parties here. I dislike very much to take the two children away from their parents, but when the mother has not been there for a couple of months, and the mother testifies she is not able to take care of the children * * * we have continued this matter from time to time and I am satisfied it is only going to lead to strife and trouble. I dislike to take the children away from the grandmother, but I do not think it is going to lead to any happiness of these children or the welfare of the children when a grandmother tells a parent to get out and keep out and so forth, because he makes some remark about the children, which a man might do, maybe in anger, and maybe in haste. * * * Well, I am going to make an order here and then give everybody a chance to try. These children do not go to school; they are not old enough for school yet, and this young man here impresses me as being a pretty decent sort of a fellow, and I think I am going to modify the order continuing the matter for a period of six months, to Department I of the Superior Court, at which time the mother can come up again. * * * I would not put anybody's children in those professional neutral homes, because the atmosphere in them is not good at all. Here is a man (Berznak) with a little girl, and it is not going to hurt anybody in this case for a period of six months time to do without the children. * * * I think I am going to make the order that the custody of the children be taken from the mother

and the grandmother, and be given to a neutral party, namely Sam Berznak and his wife, whose address is 114 North Everett, Glendale, and the mother of the children shall have the right to have the children on every other Sunday. * * * The father is ordered to support the children. The payments which were heretofore directed to be made to the wife for the support of the children are now discontinued and the whole matter is continued * * * (to) March 1st, 1943, at 9:00 o'clock in the morning, in Department I of this court. * * * (addressing Mr. Berznak) the responsibility for the comfort and care and peace of mind of these children is now with you, and if either the father or the mother cares to see them, and in the judgment of you and your wife, they can see them without trouble, why you can make such arrangements as you desire."

Appellant mother urges error on the part of the trial court in taking away from her the custody of her children in the absence of either evidence or findings that she is not a fit and proper person to have such care and custody.

In the judgment of annulment entered December 11, 1941, nunc pro tunc as of October 10, 1941, the court found that "each of the parties is a fit and proper person to have the custody and care of the children of said parties, viz: Hale Robert Browne, age 3 years, and Dennis Orman Browne, age 2. But due to their extreme youth, their custody is awarded to the mother * * *."

[1] In said judgment of annulment and in the two orders modifying the same, the matter of the custody of the children was left open and in each instance continued until a later date, and in the absence of a finding to the contrary in either of the orders referred to, it must be presumed that the trial court's conclusion as to the fitness of the parents remained unchanged. The comments of the trial judge hereinbefore set out indicate his concern for the welfare and best interests of the children, and in changing their custody he was doubtless influenced by the fact that appellant at that time was not in a position to maintain them without the assistance of the children's maternal grandmother.

In the case of Williams v. Williams, 13 Cal.App.2d 433, 434, 56 P.2d 1253, 1254, after the final decree of divorce and the subsequent remarriage of the husband, he instituted a proceeding for modification of the custodial order, asking that the son be placed in his custody and control. This the court refused to do, leaving the child in nominal custody of the wife but requiring that said child be kept in a private school, with right of visitation accorded each parent. Upon appeal from the order, the husband suggested that it was an abuse of discretion on the part of the trial judge. It was there stated by the court: "No such abuse is apparent. The whole matter is committed to the wise discretion of the judge who hears the testimony, sees the witnesses, examines the parties themselves and who is, in the very nature of things, in a position to determine what is for the best welfare of the child."

[2-5] "The code has not provided explicit rules in regard to the exercise of the trial court's discretion in awarding the custody of the children. It is manifest that the legislature intended to confine to trial courts a very extensive discretion in this respect, with a view to the conservation of the best interests of such minors, and its conclusion will not be set aside in the absence of a clear abuse of discretion. And this rule is adhered to, though at the same time it is declared that 'naturally and presumptively the mother is entitled to the custody and care of minor children of tender years.' The controlling and paramount consideration is the children's welfare. And this the trial court must decide from all the facts of which it has obtained knowledge in a competent manner. * * * If there is substantial evidence in the record to support a rational inference that the order is for the best interests of the child, and such evidence does not appear incredible, and there is nothing to impeach the fairness or good faith of the decision, it would be an excess of appellate authority to disturb the determination of the trial court." 9 Cal.Jur. 790, sec. 133, and authorities there cited.

[6, 7] Pending this appeal, the trial court was without jurisdiction to change or modify the judgment as to custody of the minor children on March 1, 1943, the date to which the matter was continued. Vosburg v. Vosburg, 137 Cal. 493, 70 P. 473. However, now that a year has elapsed since the order appealed from was made, a change of circumstances may exist which will support a further modification of the judgment respecting the custody of the children here involved.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

TABATA v. MURANE.

Civ. 14178.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1943.

Rehearing Denied Oct. 25, 1943.

Hearing Granted Nov. 29, 1943.

1. Witnesses ⇐167

A party to action against executor on claim or demand against decedent's estate is incompetent to testify as to any matter of fact occurring before decedent's death. Code Civ.Proc. § 1880, subd. 3.

2. Trial ⇐411

A party to action, by cross-examining witness, does not waive objections to questions asked witness on direct examination or right to object to improper questions asked same witness on redirect examination.

3. Witnesses ⇐167

In action against executor to establish claim against decedent's estate for amount loaned to decedent, plaintiff's testimony that bank, in decedent's lifetime, accepted plaintiff's check for such amount in payment of decedent's debt to bank, without asking decedent's endorsement, and that defendant's witness did not ask plaintiff in decedent's presence whether plaintiff knew of any outstanding obligations of decedent, was inadmissible. Code Civ.Proc. § 1880, subd. 3.

4. Appeal and error ⇐1050(1)

In action against executor to establish claim against decedent's estate, error in admission of plaintiff's testimony, tending to support his claim that transaction before decedent's death was loan to decedent, not voluntary payment of his debts by plaintiff, and contradicting testimony of defendant's witness that plaintiff stated in presence of decedent and witness that he did not know of any unpaid debts of decedent, was prejudicial to defendant. Code Civ.Proc. § 1880, subd. 3.

5. Appeal and error ⇐110

An order denying motion for new trial in civil case is nonappealable.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by George S. Tabata against Millard Murane, executor of the estate of Charles W. Zorn, deceased, to establish a creditor's claim against the estate. Judgment for plaintiff, and defendant appeals.

Reversed.

Tudor Gairdner, of Los Angeles, for appellant.

Russell H. Pray, John Y. Maeno, and S. J. Nordorf, all of Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to establish a creditor's claim against the estate of defendant's testator, defendant appeals.

There is also a purported appeal from an order denying a motion for a new trial.

The essential facts are these:

On August 22, 1941, defendant qualified as the executor of the estate of Charles W. Zorn, deceased. On November 24, 1941, within six months from the date of the first publication of notice to creditors, plaintiff filed with the clerk of the probate court a written claim against the estate of defendant's decedent for the sum of $21,115.62. On March 5, 1942, defendant as executor of the estate of Charles W. Zorn rejected in writing plaintiff's claim. Thereafter on April 2, 1942, the present action was commenced to establish plaintiff's claim that he was a creditor of the estate of Charles W. Zorn.

Defendant relies for reversal of the judgment, among others, on this proposition:

The trial court committed prejudicial error in permitting plaintiff over objection that his testimony was inadmissible under the provisions of section 1880 of the Code of Civil Procedure to testify as to matters of fact occurring before the death of decedent Zorn.

This proposition is tenable and is governed by the following pertinent rules of law:

[1] (1) A party to an action against an executor upon a claim or demand against an estate of a deceased person is incompetent to give testimony as to any matter of fact occurring before the death of the decedent. Sec. 1880, subd. 3, Code Civ.Proc.; Stuart v. Lord, 138 Cal. 672,

676 et seq., 72 P. 142; Deacon v. Bryans, 88 Cal.App. 322, 329, 263 P. 371.

[2] (2) By cross-examining a witness a party does not waive objections to questions asked a witness on direct examination, nor by cross-examining does he waive the right to object to improper questions asked the same witness on redirect-examination. Jameson v. Tully, 178 Cal. 380, 384, 173 P. 577; Estates of Boyes, 151 Cal. 143, 149, 90 P. 454; Lucy v. Lucy, 22 Cal.App.2d 629, 633, 71 P.2d 949.

The evidence discloses that plaintiff claimed that he had loaned money to decedent during his lifetime, which decedent had agreed to repay him. On the other hand, defendant contended that plaintiff voluntarily paid debts of decedent without any promise upon the part of decedent Zorn to repay plaintiff the money thus advanced.

[3] Over defendant's objections that such testimony was inadmissible under the provisions of Section 1880, subdivision 3, of the Code of Civil Procedure plaintiff was permitted to give the following testimony:

(a) "When Charlie Zorn asked me for this loan of $91.00 on March 18th, he asked me to keep this place blank. Then he took it over, evidently, to the Seaboard National Bank to make the payment and he filled in this payable part himself. It is his handwriting. Then they accepted this check at the Seaboard as payment, as I found his endorsement not on the back of the check. Mr. Zorn said they didn't ask for it, so that is why."

(b) "Q. Was there a conversation had with reference to that between Mr. Zorn, in your presence, and Mr. Mooney? A. No, sir.

"Q. Now, did you overhear a conversation that Mr. Mooney had with Mr. Zorn in which Mr. Mooney asked Mr. Zorn whether he had any further outstanding obligations? A. No, sir.

"Q. And did Mr. Mooney at that time ask you if you knew any outstanding obligations of Mr. Zorn? A. Absolutely not, no, sir."

The foregoing testimony was clearly inadmissible under the provisions of rule 1, supra, and the trial judge erroneously overruled defendant's objections thereto.

[4] Such error was prejudicial to defendant since:

(1) The testimony set forth in paragraph (a), supra, if believed by the trial jury would have tended to support plaintiff's claim that the transaction was a loan and that plaintiff had not voluntarily paid debts of the decedent, and

(2) The testimony set forth in paragraph (b), supra, contradicted the testimony of defendant's witness, Rex Mooney, which was in part as follows:

"Q. By Mr. Gairdner: Now, who else was present at this conversation other than yourself and Mr. Zorn and Mr. Tabata? A. No one.

"Q. And where was this conversation had? A. In Mr. Zorn's bedroom.

"Q. Where? At what address? A. On the second floor in the northwest room of 101 South Fuller Avenue.

"Q. And when was this conversation? A. At 5:30 in the afternoon of the evening before he passed away.

"Q. Now, will you relate that conversation? A. Yes, sir. I handed Mr. Zorn the paid chattel mortgage secured by the furniture company together with the residue of the money due him. Mr. Zorn and Mr. Tabata were seated at the foot of the bed eating dinner. I handed Mr. Zorn these papers and the money in the presence of both, 'Now, this, as I understand it, pays all of your outstanding indebtedness. You are liberty to dispose of the furniture, and as you have stated, Mr. Zorn, that you will apply the money received from the furniture on your duplex dwelling, do you know of any other outstanding indebtedness at this time?'

"The Court: That is what you said to Mr. Zorn? A. Yes, Sir. Mr. Zorn said, 'No, sir. I thank you for your kindness,' and said that 'When I get my note for the twelve hundred and some dollars secured by the trust, get the money on that, I will be able to live without the burden of debt and worry on my mind.' And I asked Mr. Tabata if he knew of anything else outstanding that should be paid, and he said, 'I know of nothing.' And I said good bye and walked out the door."

If the trial jury believed plaintiff's testimony, it of necessity destroyed the effect of Mr. Mooney's testimony, wherein he testified in substance, among other things, that plaintiff had stated in the presence of decedent and the witness that he did not know of any unpaid and outstanding debts of Mr. Zorn. It is clear, however, that

if Mr. Mooney's testimony had been submitted to the trial jury uncontradicted, and the jury had believed it, the jury could not have properly returned a verdict in favor of plaintiff for the reason that, under Mr. Mooney's statement, plaintiff had admitted in effect that decedent did not owe him any amount of money.

In view of our conclusions, it is unnecessary for us to discuss other points urged by defendant as grounds for reversal of the judgment.

[5] An order denying a motion for a new trial in a civil case is non-appealable. (See 2 McKinney, New Cal. Digest (1930) 129, Appeal and Error, Sec. 74, and Supp. thereto.) Therefore the purported appeal from the order denying the motion for a new trial is dismissed.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.



60 Cal.App.2d 575

CISCO et al. v. VAN LEW.

Civ. 3226.

District Court of Appeal, Fourth District, California.

Sept. 25, 1943.

1. Frauds, statute of ⇐107(2)

Memorandum of land sales contract must identify by name or description seller and buyer. Civ.Code, § 1624, subd. 4.

2. Specific performance ⇐28(1)

The requirement of certainty as to the agreement in order that it may be specifically enforced extends not only to its subject matter and purpose, but to the parties, the consideration, and the place and time of performance, where these are essential. Civ.Code, § 1558.

3. Contracts ⇐10(5)

Generally a contract for the purchase and sale of realty must be mutual and reciprocal in its obligations, otherwise it is not obligatory upon either party, and hence an agreement to convey property to another upon his making payment at a certain time of a named amount without a reciprocal agreement of the latter to purchase and pay the amount specified is unenforceable.

4. Specific performance ⇐28(4)

Where landowner by escrow instructions granted to her broker or his nominee the exclusive right to buy land, but as between plaintiffs and landowner, the agreement did not identify or contain any reference to plaintiffs as purchasers, plaintiffs were not entitled to specific performance of the agreement under statute relating to enforcement of contracts signed by one party only. Civ.Code, § 3388.

5. Frauds, statute of ⇐107(1)

Where complaint affirmatively disclosed that plaintiffs could not be identified either as parties or purchasers by reference to only writing subscribed by landowner, the alleged contract for sale of land to plaintiff was uncertain and did not comply with the statute of frauds. Civ.Code, §§ 1558, 1624, subd. 4.

6. Brokers ⇐31

Where landowner by escrow instructions granted to her broker or his "nominee" the exclusive right to buy land and broker authorized escrowee to vest title in plaintiffs as joint tenants with "other instructions to remain the same," broker did not "assign" to plaintiffs rights which they might assert against landowner independently of broker.

The word "nominee" in its commonly accepted meaning connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him, and ordinarily indicates one designated to act for another as his representative in a rather limited sense. The word is used sometimes to signify an agent or trustee, but has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Assign" and "Nominee".

7. Specific performance ⇐119

In action to compel specific performance of an alleged agreement to sell realty

on theory that plaintiffs were nominees of landowner's broker, burden was upon plaintiffs to show that a valid contract existed for sale of the realty by landowner to broker.

8. Principal and agent ⇐48

Equity regards the relation of principal and agent in the same general manner and with nearly the same strictness as that of trustee and beneficiary.

9. Brokers ⇐31

If the agency be the ordinary one wherein the agent is employed to obtain for his principal the highest possible price for the property beyond a fixed minimum for which service the agent is to be paid a commission on a percentage basis, "fiduciary relations" arise out of such employment which preclude the agent from purchasing the property.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relation".

10. Principal and agent ⇐70

Generally an agent may represent both parties to a contract with their full knowledge and consent, but where the agent represents the adverse party without his principal's consent, his contract is voidable at the option of the principal.

11. Principal and agent ⇐69(3)

A contract of an agent with himself is void unless the principal chooses with knowledge of all the circumstances that affect his possession to ratify the agent's act.

12. Principal and agent ⇐69(3)

An agent has the same right to deal directly with his principal as with a stranger but the utmost faith is required, and the burden is on the agent to show affirmatively that he acted in good faith fairly and honestly, and the burden of showing clearly the fact that a contract was made rests upon the agent, and it must clearly appear that the contract was fair, just and equitable, or the principal will not be bound.

13. Brokers ⇐31

Where broker was employed by landowner on a straight commission basis of five per cent of the purchase price, broker by virtue of his "fiduciary relation" to landowner was prohibited from making a contract to buy the land.

14. Brokers ⇐31

Where landowner's broker designated plaintiffs as his nominees to receive title under contract to sell land between broker and landowner, plaintiffs acquired no interest in the realty where contract was invalid.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Suit by Everett Cisco and others against Mildred Pearl Van Lew to compel specific performance of an alleged agreement to sell realty and for broker's commissions for the same transaction. From a judgment based upon nonsuit for defendant, plaintiffs appeal.

Affirmed.

Harold King and H. E. Thompson, both of San Bernardino, for appellants.

Swing & Swing, of San Bernardino, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiffs and appellants Ciscos brought this action to compel defendant and respondent to specifically perform an alleged agreement to sell certain real property. Joined in the same complaint as a party plaintiff, appellant McGuire, in a second cause of action, seeks to recover a real estate broker's commission of $100 on the same transaction.

In November, 1941, the defendant was the owner of the real property in question. She listed it with McGuire for sale, giving him an exclusive listing, reciting that the sale price thereof should be $2,500, payable $500 down and $25 per month thereafter. McGuire was a licensed real estate broker. He advertised the property for sale. The plaintiff Everett Cisco called at the office of McGuire and inquired about the purchase of the property. After being advised of the purchase price and the terms, which defendant had fixed in her listing agreement, Cisco asked McGuire whether or not the real property could be purchased for $2,000 cash. McGuire advised defendant that he had an offer of $2,000 cash for the property and she told him that she would call at his office the following morning and discuss the matter. Cisco stated to McGuire that he would be out of town the following day. The record shows, however, that he was not out of town during that day but

remained in the city during the entire time. Cisco made a deposit of $100 in cash with McGuire. During the dealings with Cisco, McGuire had an inquiry from a Mrs. Cohn as to the sale of the same property at a higher price than that offered by the Ciscos. This fact was not communicated by McGuire to the defendant. While at McGuire's office defendant apparently orally agreed to sell the property for $2,000 cash and on the following day McGuire and defendant went to the office of the title company and endeavored to open an escrow for the sale of the property in question. The Ciscos were not present. While at the title company's office escrow instructions were prepared and during the preparation thereof, when asked the name of the purchaser, McGuire stated that he had forgotten his name but that he could return to his office and obtain the same. He testified that defendant said the name of the purchaser was of no importance and that the escrow clerk suggested that the instructions be drawn to provide that title should vest in J. H. McGuire, or his nominee. He also testified that this arrangement was agreeable to the defendant. The escrow instructions, which were dated December 5, 1941, provided generally as follows: "Security Title Insurance & Guarantee Company: I will hand you cash in the amount of $2,000, payable $100 on this date, and balance on demand before close of escrow, which you are instructed to use when, after recording the necessary instruments, you can procure a owner's policy of title insurance, * * * showing title vested in J. H. McGuire, a married man, or his nominee, * * * I agree to pay one-half of escrow fee, new owner fee, recording of deed, and transfer of fire insurance. Signature—J. H. McGuire. * * * The conditions as above are hereby approved. I will hand you papers necessary to vest title as above, excepting such papers as are to be executed by vestee, and you will use the money and record instruments to comply with foregoing instructions, and pay balance to the present record owner or order, after paying your charges and disbursements, and commission in the sum of 5 per cent of $2,000 to J. H. McGuire. Signature—Mildred Pearl Van Lew."

Neither Everett Cisco nor Mary Cisco, plaintiffs herein, were present at the time said instruction was signed, nor did they participate in the signing thereof. A deposit of $100 was made by McGuire in the form of a check.

In reference to the opening of the escrow, McGuire testified: that Everett Cisco said to him "Go ahead and open the escrow * * *"; that "when he (Cisco) paid me the $100 that was enough to know he meant business on the opening of the escrow and I had the right to open it"; that Cisco told him to buy it for him. Cisco corroborated this testimony. Three days after McGuire and defendant signed the escrow instructions above mentioned McGuire and Mr. Cisco went to the escrow office, signed and deposited therein the following instructions: "You are hereby authorized and instructed to vest the property described in your above-numbered transaction in the name of Everett Cisco and Mary Cisco, husband and wife, as joint tenants. All other instructions to remain the same. J. H. McGuire. The above is hereby approved. Everett Cisco."

The escrow was opened on Saturday, December 5, 1941, and provided for the full purchase price to be paid into escrow on demand before close of escrow. The escrow period, as fixed by the instructions, was 60 days. The evidence shows that a few days after opening the escrow a Mrs. Cohn made defendant an offer of $2,350 for the property. On January 24, 1942, defendant wrote the title company notifying them that she had rescinded all agreements of every kind and nature "made by her with J. H. McGuire for good cause. * * *" On January 27, 1942, Cisco paid the balance of the full purchase price of $1,900 into the escrow. On February 9, 1942, defendant demanded the return of all documents deposited by her into escrow and refused to complete the sale or to recognize the escrow instructions or to pay the real estate commission claimed by McGuire. On February 11, 1942, this action was filed and later came on for trial. After proving the above facts and offering the above-mentioned written documents in evidence, the plaintiffs rested their case. Defendant moved for a nonsuit on the ground that the plaintiffs had failed to prove sufficient facts to entitle them to recover. The court granted the motion apparently on the theory that the contract could not be enforced because the Ciscos were not bound by the contract, were not named as purchasers therein, could not be compelled to perform their part of it, and for that reason there was no

mutuality. From the judgment based upon the nonsuit plaintiffs appealed.

Appellants contend that the trial court erred in granting the motion because the contract is in writing subscribed by the party to be charged, describes the land to be conveyed, and names the consideration for which the defendant agreed to convey. Among other cases, they cite in support thereof Bird v. Potter, 146 Cal. 286, 79 P. 970; Steel v. Duntley, 115 Cal.App. 451, 1 P.2d 999; and also section 3388 of the Civil Code. It is claimed that in accordance with the foregoing authorities the contract in question contains all of the elements required by law to entitle it to be specifically enforced and that plaintiffs cannot be defeated because of lack of mutuality in the contract.

Respondent argues that specific performance may not be compelled (first) by one who claims to be a purchaser under an executory contract of sale required by the statute of frauds to be in writing, where the name or identity of a purchaser cannot be ascertained from the written note or memorandum of the contract subscribed by the party to be charged, and (second) that a mere nominee, appointed to receive title by a purchaser under a contract for the sale of real property, may not specifically enforce the purchaser's contract in the absence of an assignment to him of the purchaser's rights thereunder.

In discussing the first question presented, it becomes immediately apparent that the names of the plaintiffs Cisco are not mentioned in any manner or form as parties to or purchasers under the original escrow instruction. It provides in part, that "I, (J. H. McGuire) will hand you cash in the amount of $2,000, payable $100 on this date * * * and balance on demand before close of escrow—when you (Mrs. Van Lew) can procure" a policy of title insurance on the described property "showing title vested in J. H. McGuire, a married man, or his nominee." This is the agreement alleged in the complaint and under the terms of which the defendant granted to J. H. McGuire or his nominee the exclusive right to buy the property. A copy of the original instruction marked Exhibit A was attached to the complaint and by reference made a part thereof. The complaint alleges that by the instrument in writing (Exhibit A) J. H. McGuire authorized and instructed defendant "to vest the property * * * in the name of Everett and Mary Cisco * * * the nominees of said J. H. McGuire." The prayer of the complaint then asks that the agreements attached to the complaint (Exhibit A) be specifically performed according to the terms thereof, or for damages in the amount of $4,000. The answer to the complaint denies generally its allegations and alleges by way of affirmative defense that defendant was a woman without business experience and unaccustomed to handle business matters and imposed explicit trust and confidence in McGuire because he was a licensed real estate agent and depended upon him for information and advice in procuring a sale of her property at the best price obtainable; that at all times mentioned McGuire knew this fact and that for the purpose of inducing her to sign Exhibit A McGuire falsely and fraudulently represented to her that he had diligently endeavored to procure a sale of the real property upon terms set forth in the original listing; that he had only received an inquiry from one person interested in buying the property and that the best and only offer obtainable for the property was $2,000; that under these circumstances, she went to the office of the title company for the purpose of signing escrow instructions concerning the sale suggested; that McGuire did not disclose to her the name of the person he said was willing to purchase the property at $2,000, and represented to her that he could not remember his name; that he represented that it was unnecessary for her to know his name and that he would therefore sign Exhibit A as the apparent purchaser; that McGuire, during the time he was employed as her agent, received inquiries from other persons interested in the real property and received and knew of a bona fide offer from Mrs. Cohn in the sum of $2,350, and that he knew that said sale could have been readily made and that he fraudulently suppressed and concealed such fact from her; that McGuire was then and there secretly employed by and acting as agent for the Ciscos and falsely suppressed and concealed such fact from her and failed to make a full or any disclosure thereof; and that promptly after the discovery of such fact so concealed, she rescinded the escrow instruction marked Exhibit A.

Section 1558 of the Civil Code provides: "It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them."

[1, 2] In Irvmor Corporation v. Rodewald, 253 N.Y. 472, 171 N.E. 747, 748, 70 A.L.R. 192, the defendant employed a broker to secure a purchaser for his property, naming $30,000 as his price. The broker obtained a $25,000 offer for the property from plaintiff which he submitted to defendant and which defendant said he would accept. A formal contract was to be afterwards prepared. In the meantime, defendant himself signed his name to a memorandum which did not describe the name of the proposed purchaser. Thereafter defendant found a better bargain and backed out. A judgment for specific performance was reversed. The court, speaking through Mr. Chief Judge Cardozo, discusses most of the points involved in this appeal. It is there said: "There is a settled rule of law that a note or memorandum of a contract for a sale of land must identify by name or description the parties to the transaction, a seller and a buyer." (Citing cases.) The statute of frauds, sec. 1624 of the Civil Code, provides that the following contracts are invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent: "* * * 4. An agreement * * * for the sale of real property, or of an interest therein; * * *." In 23 Cal.Jur. p. 433, § 13, it is said: "Matters as to Which Certainty Required.—The requirement of certainty as to the agreement made in order that it may be specifically enforced extends not only to its subject matter and purpose, but to the parties, to the consideration and even to the place and time of performance, where these are essential." Citing Breckenridge v. Crocker, 78 Cal. 529, 21 P. 179. In that case it was held that when a contract of sale of real estate is evidenced by three telegrams, one from the agent of the owner of the property communicating a verbal offer, without naming the proposed purchaser; and second, from the owner to his agent, telling him to accept the offer; and a third from the agent addressed to the proposed purchaser by name, simply notifying him of the contents of the telegram from the owner, but not otherwise indicating who the purchaser was, the contract is too uncertain as to the purchaser to be enforced, or to sustain an action for damages for its breach. In that case it was held that the judgment granting a nonsuit was proper.

[3] The general rule stated in 25 Cal. Jur. p. 506, § 34, is that "a contract for the purchase and sale of real property must be mutual and reciprocal in its obligations. Otherwise, it is not obligatory upon either party. Hence, an agreement to convey property to another upon his making payment at a certain time of a named amount, without a reciprocal agreement of the latter to purchase and pay the amount specified, is unenforceable." See, also, 25 Cal. Jur. p. 503, § 32, and cases cited.

[4] Therefore, as between the Ciscos and defendant, Exhibit A, standing alone, does not identify or contain any reference to Ciscos as the purchasers under the claimed agreement, and lacking in this material element, an action for specific performance between them could not be successfully maintained under its terms and provisions. The subsequent escrow instruction given by McGuire to the title company (Exhibit B) is not alleged in the complaint to be any part of the written contract itself or any written note or memorandum subscribed by the defendant or by her agent. Nowhere in the complaint is it alleged, nor does it appear from Exhibit B itself, that the defendant ever subscribed Exhibit B or authorized McGuire to do so on her behalf.

[5] In California National Supply Co. v. Black, 48 Cal.App. 122, 191 P. 715, where a stockholder and officer of a defunct corporation whose stockholders were being sued, was agent therefor as well as for plaintiff's corporation, under such conditions it was held that the fact that the agent knew all about a transaction on both sides was not sufficient, under the law, to charge the plaintiff with such knowledge. Exhibit B on its face purports merely to authorize the title company to whom it is addressed to "vest the property * * * in the name of Everett Cisco and Mary Cisco, husband and wife, as joint tenants. All other instructions to remain the same." The Ciscos are not described therein as being either parties to the contract or purchasers thereunder, and nowhere therein do they assume any of the obligations of purchasers. On the contrary, the last sentence of the instruction: "All other instructions to remain the same", expressly excludes any inference that the Ciscos were intended to be substituted for McGuire or to be anything other than the persons to whom McGuire, for reasons of his own, desired title to be conveyed as his nominees or agents. Any other interpretation would be pure speculation. Breckenridge v. Crocker, supra. It

therefore follows that since it affirmatively appears from the complaint itself that the contract relied upon is alleged to be in writing, that Exhibit A is a copy of that contract, that Exhibit A is the only writing subscribed by defendant or by her authorized agent, and that the Ciscos cannot be identified either as parties or purchasers by reference to said Exhibit A, that therefore the alleged contract for the sale of the property involved, to the Ciscos, is uncertain and does not comply with the requirements of the Statute of Frauds and is not subject to specific enforcement.

[6] We will next discuss the right of propriety of appellant McGuire, while acting as the agent of defendant, Mrs. Van Lew, and while occupying such fiduciary relationship, to make any contract with her whereby he became the purchaser of the property, and whether Ciscos, as mere nominees under such an agreement, can compel specific performance.

There appears to be no uncertainty or ambiguity as to the sense in which the words "his nominee" are used. They mean simply that title is to be "shown" as vested either in McGuire himself or such person or persons as McGuire should designate to receive title in his behalf. By the second instrument (Exhibit B) McGuire merely authorized and directed the escrow holder to vest the property in the name of Everett Cisco and Mary Cisco, husband and wife, as joint tenants. "All other instructions to remain the same." Any intention to assign any rights to the Ciscos or substitute them as parties to the escrow is expressly precluded by the fact that all other instructions were to remain the same. McGuire parted with no other rights and assigned none to the Ciscos. As before, he was in exclusive control of the escrow so far as the purchaser's rights thereunder were concerned, and the Ciscos were but "his nominees". The word "nominee" in its commonly accepted meaning connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him.

[7] In Schuh Trading Co. et al. v. Commissioner of Internal Revenue, 7 Cir., 95 F.2d 404, 411, the court stated: "The word nominee ordinarily indicates one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another." In the absence of an assignment from McGuire to the Ciscos or some other effective substitution of the Ciscos for McGuire as the purchasers, no rights become vested in the Ciscos which they are entitled to assert on their own behalf independently of McGuire. At best, they are but nominal parties seeking to enforce some right or rights of McGuire and not their own, and therefore, the Ciscos have failed to establish any right or interest in the subject matter of the action which they, as mere nominees of McGuire, are entitled to have specifically enforced. If the Ciscos contend that they are entitled to relief in this action on the theory that they are nominees of McGuire, the burden is upon them to show, by competent evidence, that a valid contract existed for the sale of the property from defendant to McGuire through whom they must necessarily claim as his nominees.

[8] In Burke v. Bours, 92 Cal. 108, 112, 28 P. 57, 58, the court, quoting from section 959 of Pomeroy's Equity Jurisprudence, said: "* * * 'equity regards and treats the relation of principal and agent in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary,' and this rule is even more rigidly recognized by section 2322 of the Civil Code, which provides that 'an authority expressed in general terms, however broad, does not authorize an agent to do any act which a trustee is forbidden to do by article 2, c. 1, tit. 8, of this Code.' * * * And, referring to a sale made under these circumstances by an agent to himself, the author says: 'It will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial.'"

[9] The case of Allen v. Dailey, 92 Cal. App. 308, 268 P. 404, cited by appellants, can be distinguished from the instant case for the reason that there the agent was authorized to sell at a fixed price net to his principal, with the understanding that he was to be entitled to any excess over and above the net price as his commission, whereas, in the instant case, McGuire was employed on a straight commission basis of five per cent of the purchase price. In the

Allen case the court took the view that the agent had discharged his fiduciary duty when he obtained the net price required by his principal, and could, under such circumstances, be the purchaser himself, but carefully distinguished the rule applicable to ordinary agencies such as in the instant case. Even in that case the court said, at page 313, of 92 Cal.App., at page 406 of 268 P., that "It is doubtless true that if the agency be the ordinary one wherein the agent is employed to obtain for his principal the highest possible price for the property beyond a fixed minimum, for which service the agent is to be paid a commission on a percentage basis, fiduciary relations arise out of such employment which preclude the agent from becoming the purchaser of the property or acting for others and thus unduly profiting to the injury of his employer."

[10] Whether an agent may act as such for both parties seems to depend upon the circumstances of each case. The general rule is that an agent may represent both parties to a contract with their full knowledge and consent, but that where the agent represents the adverse party without his principal's consent, his contract is voidable at the option of the principal. California National Supply Co. v. Black, supra.

[11, 12] In some cases it has been held that it is a breach of trust for a person to act as agent both for the vendor and the vendee in the same sale. Hunsaker v. Sturgis, 29 Cal. 142; 1 Cal.Jur. p. 794, § 81. When one undertakes to deal with himself in different capacities, individual and representative, there is a manifest hostility in the position he occupies. Consequently, a contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent. Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 78 P. 550, 10 Am.St.Rep. 42, 1 Cal.Jur. p. 797, § 84. However, an agent and principal are not absolutely prohibited from dealing with each other in respect to the subject matter of the agency or trust, for the agent has the same right to deal directly with his principal as has a stranger in all their dealings with each other. The utmost faith is required and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly, and though an agent may contract wth his principal, yet the fact that a contract was made must be clearly shown, and the burden of showing it must rest upon the agent, and it must clearly appear that it was fair, just and reasonable, or the principal will not be bound. Burke v. Bours, supra; Rubidoex v. Parks, 48 Cal. 215; Paige v. Akins, 112 Cal. 401, 44 P. 66; Cury v. King, 6 Cal.App. 568, 92 P. 662; Hemenway v. Abbott, 8 Cal.App. 450, 97 P. 190; 1 Cal.Jur. p. 798, § 85 et seq.

[13, 14] The trial court was justified in concluding that if the Ciscos adopt the theory that the contract was between defendant and themselves then, not only does it affirmatively appear on the face of the complaint, but the evidence conclusively establishes that the only escrow instructions, subscribed by defendant, and relied upon as the note or memorandum sufficient to take the case out of the statute of frauds, are insufficient for that purpose for the reason that the names or identity of the Ciscos either as parties to the escrow or as purchasers thereunder cannot be ascertained by reference thereto. To that exent such escrow instructions are uncertain and inchoate and at best no more than preliminary steps in the ultimate transaction contemplated by the parties. If, on the other hand, they adopt the theory that the same escrow instructions constitute a contract between defendant and McGuire which the Ciscos seek to enforce as nominees of McGuire, then McGuire, by virtue of his fiduciary relation to the defendant, was prohibited from making any such contract with defendant, and the Ciscos, by virtue merely of having been designated by McGuire as his nominees to receive title, not only acquired no property right or interest in the subject matter of the action, but by claiming under McGuire as his nominees, stand in his same position with respect to the validity of any contract made between him and the defendant and are subject to all presumptions and defenses which might have been urged against him. We therefore must conclude that the trial court was justified in holding that the plaintiffs failed to prove a sufficient case to support a judgment of specific performance. The granting of the nonsuit as to all three plaintiffs was proper.

Judgment affirmed.

MARKS, J., concurs.

60 Cal.App.2d 732

PHELPS v. PRUSSIA et al.

Civ. 12513.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1943.

Hearing Denied Nov. 29, 1943.

1. Schools and school districts ⇐20

The Legislature may enjoin reasonable limitations upon local boards of education even when such boards are operating under a charter.

2. Municipal corporations ⇐8

Where San Jose city charter was adopted by the city voters and approved by the State Legislature, it had the status of an act of the legislature. St.1915, p. 1908.

3. Schools and school districts ⇐141(1), 146

Where statute providing for termination of permanent tenure of teachers was not to become effective for more than two years after its passage and the Legislature, in anticipation of its effective date, adopted a plan for a pension and retirement system for teachers, the statute was a part of a general plan of the state for the retirement and pensioning of teachers. School Code, § 5.505, added by St.1935, p. 1881.

4. Schools and school districts ⇐20

Where the Legislature delegates the local functioning of the school system to local boards, it does so with its constitutional power and responsibility for ultimate control for the common welfare in reserve. Const.Cal. art. 4, § 25, subd. 27, and art. 9, §§ 5, 6.

5. Municipal corporations ⇐79

The authority of the San Jose city charter is superior to general laws in all matters which are purely municipal affairs and controls in matters not necessarily municipal where not in conflict therewith, or in derogation of general laws, and where charter provisions are concurrent with and in line with legislative policy, they control in their local application.

6. Schools and school districts ⇐20

The school matters are not "municipal affairs" over which the authority of the San Jose city charter is superior to general laws, but may be made so by charter provisions, which are an act of the state, but only in promotion and not in derogation of the legislative school plans and purposes of the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affairs".

7. Schools and school districts ⇐20

The power of a municipality with regard to school matters can only run current with, and never counter to, the general laws of the states, touching the common school system, and all municipal charters must be subservient to such general laws if conflict arises.

8. Municipal corporations ⇐79

When a municipality has, under its charter, exercised powers not essentially municipal, and the state has subsequently adopted legislation which conflicts with the municipal exercise of power, the latter expires with the passage of such legislation.

9. Schools and school districts ⇐141(1)

The statute providing for termination of permanent tenure of teachers declared a general legislative policy and was intended to supersede existing conflicting laws, whether found in legislative acts or charter provisions. School Code, § 5.505, added by St.1935, p. 1881.

10. Schools and school districts ⇐141(1)

The San Jose city charter section relating to permanent school teachers is invalid as inconsistent with statute requiring retirement of certified school employees attaining the age of sixty-five years. St.1915, p. 1908; School Code, § 5.505, added by St.1935, § 1881.

11. Schools and school districts ⇐135(1)

The general character of the statutory and San Jose city charter teacher tenure provisions is of a limitation on the power of the employing board to discharge, rather than an extension of power to employ, and therefore the San Jose board of education is not authorized to create a binding and perpetual employment contract with a permanent teacher which is beyond the sovereign power of the state to avoid. St.1915, p. 1908; School Code, §§ 5.405, 5.406; § 5.504, added by St.1931, p. 1395; § 5.505, added by St.1935, p. 1881.

12. Constitutional law ⇐117

Generally, the reserve power of the state to enact general laws for the public

good and in pursuance of a public policy must be read into every contract or transaction concerned with public affairs, and it is an implied condition of such contract that its fulfillment may be frustrated by the proper exercise of legislative power.

13. Schools and school districts ⇐141(2)

Whether the rights of a school employee are contractual or statutory, they issue from the local board acting under its delegated and limited powers, and while the board may not terminate the relationship except as expressly permitted, the state is under no such limitation, and the employee enters into his so-called employment contract with the knowledge that it may be terminated by general legislative enactment. School Code, §§ 5.405, 5.406; § 5.504, added by St.1931, p. 1395; § 5.505, added by St.1935, p. 1881.

14. Schools and school districts ⇐141(2)

A teacher tenure created by municipal charter creates no more binding "contract" than would one created by an act of the legislature, when both deal with school affairs. St.1915, p. 1908; School Code, §§ 5.405, 5.406; § 5.504, added by St.1931, p. 1395; § 5.505, added by St.1935, p. 1881.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

15. Constitutional law ⇐102(1)

Under saving provisions of the school code, San Jose charter provision relating to permanent school teachers was not excepted from operation of section of school code providing for termination of permanent tenure of teachers, where saving provisions were not adopted as limitations on subsequent exercise of legislative power and one saving provision was passed at the same time as statute clearly negativing any intention of creating a vested right in teacher employment. St.1915, p. 1908; School Code, §§ 5.405, 5.406; § 5.504, added by St.1931, p. 1395; § 5.505, added by St.1935, p. 1881.

16. Schools and school districts ⇐141(2)

Where section of school code declared legislative policy that employment thereunder should be subject to legislative control and should not be deemed as creating an unimpairable contract, and written contracts were not required between teachers and boards of education and there was no statutory reference to the employment relationship as being one of definite contract, San Jose charter provision relating to permanent teacher tenure did not create in permanent teacher a contractual right to teach until removed for cause. St.1915, p. 1908; School Code, §§ 5.405, 5.406; § 5.504, added by St.1931, p. 1395; § 5.505, added by St.1935, p. 1881; U.S.C.A.Const. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16, art. 4, § 25, subd. 27, and art. 9, §§ 5, 6.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Petition by Mary M. Phelps against L. S. Prussia and others to compel defendants as individuals and as members of the Board of Education of the City of San Jose and the City Superintendent of Schools to reinstate petitioner as a permanent teacher and to pay her salary as such from the beginning of the fall school term of 1942. From a judgment denying the petition, petitioner appeals.

Affirmed.

David M. Burnett, Irvin A. Frasse, and Rea, Free, Jacka & Frasse, all of San Jose, for appellant.

John P. Fitzgerald, Dist. Atty., and Leonard R. Avilla, Asst. Dist. Atty., both of San Jose, for respondents.

WARD, Justice.

Petitioner appeals from a judgment of the trial court denying her petition for a writ of mandamus to compel the defendants, as individuals and as members of the Board of Education of the City of San Jose, and the City Superintendent of Schools, to reinstate her as a permanent teacher and pay her salary as such from the beginning of the Fall school term of 1942. Except for a stipulation as to the age of petitioner, and data on several other uncontested matters, no evidence was offered. The facts alleged in the petition, which were admitted in the answer, were found to be true.

The questions involved may be stated as follows: (1) What is the rule as to the validity or invalidity of a charter provision in the matter of tenure of office when subsequent legislation on the same subject has been enacted by the state legislature? (2) Does the charter provision create in an appointee a contractual right to teach in the municipality until removed for cause? (3) Is the contractual right, if

any, impaired in violation of the federal and state constitutions?

[1] In directing the preparation of findings the trial court, in a well-considered written opinion, disposed of all the questions. Several comparatively recent citations have been called to our attention, notably Fry v. Board of Education, 17 Cal. 2d 753, 112 P.2d 229, and Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593. In the Fry case, involving salaries, the defendants' authority to fix, regulate, etc., arose primarily from the provisions of the San Francisco charter. There the court, at page 757 of 17 Cal.2d, at page 233 of 112 P.2d, said: "'It must be conceded that, within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers.'" The quotation was approved in the Kacsur case. While the question of the amount of salary is not an issue herein, the above quotation is indicative that the legislature may enjoin upon local boards certain reasonable limitations even when those are operating under a charter. On the subjects of tenure, permanency, indefinite contracts, etc., see Lost Creek School Township v. York, 215 Ind. 636, 21 N.E.2d 58, 127 A.L.R. 1287 et seq. and Campbell v. Aldrich, 159 Or. 208, 79 P.2d 257.

The following views of the trial court covering the factual background and setting forth the law are adopted as the opinion of this court:

"The plaintiff herein, Mary N. Phelps, was a certificated teacher of the San Jose High School, continuously from 1906 until the close of the school year in 1942.

"On May 12, 1942, the San Jose Board of Education dismissed her in obedience to the provisions of Section 5.505 of the School Code of the State which provides for the termination of permanent tenure of teachers at the end of the school year in which they attain the age of sixty-five years.

"The plaintiff was sixty-five years of age on November 19, 1941.

"No question is, or has been, raised concerning Miss Phelps' qualifications or abilities. She is conceded to be physically vigorous—mentally alert—and an excellent teacher. Apparently no cause existed for her dismissal, other than her age and the operation of the section of the School Code above cited.

"She has brought this action against the defendants—the officials of the San Jose Unified School District—for a writ of mandamus, to compel her re-instatement in her former position.

"Her contention is that she acquired a permanent tenure as such teacher under the provisions of the Charter of the City of San Jose, and that a contractual relation between her and the School District resulted, which was beyond the power of the District, the Legislature or the State to impair.

"As it will be necessary to examine this contention in its various aspects and implications, it may be useful to first review, historically, the various public acts which may have a bearing on the inquiry.

"1. The United States Constitution—Art 1, Sec. 10, Subd. 1—forbids any state to pass any law impairing the obligation of contracts.

"2. The Constitution of the State of California—Art. 1, Sec. 16—provides that no law impairing the obligation of contracts shall ever be passed.

"3. By Sections 5 and 6 of Art. IX of our State Constitution, the Legislature is charged with the duty to provide for a system of free common schools, and vested with broad powers in relation thereto.

"4. Subd. 27, Sec. 25, Art. IV of the same constitution forbids the Legislature to pass any local or special law providing for the management of common schools.

[2] "5. In 1915 the City Charter of the City of San Jose was adopted by the voters of the City, and approved by the State Legislature. In a legal sense, it has the status of an act of the Legislature.

"In the charter was contained these provisions (Section 127 [St.1915, p. 1908]):

"'Teachers during the first two years of service in the Department and all special teachers shall be subject to annual election.

"'After two years of service all teachers, other than special teachers, and including deputy or assistant superintendents, shall be classed as permanent teachers and shall hold office until removed for cause upon the recommendation of the superintendent and the vote of a majority of the board; such vote to be by ayes and noes and recorded in the minutes.'

"Prior to the adoption of the City Charter, the Legislature, pursuant to its duties under the constitution, had established systems of public schools, and provided for their support and management. In general, the selection of teachers, and the conduct of the schools were delegated to the boards of the local school districts. These provisions of law were changed from time to time, by the amendment—or repeal of them, and the additions of new provisions.

"At the time of the adoption of the City Charter, no general tenure law had been passed by the State; and the provisions contained in Section 127 of the Charter were not in conflict with, in derogation of, nor covered by, any other act or law of the State.

"6. In 1921, the Legislature passed some amendments to the school laws, creating for the first time a state-wide tenure for public school teachers. These provisions were very similar to the charter provision above quoted.

"7. In 1929, the Legislature passed and adopted the School Code, wherein all general school laws were codified, and all other outstanding school laws were repealed.

"The general tenure law was re-adopted; and there were enacted, and included in the new school code, these two quite important sections:

"'Sec. 5.405—Nothing in this Part shall be construed so as to repeal or negate any provisions concerning employees of school districts contained in the charter of any city, county, or city and county, heretofore or hereafter adopted and approved in conformity with Article XI of the constitution of this state.'

"'Sec. 5.406—All employments under the provisions of this Part shall be subordinate to the right of the Legislature to amend or repeal this Part or any provision or provisions thereof at any time, and nothing herein contained shall ever be held, deemed or construed to confer upon any person employed pursuant to the provisions hereof a contract which will be impaired by the amendment or repeal of this Part or of any provision or provisions thereof.'

"8. In 1931, the Legislature passed another section of the School Code as follows:

"'Sec. 5.504—Nothing in this article shall be construed as affecting any permanent employee classified as such at the time this section takes effect nor shall any decrease in the average daily attendance of any school district operate to deprive any permanent employee of the district of his classification as such.'

"9. The section of the School Code under which the defendants herein undertook to act, in the dismissal of Miss Phelps, was passed by the Legislature in 1935, and reads as follows:

"'Sec. 5.505—Excepting in districts situated within, partly within, or coterminous with the boundaries of a city, or city and county, where the charter, if any, of such city, or city and county provides an age at which employees, including certificated employees of such districts, shall be retired, when a permanent employee reaches the age of sixty-five years, or if a permanent employee has reached the age of sixty-five years, the permanent classification of such employee shall cease and thereafter employment shall be from year to year at the discretion of the governing board; provided that any certificated employee who is not reemployed under the provisions of this section, and who has not completed the requirements for full retirement salary, shall be deemed to have been retired on account of physical disability within the meaning of the provisions of this code relating to retirement of certificated employees of school districts. Provided that the effective date of this section shall be September 1, 1937.'

"It will be noted that this section was not to become effective for more than two years after its passage.

"In anticipation of its effective date, and prior thereto, the Legislature adopted a plan for a pension and retirement system for school teachers throughout the State.

[3] "It may be taken, then, that the section of the school code under particular consideration here (Sec. 5.505) is a part of a general plan of the State for the retirement and pensioning of school employees.

"In her attack on the action of the defendants in the instant case, the plaintiff undertakes to show that she has a contract of employment which is beyond the reach of this legislative enactment. Let us see how sound are her reasons for this contention.

"Her employment was effected by the local school board. If the contract she claims was one between herself and the school district, it must have been by virtue of the provisions of Section 127 of the City Charter. That charter was effective in school matters only because it had the legislative approval.

"This control of school matters was placed by our State Constitution in the Legislature.

[4] "Where the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, it does so, always, with its constitutional power and responsibility for ultimate control for the common welfare in reserve.

[5] "The authority of the City Charter is superior to general laws in all matters which are purely municipal affairs. The charter will likewise control in matters not necessarily municipal where not in conflict with, or in derogation of general laws. Also where charter provisions are concurrent with and in line with legislative policy, they will be construed to control in their local application.

[6] "Now, school matters are not municipal affairs. They may be made so by charter provisions (which, in the final analysis, is an act of the State), but only in promotion and not in derogation of the legislative school plans and purposes of the State.

[7] "The power of a municipality in this regard can only run current with, and never counter to, the general laws of the State, touching the common school system. To such general laws, if conflict arises, all municipal charters must be subservient.

[8] "When a municipality has, under its charter, exercised powers not essentially municipal, and the State has subsequently adopted legislation which conflicts with the municipal exercise of power, the latter has been held to expire with the passage of such legislation.

"It has never been held, so far as I have been able to read, that the Legislature, in approving municipal charters, or in conferring power and authority on local boards, bodies, districts, or political subdivisions, in relation to school matters, divested itself of the power of ultimate control, vested in it by the Constitution.

"Plaintiff cites Stern v. City of Berkeley [25 Cal.App. 685, 145 P. 167] as authority for the proposition (italicized in her brief) that a charter provision must be upheld unless it be shown to have been *at the time of its enactment,* repugnant to and inconsistent with existing fundamental law. The underscored phrase was obiter dicta, and unfortunate, as it is at variance with the weight of authority. The case was decided on quite a different theory, and affords no help in the present situation.

"It is my considered opinion that Section 127 of the San Jose Charter was not repugnant to, or in conflict with, the general law of the State, when the charter was adopted; and that the same was effective and controlling so long as it so remained.

* * * * *

[9] "As I have hereinbefore pointed out, the passage of Section 5.505 of the School Code was a part of a general statewide plan of the Legislature for retirement and pensioning of certificated school employees. It declared a general legislative policy. It terminated the power of all school boards and bodies, including boards acting under municipal charters, to continue the employment of such employees after the close of the school year in which they attain the age of sixty-five years, except, at their discretion from year to year. With that exception, it required the retirement of such employees.

"Whatever may have been the legislative intention in the various amendments of and additions to the school code, before this section was passed, there can be no doubt that it was intended to have general effect, and to supercede all existing laws, whether found in legislative acts or charter provisions, or elsewhere, which might conflict therewith.

[10] "The plain purport of this section, considered in the light of the general plan, of which it forms a part, it thus seen to be clearly inconsistent with the provisions of Section 157 [127] of the San Jose Charter.

"Put the plaintiff claims that the legal result of her continued service through the years when the charter provision was effective, was the creation of a contract between her and the school board, which could not be thereafter voided against her will, except for cause.

"While some cases in this State have referred to tenure rights of school employees as contracts, or contractual rights, or vested rights, the terms have generally been

loosely used, and without attempt to make particular and specific application of their use. . . . In actual practice, no formal contracts have ever been drawn or signed or entered into. The law has never authorized such; nor can there be found anywhere in statutes or charters, a suggestion of formal contracts with school employees. Indeed, the only place in the school law, so far as I can recall, where such a contract is even mentioned, is in the section of the School Code number 5.406, which expressly negates the idea of contract.

"Of course, in a broad sense, when a teacher is employed, a simple contract between employer and employee results, but into that relationship enter so many elements and conditions which neither employer nor employee can control, that it would be difficult to abstract such a contract.

[11] "The general character of these tenure provisions—statutory and charter—is that of a limitation on the power of the employing board to discharge, rather than an extension of power to employ. All of the California cases which have been cited have dealt with the subject from this point of view. And certainly this does not argue a power in a local board to create a binding and perpetual contract which is beyond even the sovereign power of the State to avoid.

[12] "It is a general principle that into every contract or transaction concerned with public affairs, must be read the reserve power of the State to enact general laws for the public good, and in pursuance of a public policy. It is an implied condition of every such contract that its fulfillment may be frustrated by the proper exercise of legislative power.

[13] "But whether the rights of the school employee be termed contractual or statutory, they issue from the local board, acting under its delegated and limited powers. While the board may not terminate the relationship except as expressly permitted, the State is under no such limitation; and the employee enters into the contract—if one can call it such—with the knowledge that it may be terminated at any time by general legislative enactment.

"Some California cases have been cited, in which expressions are used indicative, it is claimed, of a holding that tenure creates binding contracts and vested rights. Without mentioning all of them, I cite two of these cases as illustrative:

"In Klein v. Board of Education, 1 Cal.2d 706 [37 P.2d 74], this expression was used, 'Of course, any tenure previously acquired by respondent was a vested right and remained unaffected by such repeal.' Page 708 [of 1 Cal.2d, page 75 of 37 P.2d]. A reading of this decision will quickly demonstrate that the use of these expressions was unnecessary to the decision, or else were used in only such sense as would be justified by the circumstances of the case.

"In the Klein case, the plaintiff had attained tenure under the provisions of a statute which was repealed by the adoption of the School Code; but in the very act adopting the code, was contained a saving clause (Sec. 5 [Preliminary Provisions] of the same code) which provided that 'all persons who, at the time this Code takes effect, hold office under any of the statutes repealed, shall continue to hold the same according to the tenure thereof.' Obviously then, Klein retained her position, not because she had a 'vested right' to it, but because the repealing statute specifically preserved her tenure.

"This same reasoning is equally applicable to the case of Gastineau v. Meyer, 131 Cal.App. 611 [22 P.2d 31], cited in the Klein decision, and in which again the expression 'vested right' is similarly used.

"The term 'vested right' is too often loosely used. In one sense, every right is vested. If a man has a right at all, it is vested in him; otherwise how could it be his right? It may, of course, be a right fixed and defined at the time, but subject to being defeated or vacated by future contingency; or it may be a right fixed for all time–as immutable as the laws of the Medes and the Persions. But a right, whether it be of such a fixed character, or otherwise, must be a right to something. And when one speaks vaguely of her 'vested right', it induces to clarity to inquire, 'A vested right to what?' The answer to such a question in the Klein case would be 'to continue in my employment under the law as it now exists.' And a similar answer would be made to such an inquiry in the Gastineau case. Certainly there is no situation, either factual or legal, in either case, which would justify the answer 'such a vested right to continue in my employment as is beyond the utmost of the reserve power of the Legislature to terminate.'

"Yet such is the answer which the plaintiff in the instant case must make to such an inquiry, and she offers the authority of the Gastineau and the Klein cases, in partial support of her position. To my mind they are not convincing. Nor can I find in any of our State authorities any satisfactory evidence of such a view.

"A situation, very similar to that here being considered, and involving all of the major points of this case, was before the upper Courts in Taylor v. Board of Education, 31 Cal.App.2d 734 [89 P.2d 148]. This decision was by the Appellate Court, in the Fourth District, and had the approval of the Supreme Court, in an order of the latter tribunal denying a hearing therein.

"In the Taylor case, the plaintiff had been employed as a teacher in the San Diego High School, continuously from 1918. He had acquired a permanent tenure as such teacher, and held that classification until the same was terminated by the school district board in 1938. This action was taken in pursuance of Section 5.505 of the School Code, as Taylor had reached the age of 65 years before that time.

"As in the present case, the action of the board was there challenged, on the same grounds that are herein urged, with the single exception of the charter element, which was absent in the Taylor case.

"On every other question raised here, the Court in the Taylor case ruled against the plaintiff's contention.

[14] "With respect to the element of the charter provision here, it would seem that a tenure created by a municipal charter would be no more sacred, or create any more binding contract, than would one created by an act of the Legislature, when both dealt with school affairs.

[15] "The suggestion that the Legislature intended to except charter provisions from the operation of this section, is obviously without support. Both Sections 5.405 and 5.504 of the School Code were adopted as saving provisions at the time, and not as limitations on the subsequent exercise of legislative power. This was discussed and determined in Chambers v. Davis, 131 Cal.App. [500] 501 [22 P.2d 27].

"Incidentally, it would appear to be somewhat significant of the legislative intention that Sections 5.405 and 5.406 were passed at the same time—the latter clearly negating any intention of creating a vested right.

"Finally, the plaintiff here urges with great earnestness that the case of [State of] Indiana ex rel. Anderson v. Brand [303 U.S. 95, 58 S.Ct. 443], 82 L.Ed. 685 [113 A.L.R. 1482], is determinative of her rights in the premises.

"Three times the United States Supreme Court has recently passed upon the application of Art. I, Sec. 10, Subd. 1, of the Federal Constitution to State school matters. In Dodge v. Board of Education [302 U.S. 74, 58 S.Ct. 98], 82 L.Ed. 57, and Phelps v. Board of Education [300 U.S. 319, 57 S.Ct. 483], 81 L.Ed. 674, it was held that State statutes which changed a teacher's tenure or retirement payment did not violate the constitutional inhibition against the impairment of contracts; while in the Anderson case, supra, a contrary holding was made.

"Strangely enough, all three decisions were written by Mr. Justice Roberts.

"Plaintiff here attempts to distinguish the cases on the theory that the Dodge and Phelps cases arose in states where the status of a teacher was that of an officer (Illinois and New Jersey), while the Anderson case arose in a state (Indiana) where a teacher's status was that of an employee, as in California.

"Such a distinction may well have been made, as plaintiff's relation of the facts in that respect appears to be accurate; but the learned Justice who wrote the decisions did not make that distinction.

"A careful comparison of the Dodge and Anderson decisions, both written by the same Justice at the same term of court, discloses a much more substantial reason for the difference in results between these two cases.

"Quoting from the Dodge case [302 U.S. 74, 58 S.Ct. 100, 82 L.Ed. 57]: 'In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state, the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. This is true also of an act fixing the term or tenure of a *public officer* or an *employe* of a state agency.'

"(It will be noted that in the last sentence quoted, an officer or employee of the state are placed by the learned Justice in the same category.)

"Continuing the quotation: 'The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.'

"Turning now to the Anderson case upon which this plaintiff relies, compare with the above these quotations [303 U.S. 95, 58 S.Ct. 446, 82 L.Ed. 685, 113 A.L.R. 1482]: 'The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy.'

"The decision then proceeds to examine the act involved, to determine therefrom the intention of the Legislature. Quoting again: " 'The State long prior to the adoption of the act of 1927 required the execution of *written contracts* between teachers and school corporations, specified certain subjects with which such contracts must deal, and required that they be made a matter of public record. * * * The title of the act is couched in terms of contract. It speaks of the making and canceling of indefinite contracts. In the body the word "contract" appears ten times in section 1, defining the relationship; eleven times in section 2, relating to the termination of the employment by the employer, and four times in section 4, stating the conditions of termination by the teacher.

" 'The tenor of the act indicates that the word "contract" was not used inadvertently or in other than its usual legal meaning.'

"From these quotations it would appear to be the view of the learned author of those two decisions that, as stated in the Dodge case, 'If it (the statute) provides for the execution of a written contract on behalf of the state, the case for an obligation binding upon the state is clear'; and, as found in the Anderson case, that there the statute did provide for a written contract on behalf of the State, and hence, in that instance, and for that reason that an obligation binding on the State resulted. More than this I am unable to get out of the Anderson case.

[16] "Compare, then, the situation as we have it in California, with that detailed as affording the basis of the Anderson decision, in Indiana. In no one element are the cases similar. Here there are no written contracts,—no statutory requirements for explicit and written contracts, no requirement for public recordation of the contracts, no reference to the relationship as being one of definite contract; and, finally, here we have a broad, definite and unqualified declaration of the legislative policy, in Section 5.406 of the School Code, that employment thereunder should be subject to legislative control and should never be deemed or construed as creating an unimpairable contract."

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.



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HELLER v. MELLIDAY.

MELLIDAY v. HELLER et al.

No. 12328.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1943.

Hearing Denied Nov. 29, 1943.

1. Appeal and error ⇐930(1)

On appeal from judgment for respondent, all conflicts in testimony would be resolved in favor of respondent.

2. Fraud ⇐64(1)

Whether lessee of apartment house established actionable fraud on part of lessor, so as to entitle lessee to recover damages in lessor's unlawful detainer action, was for jury.

3. Fraud ⇐64(1)

The question of waiver of right to sue for fraud is, primarily, one of fact.

4. Fraud ⇐64(1)

Whether lessee of apartment house waived her right to sue for fraud of lessor in misrepresenting condition of apartments and amount of rental collectible was for

jury under evidence that following disclosure of fraud lessee was ill.

5. Fraud ⇐35

Apartment house lessee's knowledge during first four months of tenancy that lessee had been deceived did not necessarily deprive lessee of right thereafter to sue for fraud upon discovery that another material representation regarding roof and walls was false.

6. Fraud ⇐62

In lessor's action in unlawful detainer to recover possession of and to collect unpaid rental for apartment house, wherein lessee filed a cross-complaint for fraud in misrepresenting condition of apartments and amount of rental collectible, evidence sustained award of $2,000 damages in favor of lessee.

7. Fraud ⇐64(1)

In lessor's unlawful detainer action wherein lessee filed a cross-complaint for fraud, award of punitive damages to lessee was for jury.

8. Appeal and error ⇐930(1)

Where, under pleadings, it was within province of jury to award punitive damages, and a general verdict for damages was rendered, and trial court in conditional order reducing amount thereof made no segregation, it could not be said that no portion of final award represented allowance of punitive damages.

9. Landlord and tenant ⇐290(5)

Generally, neither counterclaim nor cross-complaint is permissible in unlawful detainer action, but counterclaim or cross-complaint may be maintained where it appears that prior to joining of issues of fact tenant has voluntarily surrendered possession of the premises.

10. Landlord and tenant ⇐290(5)

Lessee, who in answer to unlawful detainer action contested lessor's right to possession but who thereafter surrendered premises, was not precluded from filing a cross-complaint for damages for fraud, since surrender of premises eliminated question of recovery of possession.

11. Landlord and tenant ⇐290(5)

An apartment house lessee did not incapacitate herself from making a valid surrender, so as to be precluded from filing a cross-complaint in lessor's unlawful detainer action, by accepting rent from an occupant of one of apartments which entitled occupant to remain until after date of surrender.

12. Appeal and error ⇐1066

In unlawful detainer action wherein lessee filed a cross-complaint, general instruction, which contained statement that it was admitted that lessee surrendered possession, was not prejudicial notwithstanding it was not so admitted, where evidence conclusively showed that such was the fact.

13. Trial ⇐228(3)

In unlawful detainer action wherein lessee filed a cross-complaint for fraud, instruction that jury could award damages to lessee in such amount as "in your judgment feel" lessee had suffered was not erroneous for use of word "feel," since it was intended to be used synonymously with word "believe".

See Words and Phrases, Permanent Edition, for all other definitions of "Believe" and "Feel".

14. Fraud ⇐65(1)

In unlawful detainer action wherein lessee filed a cross-complaint for fraud, instruction based on lessee's theory that a relation of trust existed between lessor's agent and lessee was not erroneous, where there was some testimony in support of such theory.

15. Trial ⇐296(1)

An instruction was not erroneous where, if considered with others given on the subject, no error appeared.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Martin J. Heller against May Melliday, also known as May Meliday, in unlawful detainer to recover possession of and to collect the unpaid rental for an apartment house, wherein defendant filed a cross-complaint against plaintiff and Lily G. Barron to recover damages for cross-defendants' alleged fraud. From a judgment, plaintiff and cross-defendants appeal.

Affirmed.

Samuel M. Samter and J. J. Posner, both of San Francisco, for appellants.

Worthington, Park & Worthington and Leonard A. Worthington, all of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Martin J. Heller, brought this action in unlawful detainer to recover possession of and to collect the unpaid rental for an apartment house in San Francisco, which he had leased to the defendant May Melliday. By leave of court the defendant filed an amended answer and a cross-complaint for damages, bringing in a new party to the action, namely, Lily G. Barron, plaintiff's sister. The cross-complaint was based on allegations to the effect that the cross-defendants had procured the lease through false representations made prior to and at the time of entering into the lease. The trial was by jury, and a verdict was returned against the cross-defendants for $4,250. Judgment was entered accordingly, but on motion for new trial a conditional order was made reducing the amount of damages to $2,000. The cross-complainant consented to the reduction, and the cross-defendants appeal.

The lease was in writing, and dated January 22, 1940. It provided for a five year term and called for the payment of a monthly rental of $235 up to July 1, 1940, and thereafter at $245 a month. As part of the same transaction the lessee purchased the apartment house furnishings for $1,200, made a payment thereon of $600, and as security for the payment of the balance and the monthly rentals as they fell due under the lease she gave the lessor a chattel mortgage on the furniture. She took possession on February 1, 1940, and thereafter operated the apartment house for 18 months; but she paid the rent for the period covering only the first 14 months; and at the end of the succeeding four months the lessor brought the action in unlawful detainer to obtain possession and recover the unpaid four months rent amounting to $980. The complaint was filed July 19, 1941, and on July 24th the lessee filed a demurrer. On July 29th the lessor obtained an order appointing a receiver, and on July 31st the lessee delivered the keys to the premises to the receiver. On August 2nd the lessee filed an answer to the complaint denying that she was in possession under the terms of the lease or that she was then unlawfully detaining the premises. In support of such denials she alleged in substance that the lessor had failed to perform certain conditions precedent to the execution of the lease, among them being to put the entire premises in a habitable condition; that as a consequence of such failure "the minds of the parties had never met, and the consummation of said lease by the affixing of the signatures of the parties thereto was a nullity"; that in those circumstances she was liable only for the reasonable rental of the premises; that she had already paid more than that amount, and that on July 1, 1941, she was entitled to a credit of $395. She therefore asked that the relief sought by plaintiff be denied, that an accounting be had, and that the court determine the amount of credit then due her. However, four days later and on August 6th she caused to be served on the lessor written notice of the surrender of the premises; and on August 25th by leave of court she filed the amended answer and her cross-complaint for damages, bringing in as a new party to the action Mrs. Barron, who for two years had been operating the apartment house for her brother under a power of attorney, and who had participated in the negotiations which brought about the execution of the lease. Answering the cross-complaint appellants denied all charges of fraud and interposed several special defenses, including waiver, estoppel, and that it was not a proper cause for the filing of a cross-complaint.

[1] One of the several grounds urged for reversal is insufficiency of the evidence to sustain the judgment, the main contention made in this behalf being that no actionable fraud was established, that most of the representations relied upon concern matters of opinion, and that respondent had suffered no damage as a result thereof; also that assuming, but not conceding, that there was fraud in procuring the lease, respondent after the discovery of the fraud waived the right to sue therefor by remaining in possession for some 14 months, paying the rent, collecting the rentals from the subtenants and requesting and receiving favors from the lessor. Resolving all conflicts in the testimony in favor of respondent, we are of the opinion that the evidence is legally sufficient to support the adverse implied findings on the foregoing issues.

The negotiations for the leasing of the premises were initiated in this way: The respondent, Miss Melliday, and her sister, Mrs. Fowlie, for a number of years had been engaged in the business of leasing and operating apartment houses in San Francisco, and respondent desired to acquire the lease of another apartment house. She was ill at the time, and so her sister looked about to select a suitable one for her. The

Heller apartment house was located on California street between Jones and Leavenworth, and contained 12 apartments. As stated, Mrs. Barron was operating the same for her brother, who was then in New York. It had not been advertised for sale or lease, but Mrs. Fowlie, observing it from the outside, thought it might be suitable for their purpose, and she went in and inquired of Mrs. Barron if the owner would consider leasing it. Mrs. Barron replied that she would get in touch with her brother and let them know. Shortly afterwards Heller arrived in San Francisco and thereafter negotiations were carried on which resulted in the execution of the lease. During these negotiations Mrs. Fowlie and respondent inspected part of the premises and three of the apartments, including apartment 12. The negotiations continued for several days, and it was while they were being carried on that the misrepresentations were made. In part they were that the premises were in good shape; that the roof, plumbing and side walls were in excellent condition; that the entire exterior was then being painted and would be completed after the lease was signed; that all of the apartments were in perfect condition and required no repairs as they had just been redecorated; that all of them were furnished similar to apartment 12 which had been shown to respondent. In this connection the evidence shows that respondent asked permission to inspect some of the other apartments, but was told by Mrs. Barron that she did not want to disturb the tenants, and that she asked them to take her word for it, to trust her, that she would promise them and see to it that everything was satisfactory. It was further represented that all of the apartments were occupied; that the total amount of monthly rentals received therefrom was $422.50 and that this amount could be easily increased by $40 a month; that the expenses of operation amounted to only about $58 a month, and that if all but one of the apartments were rented respondent would be able to clear a monthly profit for herself of $95 and that with all of the apartments rented the profit would exceed $135 a month.

However, after taking possession respondent ascertained that the total monthly rentals received were much less than the sum represented, that they averaged less than $340 a month, and that the operating expenses exceeded the amount represented, so that during her entire occupancy of the premises she was able to make bare expenses; that only one month did she make more than $11. In this connection there is evidence showing that while the negotiations were being carried on Mrs. Barron had instructed one of the tenants who was about to vacate to avoid meeting respondent or talking with her, in return for which Mrs. Barron gave the tenant free rent to remain in the house until after the lease was signed. Moreover, shortly after respondent took possession, three of the tenants moved out, and Mrs. Barron knew, before the lease was signed, that they were about to leave. After the tenants had gone respondent was afforded the opportunity to inspect the apartments they had vacated, and found them to be in bad condition. Among other things the walls and ceilings were in such bad shape that the apartments were not fit to re-rent; and the furnishings therein were far inferior to those in apartment 12; consequently respondent at much expense to herself had to redecorate the apartments and fix them up before they could again be rented, one of them remaining vacant for five months. Later on respondent learned that the other apartments were in bad condition and had to be repaired and redecorated. In all she had to do over nine out of the twelve apartments, at an expense to her of $150 apiece. Furthermore, soon after respondent took possession, the painting of the exterior stopped, and finally in the early spring of 1941 the rain came through the roof and the side walls into nine of the apartments.

Meanwhile and during the first few months of her tenancy respondent and her sister complained to Mrs. Barron, who continued to live in the apartments, but Mrs. Barron did nothing about it; and when in the early spring of 1941 the rain came through the roof and side walls, she again complained to Mrs. Barron, who then moved out of the apartments, and referred respondent to the agents of the premises. Respondent demanded of them that the premises be put in an inhabitable condition, but nothing was done, and so in May, 1941, respondent began withholding the rent. Finally repairs were made, but shortly after they were completed respondent was served with notice of eviction, which was immediately followed by the filing of the action in unlawful detainer.

[2] In view of the foregoing facts and circumstances we are of the opinion that it cannot be held as a matter of law and contrary to the conclusions reached by the

jury and the trial court, that a case of actionable fraud has not been established, or that respondent by her acts and conduct waived her right to sue for damages sustained as a result of the fraud.

[3-5] Appellant points out that it was during the first four months of her tenancy that respondent ascertained that the condition of the apartments and the amount of rentals received therefrom were not as represented, and that notwithstanding she made complaint at the time she continued in possession and to operate the apartment house and pay the rent for approximately a year. However, the evidence shows that during all of that time and up to the spring of 1941 respondent was seriously ill and much of the time was confined to her bed or to her apartment, and she stated that it was because of her illness and the fact that she had invested a large sum of money in fixing up the apartments and refurnishing them with some of her own furniture that she thought she would try to continue on; but that when in the spring of 1941 she discovered that the roof and walls were in such disrepair that the rain began coming through into nine of the apartments, she concluded to do something about it. The jury and the trial court evidently accepted and acted upon her explanation; and since the question of waiver of the right to sue for fraud is primarily, at least, one of fact (French v. Freeman, 191 Cal. 579, 217 P. 515), we cannot say here, as a matter of law, that respondent intended to and did waive her right to sue for the fraud. In any event, she did not ascertain that the representation concerning the roof and walls was false until early in the spring of 1941, when the rain came through in nine of the apartments; therefore, even though prior thereto she had learned of certain conditions indicating that she had been deceived, such knowledge did not necessarily deprive her of the right afterwards to sue for fraud upon the discovery that another material representation upon which she relied was false. Shearer v. Cooper, 21 Cal. 2d 695, 134 P.2d 764; Kramer v. Musser, Cal.App., 136 P.2d 74. The facts of the cases cited by appellants on this issue are essentially different from those here presented, and for that reason we do not deem them in point.

[6-8] We are of the opinion also that accepting as true the evidence adduced in behalf of respondent, it is legally sufficient to sustain an award of damages in the sum of $2,000. It is true that during the time respondent was operating the apartment house the total gross income therefrom was approximately $6,100 and that the amount of rent paid the lessor during that same period was only $3,370. But as already pointed out, there is the testimony of respondent that after paying the operating expenses, there was only one month that she cleared more than $11; whereas, based on itemized statements shown respondent during the negotiations for the lease, it was represented that the net earnings would range from $95 to $135 a month. Furthermore, the evidence in behalf of respondent shows that as a direct result of the misrepresentations as to the condition of the apartments, and in order to make them rentable, she was obliged to fix over nine of them at a cost to herself of $150 apiece. Then, again, under the pleadings it was within the province of the jury to award punitive damages; and since a general verdict for damages was rendered, and the trial court in its conditional order reducing the amount thereof made no segregation, it cannot be said that no portion of the final award did not represent an allowance of punitive damages.

[9] Appellants urge also, as one of their main points, that it was error for the trial court to grant leave to file a cross-complaint for damages, bringing in a new party, subsequent to the filing of the original answer. The contention is without merit. It is doubtless the general rule that neither a counterclaim nor a cross-complaint is permissible in an action in unlawful detainer (Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann.Cas.1916D, 370; Schubert v. Lowe, 193 Cal. 291, 223 P. 550), the purpose of the rule being to prevent tenants who have violated the covenants of their leases from frustrating the extraordinary remedy provided by statute for the restitution of the premises (Smith v. Whyers, 64 Cal.App. 193, 221 P. 387). But the courts have held that such rule is not absolute, and that a counterclaim or cross-complaint may be maintained where it appears that prior to the joining of the issues of fact the tenant has voluntarily surrendered possession of the premises and the issue of possession is thus removed from the case (Samuels v. Singer, 1 Cal.App.2d 545, 36 P.2d 1098, 37 P.2d 1050; Servais v. Klein, 112 Cal.App. 26, 296 P. 123, 127); and this is such a case. As already pointed out, on July 31, 1941, respondent turned over the keys to the re-

ceiver and moved away from the premises; and on August 6, 1941, she caused to be served on the lessor a written notice of surrender of the premises. Thus it appears that so far and as completely as was possible for her to do so, respondent at the time she asked leave to file the cross-complaint had relinquished possession of the property and, so far as the unlawful detainer action was concerned, joined issue only on the question as to whether she was liable for the payment of the four months rent. In that state of the pleadings it cannot be said that the filing of the cross-complaint in any manner frustrated the lessor's remedy for the restitution of the premises.

[10] Appellants argue that since it appeared from the allegations of respondent's original answer that she was contesting the lessor's right of possession she was precluded thereafter from filing a cross-complaint even though prior to the filing thereof there had been an actual surrender of the premises and it so appeared from the allegations of the amended answer. As said, however, in Servais v. Klein, supra, the rule that a cross-complaint or counterclaim may not be interposed in an action in unlawful detainer is an exception to the general rule allowing such pleadings to be filed in other cases, and that the exception "should not be extended beyond the reason which lies behind it. That is, the exception should not be invoked to nullify the general rule in cases where there is no basic reason for the existence of the exception"; and the court then went on to point out that the denial of leave to file a cross-complaint or counterclaim would necessarily result in a multiplicity of suits because in any event the cross-complainant is entitled to enforce his rights in an independent action, and that therefore such leave should not be denied "except in those cases in which it is necessary, upon reason, to enforce the rule against the filing of pleadings by defendants asking affirmative relief." Here the record shows that before the issues of fact were finally joined in the unlawful detainer suit and long prior to the commencement of the trial of the action, respondent had actually turned over the possession of the premises to appellants' agents, which eliminated the question of the recovery of possession from the unlawful detainer action and in effect resolved that action into one for the recovery of the unpaid rent. That being so, there would be no legal reason for requiring respondent to prosecute her claim for damages in an independent action.

[11] Relying on the case of Greene v. Kline, 24 Ohio Cir.Ct.R., N.S., 177, appellants further contend that respondent on July 28, 1941, incapacitated herself from making a valid surrender by accepting rent from an occupant of one of the apartments which entitled the occupant to remain until August 28, 1941. An examination of that case shows, however, that all that was held therein, so far as we are here concerned, is that where, upon surrendering possession, a lessee leaves a subtenant in possession of part of the premises, the lessee is accountable to the lessor for the rent for that part not surrendered. In other words, such a situation calls merely for an accounting of rent for which, under some circumstances, a tenant would be liable even though he was not in possession.

[12-15] Appellants' final contention is that the court erroneously instructed the jury. But the objections urged are obviously technical, and in our opinion are not meritorious. The first one challenged was a general instruction outlining the nature of the case to the jury, and it contained the statement that "it was admitted that the tenant herself surrendered the possession." Even though it was not so admitted, the evidence shows beyond question that such was the fact; consequently no harm to appellants resulted from the statement. In the second challenged instruction the jury was told that it could award damages to the respondent "in such amount as in your judgment feel she has suffered by reason of the fraud alleged in her cross-complaint." Appellant complains of the use of the word "feel"; but obviously it was intended to be used synonymously with the word "believe", and was doubtless so understood by the jury. The third one objected to was based on respondent's theory that a relation of trust and confidence existed between Mrs. Barron and respondent; but it was not error to give the instruction because there was some testimony given in support of such theory. The fourth instruction complained of related to the measure of damages and used the word "profit," but when this instruction is read and considered along with the others given on the subject of damages, no error appears.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

60 Cal.App.2d 530

HAMBURGER v. HAMBURGER.

Civ. 13917.

District Court of Appeal, Second District, Division 3, California.

Sept. 23, 1943.

1. Divorce ⇐150(2), 184(12)

The failure of trial court, which entered interlocutory judgment of divorce in favor of plaintiff, to make a finding as to plaintiff's residence, was prejudicial error. Civ.Code, §§ 128, 130.

2. Divorce ⇐125, 127(3)

In action for divorce, in determining whether residence exists, trial court is controlled by statute and cannot act upon uncorroborated statement, admission or testimony of parties. Civ.Code, §§ 128, 130.

3. Divorce ⇐125

The wife's admission, in answer to husband's complaint for divorce, of allegation as to husband's residence, did not obviate necessity of proof and finding as to residence, and did not preclude wife from asserting on appeal that court erred in failing to make such a finding. Civ.Code, §§ 128, 130.

4. Divorce ⇐186

On wife's appeal from judgment of divorce, appellate court would not remand case with directions that trial court make a finding that husband had resided in county where divorce was granted for requisite statutory time, where record disclosed that there was no sufficient proof of residence. Civ.Code, §§ 128, 130.

5. Divorce ⇐99

Where husband suing for divorce did not plead revocation of condonation, but alleged cruelty in general terms without specifying that he would rely upon asserted cruel acts occuring prior to the reconciliation, wife was not required to plead condonation in anticipation of a claim that condonation was revoked. Civ.Code, § 121.

6. Divorce ⇐99, 150(2)

Condonation is a special defense and should be pleaded if complaint is sufficiently specific to indicate that plaintiff will rely upon acts which defendant asserts were condoned, but, if evidence shows condonation, it is duty of court even without a pleading to find to that effect. Civ.Code, § 121.

7. Divorce ⇐127(4), 150(2)

Where condonation stood as an agreed fact at trial of divorce action, such condonation should be regarded as continuing until a finding was made that condonation was revoked, and, unless condonation was revoked, evidence concerning asserted acts of cruelty occurring prior to condonation was inadmissible for purpose of corroborating asserted acts of cruelty after condonation. Civ.Code, § 121.

8. Divorce ⇐150(2)

Wife, who claimed that husband's testimony regarding cruelty was not corroborated, was entitled to findings concerning condonation and revocation of condonation so that wife might be advised whether divorce for husband was rendered upon basis of acts committed after reconciliation which were uncorroborated, or upon basis of acts committed after reconciliation which were corroborated by testimony as to acts committed before reconciliation or upon basis of acts committed before reconciliation. Civ.Code, § 121.

9. Appeal and error ⇐1071(6)

Where court renders judgment without making findings upon all material issues of fact, judgment may be reversed provided it appears that there was evidence as to such issue, and evidence was sufficient to sustain a finding in favor of party complaining.

10. Divorce ⇐150(2)

Where evidence as to condonation was undisputed, and if condonation was not revoked husband would not be entitled to divorce because his testimony as to cruel acts after condonation would stand uncorroborated, and evidence as to revocation of condonation was conflicting, wife was entitled to reversal of judgment granting divorce for trial court's failure to make findings upon condonation and revocation. Civ.Code, § 121.

11. Divorce ⇐203

In husband's action for divorce, evidence regarding property rights and alimony was properly rejected under pleadings.

12. Divorce ⇐238

Where plaintiff sought divorce but defendant did not, if plaintiff was entitled to a

divorce, he could not be required to pay alimony.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action for divorce by Charles Hamburger against Mathilde Hamburger. From an interlocutory judgment of divorce in favor of plaintiff, defendant appeals.

Reversed.

H. A. Gebhardt, of Los Angeles, for appellant.

Roderick Johnston, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an interlocutory judgment of divorce in favor of plaintiff.

Defendant contends that the judgment was erroneous for the reasons: (1) The court did not make a finding regarding plaintiff's residence; (2) there was no corroboration of plaintiff's testimony that he had resided in California and Los Angeles County the requisite statutory time; (3) there was no corroboration of plaintiff's testimony as to asserted acts of cruelty occurring after the reconciliation; and (4) the court erred in rejecting evidence regarding property rights and alimony.

Plaintiff alleged in his complaint that he had been a resident of California and Los Angeles County for more than one year preceding the date of the complaint; that defendant had treated him in an extremely cruel manner; and that he was willing to pay defendant $50 per month for her support. The allegation as to extreme cruelty was in general terms and did not state specific acts or dates of the alleged cruelty.

Defendant admitted the allegation as to residence, and denied the allegation of cruelty.

The court found that the parties were married in 1930, and separated January 8, 1941; that there was no issue and no community property; and that defendant, without cause, had treated plaintiff in an extremely cruel manner. No finding was made regarding plaintiff's residence.

Plaintiff testified he had resided in California and Los Angeles County since 1926; that he was a Jew, 62 years of age; that defendant was a German, born in Germany, and was 68 years of age; that they were married in 1930; that they had separated 5 times (in 1932 for 2 days, in 1933 about 3 weeks, in 1934 about 3 months, in 1936 for 2 years and 3 months, and on January 8, 1941); that on the day before the final separation she called him "all kinds of Jews"; that she continuously nagged him, and said, in his presence and in the presence of others, he was no good because he was a Jew, that all Jews were no good, that Hitler was justified in persecuting the Jews; that she said in the presence of Mr. Seebold that plaintiff was "a damn Jew"; that when they would separate she would promise, if he would return, she would treat him differently.

Mr. Seebold, called as a witness by plaintiff, testified that in 1934 he heard defendant say to plaintiff "you damn dirty Jew," and that Hitler should have plaintiff; that also in 1934, on another occasion, he heard her call him a Jew several times. Defendant's motion to strike out the testimony of Mr. Seebold concerning happenings prior to the time the parties were reconciled and began living together again in 1938, after 2 years separation, was denied.

Another witness, called by plaintiff, testified that she had known the parties 9 years; that "a week or so" after defendant returned from a trip to Germany in 1936 (while the parties were separated), defendant told her that she used the name of her former husband on her trip to Germany because she "didn't like the friends to know that she married a Jew"; that the witness did not remember when she told plaintiff what defendant had said about the name used on that trip (plaintiff said the witness told him in 1940).

It was stipulated that the last witness' husband would testify the same as she did.

Plaintiff's exhibits were: The marriage license of the parties, issued in 1930, reciting that plaintiff was a resident of San Diego County; and a letter written by defendant to plaintiff after they had separated in 1941, which stated in part: "Please give me sign of hope that you to [sic] will forgive and make me happy again. I promise that I will do everything to make you love me again * * *."

Defendant testified in substance that she was a German and became a citizen of the United States, and was 68 years of age; that the testimony of the plaintiff and the witnesses called by him was untrue, except she did say to plaintiff, "you Jew," in 1934, in the presence of Mr. Seebold after plaintiff had called her a "German bastard," a "kike," and "lowlife, all kinds of names";

that she was not cruel or unkind to plaintiff; that plaintiff became intoxicated on various occasions, hit defendant, and stayed in various liquor bars until late at night; that they separated 4 times including a separation for 2 years or more commencing in 1936; and that when they separated in 1933 and 1934 plaintiff went to San Diego.

A witness for defendant testified that she had known defendant for "a year"; that she knew plaintiff; that she had visited them 5 times, including Christmas of 1940; that the relations between the parties had always seemed pleasant; that defendant was "always very thoughtful about her husband," and "spoke very kindly of him."

Another witness for defendant testified that plaintiff and defendant lived in her apartment house on Pico Boulevard in 1939 or 1940; that she was not sure how long plaintiff resided there, "a year or more, 9 months to a year"; that the tenants complained about noise made by plaintiff, and on 2 occasions the witness went to his apartment to quiet him.

[1-3] As above stated, the court did not make a finding regarding plaintiff's residence. It was stated in the case of Flynn v. Flynn, 1916, 171 Cal. 746, at page 748, 154 P. 837, at page 838, that the residence prescribed by section 128 of the Civil Code is "essential to jurisdiction" to grant a divorce. In the case of Kelsey v. Miller, 1928, 203 Cal. 61, at page 88, 263 P. 200, at page 211, it was said that the failure to comply with the provisions of section 128 of the Civil Code, forbidding the granting of a divorce unless the plaintiff has been a resident of the state and county for the time specified, was an "error in the exercise of jurisdiction." In the present case, whether it be considered that such residence is "essential to jurisdiction" or that the granting of the divorce without a finding as to residence was an "error in the exercise of jurisdiction," the failure to make a finding as to residence was prejudicial error. In determining the fact whether such residence exists, "the trial court is controlled by the provisions of section 130, Civil Code, and cannot act upon the uncorroborated statement, admission or testimony of the parties." Flynn v. Flynn, supra. The admission, in the answer, of the allegation of the complaint as to residence was an admission of a party to the action, and did not obviate the necessity of proof and finding as to residence (Flynn v. Flynn, supra; Eriksen v. Eriksen, 1943, 57 Cal.App. 2d 532, 134 P.2d 825), and did not preclude defendant from asserting on appeal that the court erred in failing to make such a finding. Eriksen v. Eriksen, supra, 57 Cal.App. 2d at page 535, 134 P.2d 825; Flynn v. Flynn, supra, 171 Cal. at page 748, 154 P. 837; Bennett v. Bennett, 1865, 28 Cal. 599. In the divorce case of Flynn v. Flynn, supra, the allegation of the complaint as to residence was not denied in the answer, and no finding was made as to residence. The Supreme Court, in reversing judgment for plaintiff, said therein at page 749 of 171 Cal., 154 P. at page 838: "* * * the trial court failed to require the essential proof of residence, and * * * it acted entirely, so far as that question was concerned, on the uncorroborated admissions and statements of the parties. We are satisfied that under such circumstances the judgment cannot be upheld."

[4] Counsel for plaintiff has suggested that the omission in the findings as to residence may be remedied by remanding the case to the trial court, upon the evidence which was before it, with directions that it make a finding as to residence. The record shows, however, there was no proper and sufficient proof of the essential fact of residence. The action was commenced on February 10, 1941. Although plaintiff said he had lived in California and Los Angeles County continuously since 1926, except for short visits, there was evidence that he had resided at times in San Diego County. The marriage license showed that he was a resident of San Diego in 1930. Defendant testified that they lived in San Diego for one year following the marriage, and that plaintiff went to San Diego when they separated in 1933 and 1934, and remained there several days. Mr. Seebold, a witness called by plaintiff, said he saw the parties in front of "their" house in Hollywood in 1934. The other witness called by plaintiff did not state anything concerning residence or where she saw plaintiff. A witness, called by defendant, testified that plaintiff lived in her apartment house on Pico Boulevard "a year or more, 9 months to a year" in 1939 or 1940. Another witness, called by defendant, testified that she was in the home of plaintiff about Christmas of 1940. Even if it be assumed that "the house" and "the home" referred to by the witnesses were in Los Angeles County, it should not be inferred that plaintiff resided in Los Angeles County for 3 months next preceding the commencement of the action, in view

of the indefinite character of the corroborating evidence as to place and time of residence, and in view of the evidence that plaintiff had changed his residence at various times from one county to another. This court, therefore, would not be justified in remanding the case with directions that the trial court make a finding that plaintiff had resided in Los Angeles County for the required statutory time.

[5-8] Another contention of defendant is that there was no corroboration of plaintiff's testimony as to asserted acts of cruelty occurring after the asserted reconciliation in 1938. Inasmuch as no one other than plaintiff testified that any acts of cruelty occurred after the asserted reconciliation in 1938, of course, plaintiff's testimony as to cruelty during such time was uncorroborated unless there was no condonation or unless condonation was revoked. The evidence offered by plaintiff in corroboration of his testimony related to alleged incidents occurring 5 or 7 years prior to the separation in 1941, i. e., to happenings in 1936 and 1934. Plaintiff argues that "it does not matter that the corroboration happened to be only as to acts occurring before condonation, because after revocation of the condonation all condoned acts were revived and could be used as grounds of divorce," and that such acts "are pleaded and proven not as grounds of divorce but as grounds for revoking condonation reviving the original cause of divorce." Plaintiff cites section 121 of the Civil Code which provides: "Condonation is revoked and the original cause of divorce revived: 1. When the condonee commits acts constituting a like or other cause of divorce; or, 2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual * * * to show that * * * condonation had not been accepted in good faith * * *." The argument of plaintiff is based upon the assumption that condonation was revoked. The court did not find there was condonation or that condonation was revoked. Plaintiff did not plead that condonation was revoked, or plead any specific acts of cruelty after the reconciliation in 1938 as a basis for showing that condonation was revoked within the provisions of section 121 of the Civil Code. Since plaintiff did not plead revocation of condonation, but alleged cruelty in general terms without specifying that he would rely upon asserted cruel acts occurring prior to the reconciliation in 1938, defendant was not required to, and apparently for that reason did not, plead condonation in anticipation of a claim that condonation was revoked. Condonation is a special defense and should be pleaded if the complaint is sufficiently specific to indicate that plaintiff will rely upon acts which defendant asserts were condoned. If the evidence, however, shows condonation, it is the duty of the court, even without a pleading, to find to that effect. Hunter v. Hunter, 1901, 132 Cal. 473, 476, 64 P. 772. Irrespective of the general nature of the complaint, the case was tried, as above shown, upon the theory there was condonation in 1938, and that revocation of such condonation was an issue to be determined in the case. Although the evidence showed there was condonation in 1938, and that the parties lived together thereafter about 2 years, and although the parties agreed at the trial there was such condonation, the court did not include a finding that there was condonation. Although revocation of such condonation was a controverted issue at the trial, the court did not make a finding as to whether or not condonation was revoked. Inasmuch as condonation in 1938 stood as an agreed fact at the trial, such condonation should be regarded as continuing until a finding is made that condonation was revoked. Unless condonation was revoked, the evidence concerning asserted acts of cruelty occurring prior to the condonation was inadmissible, and plaintiff's testimony as to asserted acts of cruelty occurring after condonation was uncorroborated. A decree having been granted plaintiff, it appears the trial court considered that plaintiff's testimony as to cruelty, whether it related to acts after or before reconciliation, was corroborated by evidence as to acts occurring prior to the reconciliation. Although all intendments are in favor of the judgment, it cannot be ascertained whether the judgment was rendered upon the basis there was no condonation, and therefore evidence of acts occurring prior to the alleged condonation was admissible; or upon the basis there was condonation which had been revoked, and therefore evidence of acts occurring prior to the condonation was admissible. It is not probable that the court determined there was no condonation since condonation was undisputed. If the court determined there was condonation and that it had been revoked, a question would arise as to the sufficiency of the evidence to support a finding of revocation of condonation.

In either event defendant was entitled to findings concerning condonation and revocation of condonation for the reason, among others, that she might be advised whether the judgment was rendered upon the basis of acts committed after the reconciliation, which were uncorroborated; or upon the basis of acts committed after the reconciliation, which were corroborated by testimony as to acts committed before reconciliation; or upon the basis of acts committed before the reconciliation. It was stated in Bilger v. Bilger, 1942, 54 Cal.App.2d 739, at page 742, 129 P.2d 752, at page 754: "The basis of the trial court's decision should appear from the findings."

[9, 10] Condonation and revocation of condonation were material issues. "[W]here a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground * * * for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining." 24 Cal.Jur. 940, sec. 186. The evidence as to condonation, being undisputed, required a finding that there was condonation. A finding that there was condonation would be favorable to defendant, and if condonation was not revoked, plaintiff would not be entitled to a judgment of divorce for the reason that his testimony as to cruel acts after the condonation would stand uncorroborated. As to revocation of condonation, defendant and a witness called by her testified to the effect that there was no revocation. Plaintiff's uncorroborated testimony was in conflict therewith. The evidence, therefore, was sufficient to support a finding that there was no revocation of condonation, which finding would be in favor of defendant. The following statement in Bilger v. Bilger, supra, 54 Cal.App. 2d at page 743, 129 P.2d at page 754, is applicable to the present case: "In the circumstances she had the right to specific findings as to whether the husband [wife] had committed the acts to which she [he] testified. * * * In the present form of the findings it cannot be ascertained whether the court accepted the husband's version * * or, believing [believed] the wife * * *."

[11, 12] The last contention of appellant that the court erred in rejecting evidence regarding property rights and alimony cannot be sustained. The pleadings presented no issue as to property rights. The defendant did not seek a divorce. Under the pleadings a divorce could be granted only to plaintiff. If plaintiff was not entitled to a decree of divorce, the matter of alimony was immaterial. If plaintiff was entitled to a divorce, he could not be required to pay alimony (In re Nielsen, 1937, 19 Cal.App.2d 305, 306, 65 P.2d 360), and in that event also, the matter of alimony was immaterial.

Judgment is reversed.

DESMOND, P. J., and BISHOP, Justice pro tem., concur.



60 Cal.App.2d 642

WILSON et al. v. STOUDAMIRE et al.

Civ. 14015.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1943.

Descent and distribution ⇐90(1)

Heirs at law of deceased owner of realty could maintain action against deceased's widow and another, who claimed title adversely to them, to acquire undivided two-thirds of realty and to quiet title under Code section authorizing heir to bring action for possession of real estate or for the purpose of quieting title. Probate Code, § 581.

Appeal from Superior Court, Los Angeles County; Arthur S. Guerin, Judge.

Action for possession of real estate and to quiet title by Maude C. Wilson and another against Lulu F. Stoudamire and another. From an order dismissing action, plaintiffs appeal.

Reversed and remanded with instructions.

Alexander L. Oster, of Los Angeles, for appellants.

Oliver M. Hickey, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Plaintiffs' first amended complaint alleges that they are daughters of a decedent, that one of the defendants is the widow of said decedent, and that these three persons are the only heirs at law; that the decedent owned certain real property described in the complaint, that the plaintiffs own and are entitled to the possession of an undivided two-thirds thereof and that the defendants claim title thereto adversely to the plaintiffs, which claim is without right.

Answer was filed and the case came on regularly for trial. After the first witness was sworn, objection to the introduction of any evidence was sustained, and the case was dismissed, upon the ground and for the reason that the amended complaint failed to allege facts sufficient to constitute a cause of action.

Counsel for appellants cites no case in support of the appeal; counsel for respondents cites Pryor v. Winter, 147 Cal. 554, 82 P. 202, 109 Am.St.Rep. 162. There the Supreme Court held that future interest may not be defeated or barred by alienation or other act of an owner of intermediate interests, and that the statute of limitations does not begin to run against remaindermen in favor of the grantee of a life estate until the life estate has terminated. Respondents quote a portion of the opinion in the Pryor case at page 558 of 147 Cal., at page 203 of 82 P., 109 Am.St.Rep. 162, reading as follows: "For instance, in section 1452, Code Civ.Proc., it is provided that the heirs or devisees may maintain an action for the recovery of the real estate against any one except the administrator or executor; but surely that provision could not be considered as applicable to a remainderman, although he may have received his estate through a devise, and therefore, is literally in the general category of 'devisees.' It means only those heirs and devisees who have a present right of possession, and therefore a present cause of action, as against every one except the administrator."

There is no dearth of California authority to settle the problem. In 1872 the following language was enacted by our legislature as part of Code of Civil Procedure, Section 1452: "The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator."

In 1931 the same clause was made part of Probate Code, Section 581, with the addition of the words, "but they are not required so to do". Prior to 1872 this particular clause was not in section 114, Probate Code of 1851, upon which Code of Civil Procedure, Section 1452 was based.

In Harper v. Strutz, 53 Cal. 655, it was held that during administration the heir can not maintain an action of ejectment or to quiet title. This case was cited in Thorpe v. Sampson, C.C., 84 F. 63, and is discussed in a note in 23 Am.Dec. at page 201, in which it is said: "This decision seems to be in defiance of the express language of the statute and in conflict with the opinion of the present court as announced in Crosby v. Dowd, November 29, 1880, 6 Pac. Coast L.J. 674".

All other California decisions which we have been able to find declare that the quoted clause as used in the Probate Code means what it says, and that the heir may bring the action plead in the complaint in the present case. McFadden v. Ellmaker, 52 Cal. 348; Janes v. Throckmorton, 57 Cal. 368; Tryon v. Huntoon, 67 Cal. 325, 7 P. 741; Miller v. Luco, 80 Cal. 257, 22 P. 195; Spotts v. Hanley, 85 Cal. 155, 24 P. 738; Jordan v. Fay, 98 Cal. 264, 33 P. 95; Phelan v. Smith, 100 Cal. 158, 34 P. 667; Robertson v. Burrell, 110 Cal. 568, 42 P. 1086; Toland v. Toland, 123 Cal. 140, 55 P. 681; Alcorn v. Buschke, 133 Cal. 655, 66 P. 15; Trubody v. Trubody, 137 Cal. 172, 69 P. 968; Alcorn v. Brandeman, 145 Cal. 62, 78 P. 343; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; Holland v. McCarthy, 177 Cal. 507, 171 P. 421; Collette v. Sarrasin, 184 Cal. 283, 193 P. 571; Harper v. Murray, 184 Cal. 290, 193 P. 576; Earle v. Bryant, 12 Cal.App. 553, 107 P. 1018; Miller v. Oliver, 54 Cal.App. 495, 202 P. 168; Mau v. McManaman, 29 Cal.App.2d 631, 85 P.2d 209.

The order dismissing the action is set aside and the cause remanded to the Superior Court with instructions to proceed with the trial.

YORK, P. J., and DORAN, J., concur.

60 Cal.App.2d 628

REED v. CITY COUNCIL OF CITY OF ROSEVILLE et al.

Civ. 6929.

District Court of Appeal, Third District, California.

Sept. 29, 1943.

1. Mandamus ⇐167

A city personnel board exercised no "judicial" or "quasi judicial duty" in hearing protest against and appeal from city council's order removing appellant from civil service position of city housing and sanitation inspector and assigning him to perform duties of special police officer, but board's duties in such matter were purely "administrative", so that its fact findings could be set aside by court without allegation and proof of board's abuse of discretion. St.1939, p. 3112, art. 19, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Duty", "Judicial Duty" and "Quasi Judicial Duty".

2. Mandamus ⇐163

In mandamus proceeding demurrer to petition admitted allegations thereof.

3. Mandamus ⇐154(4)

In mandamus proceeding to compel city council and personnel board to recognize petitioner as permanent holder of civil service position of city housing and sanitation inspector after his transfer to position of special police officer, the petition, showing on its face that such positions were not in same or comparable class and that transfer effected demotion of petitioner, sufficiently showed that transfer exceeded council's and board's powers, so that their decisions were not conclusive on courts, as such matters were not fact questions. St.1939, p. 3112, art. 19, § 1 et seq.

4. Municipal corporations ⇐191

The duties and qualifications of city housing and sanitation inspector and special police officer, as fixed by city personnel board pursuant to city charter, *held* so dissimilar as to show that such positions were not of same or comparable class and that transfer from position of such inspector to that of special police officer effected "demotion" of person transferred, in violation of charter, though salaries of two positions were the same. St.1939, p. 3112, art. 19, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Demotion".

5. Municipal corporations ⇐218(7)

"Demotion," as of holder of city civil service position, means reduction to lower rank or grade, and there may be demotion in type of position, though holder's salary remains the same.

6. Mandamus ⇐154(10)

In mandamus proceeding to compel city personnel board to recognize petitioner as holder of city civil service position, from which he was removed by board, failure of petition to allege that board acted arbitrarily, was at most a defect remedial by amendment, if special demurrer were interposed on such ground. St.1939, p. 3112, art. 19, § 1 et seq.

7. Mandamus ⇐187(9)

Where petition for writ of mandate requiring city council and personnel board to recognize petitioner as holder of city civil service position, from which he was transferred to lower position, showed on its face that board exceeded its powers in making transfer, absence of allegation in petition that board acted arbitrarily, capriciously or fraudulently was not prejudicial to respondents, as such allegation would have been mere "conclusion". St.1939, p. 3112, art. 19, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

8. Constitutional law ⇐102(1)

A rule of city personnel board that city employee may be transferred from one position to another in same or comparable class is sufficiently similar to provision of state Civil Service Act that appointing power may transfer employee from one position to another in same class or another class having substantially similar duties, responsibilities and qualifications to require holding that city, as well as state, civil service employee has "vested right" to tenure in his position. St.1937, p. 2101, § 144; St.1939, p. 3112, art. 19, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Proceeding by M. E. Reed for a writ of mandate, requiring the City Council and Personnel Board of the City of Roseville and their members to rescind the council's order for transfer of petitioner from the civil service position of housing and sanitation inspector to that of special police officer, recognize petitioner as such inspector with full permanent civil service status, and restore him to such position. From a judgment granting a peremptory writ, respondents Personnel Board and members thereof appeal.

Affirmed.

L. Dewitt Spark, of Roseville, for appellants.

Anthony J. Kennedy, Albert E. Sheets, and Carl Kuchman, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

Respondent herein filed in the Superior Court of Placer County a petition praying for a writ of mandate to issue to the City Council of Roseville and its members, the Personnel Board of said city and its members, and others. He alleged that in 1939 the charter of the city had been amended by the addition thereto of Article XIX, St. 1939, p. 3112, providing a classified civil service system for certain positions in the employment of the city; that it was therein provided that any person holding a position in the city when the amendment took effect who had served six months should be considered as a permanent employee; that it should be the duty of the Personnel Board to adopt rules for the administration of the article, and to adopt the position classification plan developed according to the rules provided thereunder; that such rules should incorporate principles of merit and fitness and should include specific procedures governing the preparation, installation, revision and maintenance of the position classification plan based upon a study of the functions and responsibilities of all positions in the competitive service, and the transfer, promotion and demotion of employees therein; that every officer and employee should retain his office or employment so long as it existed under the same or a different title, during good behavior, and that such officer or employee should not be suspended, fined, demoted, removed or otherwise penalized, except as therein provided; and that no person in a permanent office or employment should be removed or penalized except on written charges, etc. It was also alleged that the Personnel Board adopted rules for personnel administration which incorporated the principles of merit and fitness; that Rule No. IV, section 1, provided that the personnel officer should ascertain and record the duties and responsibilities of all positions in the competitive service, that the classification plan should establish appropriate titles for each class of position, describe the duties and responsibility of each position and specify the qualifications therefor, and that all positions substantially similar with respect to duties, responsibilities, authority, and character of work should be included within the same class; that Rule XI, section 1, provided that an employee might be transferred from one position to another "in the same or comparable class," but that a transfer should not be used to effectuate a promotion, demotion, advancement or reduction, except as provided in the rules.

That thereafter the Personnel Board designated "Housing and Sanitation Inspector" as a class of employment in the Department of Public Works and fixed the duties, responsibilities and qualification requirements for such position; that minimum qualifications for said position are three years of responsible experience in building construction or in engineering work, or five years experience as a journeyman plumber, supplemented by some building and plumbing inspection experience, and training equivalent to that represented by completion of the twelfth grade; that knowledge of building construction methods, of methods used in the installation of plumbing, gas and oil burning equipment, thorough knowledge of city ordinances and state laws governing building construction and plumbing, gas and oil installations and of city ordinances and state laws on sanitation, public health, business regulation and public nuisance regulation are required; that the duties are defined as the inspection of building construction, plumbing, gas and oil burning installations, and the inspection and enforcement of provisions for sanitation and health and regulation of business; that such inspector receives general instructions from the Superintendent of Public Works and receives specific assignments from the City Health Officer; that his work is subject to, but may not always be given review; that he gives instructions to the City Poundkeeper; that under "Degree of Difficulty" the classification provides that the work requires a

broad knowledge of building construction and plumbing, gas and oil burner installation methods and problems, and requires judgment and discretion in interpreting and enforcing sanitary and regulatory ordinances; and that such inspector has responsibility for all construction and installation inspections, and for alert and adequate enforcement of sanitary and regulatory ordinances; that "Examples of Work" set forth in the rule show that such inspector must make both preliminary and final inspections of buildings for compliance with laws and ordinances, and similar inspections of plumbing, gas and oil burning equipment installations to insure their safety, make continuous health and sanitary inspections of buildings, streets, etc., secure compliance with health and sanitary laws and enforce regulatory ordinances such as provisions for licenses for the truck business, for peddlers, for junk dealers, etc.

That said Board also designated "Special Police Officer" as the name of another class of employment, outside the Department of Public Works, and fixed the duties, responsibilities and qualification requirements for such position; that such special officer patrols assigned areas of the city, enforces city ordinances and general laws and does related work as required; that he receives general instructions and review of work from the Police Chief and receives specific assignments of tasks and instructions on details of work from a police sergeant; that he exercises no supervision; that he does routine police and traffic patrolling, routine collecting work requiring reference to superior officers when such work varies from established procedure; that he is responsible for maintenance of law and order during an assigned shift within an assigned area; that he patrols the city on foot in assigned areas and enforces traffic laws relative to parking of automobiles and trucks, enforces business license ordinances, collects licenses and does such police work as may be assigned to him by the Police Chief or police sergeant; that education and experience for such position are an education equivalent to that represented by completion of the twelfth grade and one year's experience in business or manual work; that "Specialized Knowledge, Abilities and Skills" required are familiarity with traffic and business license ordinances, willingness to follow prescribed routine and carry out oral or written instructions, ability to deal courteously but firmly with the public, and skill in firearms.

Petitioner further alleged that from 1934 until July 16, 1941, he performed the duties of Housing and Sanitation Inspector and at all times after July 10, 1939, had full and permanent civil service status in and to said position; that on July 16, 1941, upon order of the City Council, concurred in by the Personnel Board, petitioner without his consent was removed from said position and assigned to perform the duties of Special Police Officer, and that respondents have since said date prevented petitioner from performing the duties of such inspector and have caused the books and records to show respondent Charles Donaldson as such inspector; that petitioner has at all times been ready, able and willing to perform the duties of such inspector, that no action has been taken to lay off, suspend, fine, demote, remove or otherwise penalize him under section 10 of said Article XIX, or under section 3 of Rule XII; that prior to the filing of this petition petitioner regularly protested and appealed to respondent Personnel Board from his said removal as such inspector and his assignment to perform the duties of Special Police Officer and that a hearing was had upon said protest and appeal after which said Personnel Board made its decision denying his protest and approving his removal.

An alternative writ of mandate was issued by the trial court, whereupon appellants demurred to the petition on the ground that it does not state facts sufficient to constitute a cause for relief and that it is ambiguous, uncertain and unintelligible for the reason that it does not appear what if any section of Article XIX of the Charter or what if any rule adopted by the Board has been violated. An answer to said petition was also filed.

The trial court overruled the demurrers and the matter was thereafter brought on for trial before the court. At its conclusion, findings were filed sustaining the allegations of the complaint, and a judgment followed ordering that a peremptory writ issue requiring the City Council to rescind its order transferring petitioner from the one position to the other, and forthwith recognize petitioner as holding said civil service position of Housing and Sanitation Inspector; that respondent Personnel Board recognize petitioner as holding the civil service position of Housing and Sanitation Inspector with full and permanent civil service status therein, and forthwith record and enter such facts on the official records;

that the Superintendent of Public Works restore petitioner to his civil service position and recognize him as the holder of said position with full and permanent civil service status and cause said facts to be entered upon his books and forthwith restore petitioner to the performance of all the duties and responsibilities of said position, etc.

Thereafter, the City Council, in compliance with said writ, rescinded its former approval of the transfer.

Appeal to this court is taken by the Personnel Board and its respective members only, their sole contention here being that the petition fails to state a cause of action because it does not allege that the Personnel Board acted arbitrarily, capriciously or fraudulently "in making its decision in the matter." In other words, appellants apparently contend that though petitioner had permanent civil service status as Housing and Sanitation Inspector, and though the charter provides in section 10 of Article XIX that every officer or employee shall retain his office or employment during good behavior and shall not be demoted, removed or otherwise penalized except as therein provided, and though Rule XI provides that a transfer may be made from one position to another only when the latter is in the same or a comparable class and that a transfer shall not be used to effectuate a demotion or a reduction, and though the allegations of the petition as to the rule show that the classification, the general duties, the responsibilities and the qualification requirements of the position of Housing and Sanitation Inspector, and the classification, general duties, the responsibilities and the qualification requirements of the position of Special Police Officer are essentially different, and the positions are not in the same or a comparable classification, and that a transfer from the former position to the latter does effect a demotion of petitioner, that nevertheless a court may not so find and so hold unless it is alleged (and proven) that the Personnel Board, in approving the transfer, and in denying petitioner's protest on appeal to said Board, acted arbitrarily, capriciously or fraudulently.

Appellants' argument is that the Personnel Board has judicial or quasi judicial powers by virtue of the provisions of the charter, and that where a local board has such powers its "decisions" cannot be set aside unless it is alleged and proven that it has acted arbitrarily, capriciously or fraudulently (citing Bennett v. Brady, 17 Cal. App.2d 114, 116, 61 P.2d 530; Hogan v. Retirement Board, etc., 13 Cal.App.2d 676, 57 P.2d 520); and that where fact-finding powers have been conferred upon local boards their decisions cannot be set aside unless an abuse of discretion is pleaded and proven (citing Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513; Klevesahl v. Byington, 1 Cal.App.2d 671, 37 P.2d 179); that petitioner failed to allege that no evidence was adduced at the hearing before the Personnel Board to sustain the Board's decision nor did he allege that any evidence was adduced to support his contention.

[1, 2] It does not appear necessary in order to decide this case to determine whether the Personnel Board under the charter exercises judicial or quasi judicial powers. Conceding for the sake of argument that in certain instances it does, and that in the exercise of those powers its finding of fact may not be set aside by a court unless it is alleged and proven that it abused its discretion, here the exercise of no judicial or quasi judicial duty was involved. Appellants' duties in the matter were purely administrative. We cannot see that the taking of evidence was necessary to a determination of the two matters to be decided, that is, whether the two positions are in a comparable class, and whether the transfer effected a demotion. Appellants' demurrer admits the allegations of the petition and it is therefore admitted that "Housing & Sanitation Inspector" is the name and title of a class of employment in the Department of Public Works of the city and that the duties and qualifications for such position are those set forth in the petition; that from about 1934 to July 16, 1941, petitioner was assigned to perform and did perform the duties of such inspector and that he had full and permanent civil service status in said position; that there is another class of employment in the civil service of said city, not in the Department of Public Works, designated "Special Police Officer," the duties and qualifications for such Special Police Officer being those set forth in the petition; that petitioner upon order of the City Council, approved and concurred in by appellant Personnel Board, was removed from the one position to the other without his consent and was thereafter prevented from performing the services of his former position; that there is no lack of work to be performed by such inspector; that petition-

er is ready, able and willing to perform it, and that no action was taken to lay him off, suspend, demote or otherwise penalize him under the section of the charter providing for such action in a proper case; that petitioner appealed to appellant Board from the order removing him from his former position and his assignment to the latter; that a hearing was had and his protest denied.

[3] It may be conceded that if the two positions are in the same or a comparable class and notice was given as required by section 1 of Rule XI, and if such transfer did not "effectuate a promotion, demotion, advancement or reduction" of petitioner, the Council had power to make the transfer; but the determination of these things did not require a determination of any question of fact such as was required in the cases cited and relied upon by appellants; and if upon the face of the petition herein it appears that the two positions are not in the same or comparable class, and that a demotion or reduction of petitioner was effected by his transfer, then it sufficiently appears that such transfer was in excess of the powers of the Council and the Board; and the courts are not concluded by their decision. Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 329, 109 P.2d 935; Spaulding v. Philbrick, 42 Cal.App.2d 58, 61, 62, 108 P.2d 59; Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804; Winslow v. Bull, 97 Cal.App. 516, 523, 275 P. 974; Rixford v. Jordan, 214 Cal. 547, 555, 556, 6 P.2d 959; State ex rel. Reilly v. Civil Service Comm., 8 Wash.2d 498, 112 P.2d 987, 134 A.L.R. 1100.

[4, 5] Comparison of the duties of and qualifications for the two positions as fixed by appellant Board shows that same are markedly dissimilar and that said positions are neither of the same nor of a comparable class. It is also, we think, obvious that the transfer complained of effected a demotion of petitioner. It is conceded by the parties (though not alleged) that the salaries of the two positions are the same; but demotion means something more than a reduction in salary. To denote is to reduce to a lower rank or grade, and there may be a demotion in the type of position though salary may remain the same. While it may appear that one qualified to perform the duties of Housing and Sanitation Inspector is qualified to perform the duties of Special Police Officer, yet if the situation be reversed, the lack of qualification of the latter to perform the duties of the former instantly appears, and compels the conclusion that petitioner's transfer did effect a demotion.

[6, 7] But appellants contend that the petition does not allege that the Board acted arbitrarily, capriciously or fraudulently, and that for this reason it is insufficient as a pleading. If this were true it would at most be a defect remediable by amendment if a special demurrer were interposed on that ground. But where, as here, it appears upon the face of the pleading, as we think it does, that the Board exceeded its powers in making the transfer complained of, such an allegation would add nothing but a conclusion, and no prejudice to appellants appears from its absence. Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 192, 193, 215 P. 673, 27 A.L.R. 1508.

[8] Petitioner asserts that he has permanent civil service tenure as Housing and Sanitation Inspector and that tenure to this position is a vested right. Citing Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31; Eisenhuth v. Department of Motor Vehicles, 2 Cal.App.2d 207, 37 P.2d 725. Appellants concede that a state civil service employee does have tenure and that this tenure is a vested right, and that the cases cited by respondent are good authority on this point; but they argue that said decisions do not apply to the instant case because the charter of Roseville authorizes the transfer of one employee from one position to another. But appellant apparently overlooks the fact that section 144 of the State Civil Service Act, St.1937, p. 2101, contains language similar to that of section 1 of Rule XI of appellants' rules. It provides that "an appointing power may at any time transfer any employee under his jurisdiction from one position to another in the same class or in another class having substantially similar duties, responsibilities, and qualifications and substantially the same salary range"; while said section 1, Rule XI, provides that "an employee may be transferred at any time from one position to another position in the same or comparable class." The language of these two provisions is sufficiently similar to make applicable the principles laid down under the Civil Service Act. See Noce v. Department of Finance, 45 Cal.App.2d 5, 113 P.2d 716; Spaulding v. Philbrick, supra; Win-

slow v. Bull, supra; Krapp v. Kern, 255 App.Div. 305, 7 N.Y.S.2d 499, 500, 501, affirmed 281 N.Y. 617, 22 N.E.2d 176.

The trial court found that the two positions are not comparable and that the duties, qualifications and responsibilities of the position of Housing and Sanitation Inspector are substantially different and of a higher grade than the duties, qualifications and responsibilities of the position of Special Police Officer.

As we are of the opinion that the conclusions of the trial court are correct, and the petition of respondent is sufficient to state a cause of action, the judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



GUILFORD v. OIEN et al.

No. 12421.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1943.

Rehearing Denied Oct. 30, 1943.

Hearing Granted Nov. 22, 1943.

Dismissed April 17, 1944.

1. Estoppel ⇐52

In order to constitute a "waiver" there must be an existing right, benefit or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or such conduct as warrants an inference of relinquishment.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

2. Estoppel ⇐52

"Waiver" is a voluntary act and implies an abandonment of a right which can be enforced or of a privilege which can be exercised, an election to dispense with something of value or to forego some advantage which one might at his option have demanded or insisted on.

3. Estoppel ⇐53

"Waiver" will never be presumed or implied contrary to intention of party whose rights would be injuriously affected thereby unless by his conduct the opposite party has been misled to his prejudice into honest belief that such waiver was intended.

4. Sales ⇐479(7)

Evidence established that conditional seller, which sold machinery under contract providing that acceptance of payment after it was due or failure of seller to pursue remedies provided on buyer's default should not constitute waiver of any provisions of contract, did not waive provision of contract that time was of the essence thereof.

5. Sales ⇐477(6)

Where contract expressly provides that acceptance of installment payments after they become due shall not operate as waiver of forfeiture provision, acceptance of past-due payments does not "waive" strict performance as to any other payments or conditions stipulated in the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Sales ⇐479(6)

In order to entitle buyer in default under conditional sales contract to benefit of statute providing for relief from forfeiture, there must be a tender of full compensation. Civ.Code, § 3275.

7. Sales ⇐479(6)

Where conditional sales contract provided for attorneys' fees, buyer's tender which was made after suit was commenced and did not include attorneys' fees was ineffectual and did not entitle buyer to protection of statute providing for relief from forfeiture. Civ.Code, § 3275.

8. Tender ⇐12(4)

After suit is commenced, a "tender" to be effectual must be sufficient to cover the debt and costs accrued before making tender.

See Words and Phrases, Permanent Edition, for all other definitions of "Tender".

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action in claim and delivery by Frank I. Guilford against G. T. Oien and others to recover certain earth-moving equipment

purchased by defendants under conditional sales contract, wherein defendants filed cross-complaint. From an adverse judgment, the plaintiff appeals.

Reversed with directions.

Blewett & Blewett, of Stockton, for appellant.

Ward A. Hill, of Stockton, for respondents.

KNIGHT, Justice.

Plaintiff brought this action in claim and delivery to recover possession of a piece of heavy earth-moving equipment known as a Le Tourneau carryall scraper, purchased by defendants from plaintiff's assignor, under a conditional sales contract. Defendants interposed a cross-complaint for damages based on allegations of an unlawful seizure. The trial court gave judgment for defendants on the cross complaint, and plaintiff appeals. Admittedly the defendants did not conform to the provisions of the conditional sales contract, and the determination of the appeal rests largely on the soundness of the trial court's conclusion that the sellers waived the provision of the contract wherein it was specifically agreed that time was of the essence thereof.

The defendants were engaged in mining operations in Calaveras county, and they purchased the scraper from Guerin Bros. in South San Francisco on September 8, 1941, under a conditional sales contract, for use by defendants in Calaveras county. The purchase price was $2,901.77, on which defendants made a down payment of $1,375, and by the terms of the contract they agreed to pay the balance in $275 installments on the 15th day of each succeeding month, commencing on October 15, 1941, the final payment of $151.77 to be made on March 15, 1942. The contract contained all of the usual provisions employed in a sale of that kind. Among other things it provided that title was retained in the seller until the full purchase price, including interest and any other sum which might be due under the contract, was paid; that should the seller employ an attorney to enforce any of the rights under the contract there should immediately become due and payable a reasonable attorney's fee; that the scraper would not be removed from the county wherein the contract was recorded, without the written consent of the seller. Section 10 of the agreement read as follows: "At the option of seller, buyer shall be deemed to be in default: (a) If buyer fails to do or perform any of the acts or things, or to make any of the payments required by this contract, or said promissory notes, at the times or in the manner herein or therein specified; * * * or, (d) if at any time seller shall deem the said property or seller's interest therein insecure. In the event of the happening of any of the above contingencies, seller may, at its option, without demand or notice exercise any of the following remedies: First: It may without notice elect to treat the entire remaining balance of the purchase price and interest, evidenced by said promissory notes due and payable immediately and sue therefor; or, * * * Third: It may take possession of said property wherever and whenever found, and with or without notice or demand, may elect to treat buyer in default, and in such event all of the rights, titles, and equities of buyer in said property shall immediately cease and determine, and seller shall be released from all obligations to transfer or deliver said property to the buyer, and all sums of money theretofore paid, and all sums then due and unpaid by the buyer to seller hereunder or under said promissory notes shall remain the property of seller and shall be considered compensation for the use, wear and tear and depreciation of said property, and buyer agrees forthwith to pay to seller all of said payments which are then due and unpaid; or, Fourth: It may avail itself of any of the remedies for the enforcement of a seller's rights under an agreement such as this, as provided by the laws of the State of California." By section 12 of the agreement, time and each of the terms and conditions of the contract were expressly declared to be of the essence thereof, and the acceptance of any payment after it was due or the failure to pursue any of the remedies of the seller therein provided for upon default by the buyer in performance of any of his obligations, should not constitute a waiver of any of the provisions of the contract and should not prevent the seller from exercising any of the remedies herein provided on account of any past or future defaults either in making the payments or in the performance of the various obligations by the buyer. And it was further provided that in the event of assignment of the agree-

ment by the seller, the buyer agreed to waive all defenses he might have under the agreement.

The defendants took possession of the scraper at the time of the execution of the contract, operated it for a while in Calaveras county wherein the contract was recorded, and then without obtaining permission from the seller so to do, moved the scraper to Amador county and then to San Joaquin county; but in spite of repeated demands, defendants paid no part of any of the monthly installments, and on February 16, 1942, Guerin Bros. assigned the contract to plaintiff. On February 17, 1942, plaintiff demanded possession of the scraper, but defendant Oien, with whom most of the dealings were had, refused to divulge where it was kept, and on February 20, 1942, plaintiff filed this action in claim and delivery for the possession of the scraper or its reasonable market value, plus damages for its unlawful detention, attorneys' fees and costs of suit; and on February 21, 1942, the sheriff seized the scraper.

The defendants filed an answer and cross-complaint, admitting the default on the contract and admitting that they had refused to deliver the scraper to plaintiff, but alleging adverse business conditions and financial inability to meet the payments as the reason for their default, and alleging a tender of the balance of the purchase price after the scraper had been seized by the sheriff. It was also alleged that financial arrangements had been made to enable them to pay the balance due prior to February 14, 1942, and that they had communicated with Guerin Bros., stating they were in a position to pay the full balance due and requesting a statement of the amount due, which Guerin Bros. promised to furnish, but failed to do so; also that when plaintiff demanded possession of the scraper defendants informed him they were in a position to make immediate payment of the balance due and requested that plaintiff advise them as to the amount due, but that plaintiff stated he intended to get possession of the scraper and would not accept payment of the balance. No specific allegation of waiver was made.

The action was tried by the court without a jury, and findings were entered in favor of defendants, substantially in accord with the allegations of the cross-complaint, and further finding that Guerin Bros. had waived the provision of the contract that time is of the essence thereof. Judgment was entered pursuant to the findings (1) awarding defendants possession of the scraper, defendants to be charged with $1,580 as the balance due on the conditional sales contract; (2) in case return of the scraper could not be made, $1,420, representing the difference between the reasonable value of the scraper and the balance due under the conditional sales contract; (3) damages for the unlawful taking and withholding of said scraper at the rate of $25 a day, amounting at the date of the judgment to $3,950, which it will be noted is approximately $1,050 more than the purchase price of the scraper. In other words, the net result of the judgment as rendered is that defendants, after having had the use of the scraper for more than five months, now receive it entirely paid for, plus $2,370 damages. One of the grounds urged for reversal is, therefore, that the amount of damages awarded is wholly unreasonable, particularly in view of the uncontradicted evidence showing that certain repairs had been made necessary due to the hard usage given the scraper by defendants. There would seem to be much merit in the point; but it is our conclusion that plaintiff is entitled to a reversal on the other major ground urged, that the trial court's conclusion that there had been a waiver of the provision that time is of the essence of the contract is not supported by the evidence. Consequently it is unnecessary to inquire into the merits of the question of damages.

With regard to the question of waiver, the record shows the following facts: Shortly after the purchase of the scraper defendants took it to Jenny Lind in Calaveras county where gold mining operations were being carried on by defendants. It was used in connection with other mining equipment, in hauling gravel to a hopper and washing the gravel down. It was subjected to very hard usage, being used some 20 hours a day seven days a week. The mining venture proved unsuccessful, and after December 24, 1941, defendants moved the scraper to Amador county, and about February 1, 1942, to Stockton in San Joaquin county, to the Le Tourneau shop there, and afterwards it was rented out to work on a railroad yard. The first installment under the contract fell due October 15, 1941, but no payment was made because the mining operations were proving unsuccessful. Shortly before

the second installment fell due, and on November 13, 1941, Guerin Bros., the seller, wrote to Oien and the defendant Stickney calling attention to the default in payment and requesting a check for the two installments by return mail. Oien admitted receiving the letter, but did not reply. On December 26, 1941, Guerin Bros. again wrote Oien demanding "a check in the amount of $825.00 by return mail or otherwise we will have to take some action to collect same." On December 30, 1941, a telegram was sent Oien which he received, stating that "if we do not receive payment of $825.00 by the 2nd it will become necessary to take legal action." On January 6, 1942, Guerin Bros. wrote Oien in part as follows: "We have written and wired without any response and therefore, if a check in the amount of $1,100.00 plus interest of $30.54 is not in our possession by January 10th you can then expect our truck to be up there by January 12th to take possession of the carryall." On January 8, 1942, Guerin Bros. attorney in San Francisco wrote Oien and Stickney, stating the amount claimed to be due, plus interest and attorneys' fees; that unless a check was received covering this amount before January 15th he would "take such legal action" as may be available under the contract, and suggesting that a check be sent at once in the amount of $945.78. On January 13, 1942, Guerin Bros. received a letter signed "G. T. Oien" (the signature was denied by Oien but he admitted he wrote to Guerin Bros. about that time) promising that he would "shortly begin to make payments" on the contract. Guerin Bros.' attorney wrote again on January 22, 1942, to Oien and Stickney, and Oien testified he thought he received it but was not sure. It was in reply to Oien's letter of January 13, 1942, to Guerin Bros., and again stated the amount due, as follows: "There are now four payments due, according to the terms of your notes, each in the amount of $275.00, plus interest $30.56, and plus attorney fee of $100.00, a total of $1230.56." The letter then went on: "Unless payment of this amount is received within the next five days, I have been instructed by Guerin Bros. to take such action as may be necessary. You are also requested to inform me the present location of the carryall." Thus it will be noted that as late as January 22, 1942, Oien had a statement of the amount due under the contract. On Thursday, February 12, 1942, E. H. Guerin went to Stockton and saw Oien. It is apparently the discussion had at this time which formed the basis of the court's finding of waiver. Two versions of the discussion were given, one by Oien and one by Guerin. Oien testified that he met Guerin at the Le Tourneau shop in Stockton; that Guerin asked him what he was going to do about the carryall; that he told Guerin how much difficulty he had had in mining, and he was sorry the thing had happened the way it did, but he wanted to make a settlement with him, and he asked Guerin for a bill; that Guerin said he did not have a bill with him, and Oien asked him to send one as soon as he could; that Guerin said he would send him one Monday, and Oien said as soon as it arrived he would make a settlement, that he had made financial arrangements enabling him to pay it off; that Guerin did not ask for the scraper, but inquired where it was, and Oien told him it was there, right outside the shop. Later Oien testified that "when Mr. Guerin demanded the carryall I went out and got it and took it into Thompson-Morton and locked it up." Thompson-Morton was the company that was lending Oien the money to pay the balance due.

Guerin's version of the discussion was as follows: He testified that he met Oien at the Le Tourneau shop and told Oien that he wanted either the scraper or the money; that he told Oien he thought he had already given him ample opportunity to pay; that Oien told him he was not in a position to pay at that time, and made some mention about sending a bill; that Guerin told him he had the same contract as Guerin had and Oien could figure simple interest as well as he could; and Oien said that about on Tuesday he was going to get in touch with his partners and see if he could raise some money.

At any rate, no bill was received by Oien, but on Monday, February 16th, C. B. Rohn, the president of the California Tractor & Equipment Corporation in Stockton, called on Oien at the Thompson-Morton place of business with a written authorization signed by Guerin to pick up the carryall. Oien testified that Rohn asked him where the scraper was and he refused to tell him, and refused to give him the scraper; that he told Rohn that he was going to pay for the scraper as soon as Guerin sent him a bill; that Rohn asked to take the scraper and hold it for three

days, but Oien refused to let him have it, stating it might as well remain in his possession until it was paid for because as soon as he got a bill it would be paid for; that the authorization Rohn presented did not state the amount due and demand payment thereof, but only demanded that the carryall be turned over to Rohn.

Oien further testified that the next day, February 17th, he met Guilford, the plaintiff, at Thompson-Morton's, and Guilford demanded the scraper, but Oien refused to give it to him; that Guilford said he had purchased the contract and wanted delivery of the scraper; that Oien told him he had already made arrangements with Guerin to pay it off, and all he wanted was a statement; that he wanted the scraper himself; that he offered to pay Guilford the balance due, that he had a check in his pocket for $1580, but did not show it to Guilford; that Guilford said he did no care anything about the financial end of it, that he wanted the scraper; that he told Guilford he would call him up that night or see him the next day; that the next morning, the 18th, a check for $1,580 wa: delivered to Oien's attorney by Thompson-Morton and efforts were made to locate Guilford at his hotel in Stockton, but he had checked out; that he phoned Guilford's home that night and the next, but could not locate him. Much of the foregoing testimony so given by Oien was contradicted by Rohn and Guilford. On Saturday the 21st the scraper was seized by the sheriff. On February 24th, the next business day, Oien's attorney tendered to one of plaintiff's attorneys a cashier's check for $1,580, representing the unpaid installments and interest on the contract, but not including attorneys' fees or costs. The tender was refused.

In support of the judgment defendants contend that the evidence establishes a waiver of the provision of the contract that time is of the essence thereof; and that tender of full compensation was made; that therefore they were entitled to be relieved of their default under the provisions of section 3275 of the Civil Code. That section reads: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." However, it is our opinion that resolving all conflicts in favor of the defendants the record does not show any legal basis for the conclusion the Guerin Bros. waived the provision of the contract to the effect that time is of the essence thereof, or that a tender of full compensation was made.

[1-5] Oien's testimony was to the effect that on February 12, 1942, when Guerin called on Oien, he told Oien he would send a statement of the balance due the following Monday, and that although the scraper was then in plain sight, within a hundred feet of Guerin, he made no move to repossess it. But in order to constitute a waiver "there must be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence; *and an actual intention to relinquish it or such conduct as warrants an inference of the relinquishment.* It has been held that there must be a meeting of minds and an intentional forbearance to enforce a right. Waiver is a voluntary act and implies an abandonment of a right which can be enforced, or of a privilege which can be exercised—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. * * * In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to." 25 Cal.Jur. p. 926, (Italics added); Lincoln Holding Corp. v. Union Indemnity Co., 129 Cal.App. 399, 18 P.2d 744. Applying the foregoing legal doctrine to the situation here presented, it seems quite clear that Guerin's acts and conduct cannot be construed as a waiver. Certainly the mere fact that he said he would send a statement of the amount due on Monday cannot be considered as a voluntary relinquishment of any right, when he did not send such statement, but instead sent Rohn with a written authorization to repossess the scraper. Nor can the fact that Guerin failed to repossess the scraper that day be considered as an expression of intent not to repossess the scraper, because as he testified the scraper was a large piece of equipment weighing several tons, and he had no facilities at that time to take it away. Nor in view of Rohn's arrival on Monday with an authorization to repossess the scraper, can it be said that Oien was

misled to his prejudice into the honest belief that a waiver was intended. Furthermore, the contract provided: "Time, and each of the terms and conditions hereof, is expressly declared to be of the essence of this agreement. The acceptance of any payment after the same is due or the failure in any one or more instances to pursue any of the remedies of the seller or his assignee herein provided for upon default by the buyer in performance of any of his obligations, shall not constitute a waiver of this, or any other provisions of this contract and shall not prevent the seller or his assignee from exercising any of the remedies herein provided on account of any past or future defaults either in the making of the payments herein provided or in the performance of the various obligations hereof by the buyer." And as held in Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 756, 117 P.2d 669, 674: "The contract provides that time is the essence of every part thereof; that neither acceptance of any overdue payment nor the waiver of any breach of any term or condition shall 'operate as a waiver of any other *prior or subsequent breach*'; and that upon default repossession may be gained without previous demand of performance. Having so provided, the parties were bound by such covenants to the same extent as they were bound by any other article of their agreement. By such provisions they neither violated a statute nor contravened public policy. Where a contract expressly provides that acceptance of installment payments after they become due shall not operate as a waiver of its forfeiture provision, the acceptance of past due payments does not waive strict performance as to any other payments or conditions stipulated in the contract. Pacific Finance, etc., Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Lundberg v. Switzer, 146 Wash. 416, 263 P. 178, 59 A.L.R. 131. It having been established that Thomas was in default as to the payment due January 10 and that such default was never waived, plaintiff's repossession of the truck was its absolute right."

[6-8] As to the second point, in order to come within the provisions of section 3275 there must be a tender of full compensation (Deevy v. Lewis, 54 Cal.App.2d 24, 128 P.2d 577; Fickbohm v. Knaust, 103 Cal.App. 443, 284 P. 692); and here the evidence shows as a matter of law that there was never any sufficient tender of the amount due on the contract. Oien told Guerin that he wanted to make a "settlement", but he admitted that he did not make any actual offer of money; there is the bare statement in his testimony that he offered to pay Rohn the balance due, but there is no showing made in what form his offer was, nor in what amount; when he offered, according to his testimony, to pay Guilford the amount due he had a check in his pocket for $1580 but did not even show it to Guilford. And when through his attorney he delivered a cashier's check to Guilford's attorney for $1,580, admittedly that amount included only the delinquent payments of principal and interest, and nothing was included for attorneys' fees or costs. The contract provided for attorneys' fees, and in the written demands made of Oien before suit was instituted, attorneys' fees were included in the amount demanded. Therefore, the suit having been commenced, the right to attorneys' fees had accrued and since the tender did not include attorneys' fees, the tender was invalid; after suit is commenced, a tender to be effectual must be sufficient to cover debt and costs accrued before making tender. Cassinella v. Allen, 168 Cal. 677, 144 P. 746; Equitable Life Assur. Soc. v. Boothe, 160 Or. 679, 86 P.2d 960; 26 R.C.L. p. 639; 62 C.J. 662.

In any event, it is our opinion that the decision rendered in the case of Deevy v. Lewis, supra, furnishes a complete answer to defendants' contention that they were entitled to be relieved of their default. In that case the buyer brought an action against the seller's assignee for conversion of certain farming equipment which had been sold to the plaintiff under a contract of conditional sale. The plaintiff had defaulted in the payments specified therein, and the assignee of the seller repossessed the equipment. Two tenders were made and refused after the filing of suit and repossession of the property, the first for $347, and the second, two days later, for $920.15. This second offer was refused by the seller's attorney upon the ground that it was made too late and after plaintiff's rights under the contract had been terminated and upon the further ground that the amount offered was insufficient as $1,020.-15 was the amount which would have been required. Thereafter defendants sold said equipment and plaintiff filed suit. The contract was similar to the one involved in the present case; time was made of the es-

sence thereof; the seller was given the right to repossess the equipment upon default of the purchaser, and further provided that "Any indulgences granted purchaser shall not constitute a waiver of any of seller's rights." The jury was instructed and the trial court proceeded upon the theory that there had been a waiver by the seller of the portion of the contract making time of the essence by reason of the indulgences granted to the purchasers by the seller in accepting payments after the times specified in the contract, and judgment was entered in plaintiff's favor. The appellate court reversed the judgment, and held, relying on Fageol T. & C. Co. v. Pacific Indemnity Co., supra, that provisions in a conditional sales contract that time is of the essence of the contract, and that any indulgences granted the purchaser shall not constitute a waiver of any of seller's rights, are valid and give the seller the right to repossess the property regardless of prior indulgences granted the purchaser in accepting payments after the times specified in the contract. And it further held that where a contract contains such a provision, the purchaser may not rely on the provisions of section 3275 of the Civil Code, should he fail to tender "full compensation" as required by that section as prerequisite to relief from forfeiture. To quote from the opinion [54 Cal.App.2d 24, 128 P.2d 579]: "We are therefore of the opinion that the theory upon which the instructions were based and upon which the trial court proceeded did violence to the express terms of the contract of the parties, which terms were valid and gave to the seller the right to repossess the property regardless of prior indulgences. We further conclude that plaintiff may not rely upon the provisions of section 3275 of the Civil Code to sustain the judgment as the uncontradicted evidence shows that plaintiff failed to tender 'full compensation' as required by that section as a prerequisite to relief from forfeiture."

Defendants rely on the case of Miller v. Modern Motor Co., 107 Cal.App. 38, 290 P. 122, but that case is not controlling here because the facts there were amply sufficient to support the finding that there had been a waiver of the provision making time of the essence of the contract, and the contract there evidently did not contain the provision contained in the present contract to the effect that acceptance of payment after it was due, or any failure of the seller to pursue any of the remedies provided for upon default of the purchaser shall not constitute a waiver of any of the provisions of the contract. See Deevy v. Lewis, supra, 54 Cal.App.2d at page 28 128 P.2d at page 578. Furthermore, in the Miller case [107 Cal.App. 38, 290 P. 124] the plaintiff tendered "a sum in excess" of the entire balance due on the contract.

For the reasons stated the judgment is reversed with directions to the trial court to enter judgment in plaintiff's favor for the possession of the scraper, and for such additional relief as may seem just.

PETERS, P. J., and WARD, J., concur.



60 Cal.App.2d 722

PEOPLE v. MAYOR et al.

Cr. 3706.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1943.

1. Criminal law ⇐260(11)

Where trial court, in jury waived case, had opportunity to hear testimony and to observe witnesses, it was not within province of appellate court to set aside trial court's finding unless as a matter of law it could be said that there was no evidence to support conviction.

2. Robbery ⇐24(3)

Evidence, including testimony identifying defendants as the persons committing crime, was sufficient to sustain conviction for robbery with a deadly weapon.

Appeals from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Jesus Hernandez Mayor and Salvadore Viveros were convicted of robbery with a deadly weapon, and they appeal.

Affirmed.

Philip S. Schutz, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

Appellants were charged jointly with the crime of robbery in which a deadly weapon, namely, a rifle was employed, and in a jury-waived trial were found guilty as charged. As to the defendant Mayor, he was charged with a prior conviction of first degree robbery which he admitted upon being arraigned. In the instant case he was sentenced to the state prison and defendant Viveros, a minor, was committed by the trial judge sitting as a juvenile court to the Preston School of Industry during the period of his minority.

The appeals are from orders denying a motion for a new trial as to both defendants and from the judgment as to the defendant Mayor. These appeals are grounded upon the alleged insufficiency of the evidence to sustain the conviction of either defendant and, particularly, the insufficiency of the evidence by which the defendants were identified as the perpetrators of the crime.

One Joseph Alargon testified that both defendants, whom he had known for two or three years while at school, came to the liquor store where he was employed on November 6, 1942, at about 8:00 o'clock p.m.; that Viveros ordered a quart of beer which the defendants drank outside the store; that defendants returned shortly thereafter and Mayor at that time pulled a rifle from under his overcoat and ordered Alargon to place his hands on the counter while Viveros took the money from the cash register. At the trial Alargon first stated that he did not know whether they were the boys who held him up, but after his testimony given at the preliminary hearing was read to him, he said that it was true and by it, when asked about the rifle, he had admitted that defendant Mayor held the rifle while defendant Viveros took the money out of the cash register. A customer named Lawrence Franklin entered the store while the robbery was being perpetrated and positively identified Mayor as the man who held the rifle and ordered him to get against the wall, at the same time pointing the rifle directly at his stomach. Franklin was unable to identify Viveros positively for the reason that the man at the cash register was standing with his back toward him. He testified that Viveros "looked like" the man who was rifling the cash register. After the robbery had been completed, Mayor, according to Franklin, told him and Alargon to stand where they were, saying to Viveros, "Come on let's get going," sent him out of the door and backed out after him. After the preliminary hearing Alargon told the deputy district attorney and the two deputy sheriffs who testified as arresting officers that defendant Mayor told him that if he testified against them they would get him. Mrs. Alargon overheard Mayor make this statement to her husband and on the trial Mayor admitted that he told Alargon at the preliminary hearing that "I will get even with you." Both Alargon and Franklin identified the rifle introduced as an exhibit as resembling the one used in the holdup.

Appellants denied having committed the robbery and attempted to set up an alibi which was replete with contradictions and altogether unsatisfactory and unconvincing.

The arresting officers testified that shortly after the commission of the robbery and at about 9:15 o'clock p.m. they called at the home where Mayor lived and where his brother-in-law Viveros also resided; that they found no one at home and, the house being open, they undertook to search the place; that they found no rifle but did find in one of the rooms an army shirt over the back of a chair and a garrison cap upon the dresser. About an hour later they returned to the house to stake it out and just as they arrived saw Mayor leave the house wearing an army uniform, including an army shirt and a garrison cap. His uniform had just been returned from a cleaner's and previously during that day and evening Mayor had been wearing civilian clothes. He was at the time AWOL (absent without official leave) from the armed forces. The officers arrested Mayor and entering the house found the rifle, which was introduced in court, leaning against the wall of the northwest room of the dwelling behind a closet door which had been opened. This same closet door was closed at the time of the original search. They also found a white shirt where the army shirt had been, but no garrison cap.

[1, 2] Since the trial court had an opportunity to hear all the testimony and to observe the witnesses, it is not within the province of this court to set aside its find-

ing unless as a matter of law it could be said that there was no evidence to support the conviction. People v. Farrington, 1931, 213 Cal. 459, 463, 2 P.2d 814; People v. Connelly, 1925, 195 Cal. 584, 593, 234 P. 374; People v. Deal, 1940, 42 Cal.App.2d 33, 36, 108 P.2d 103. We feel that in this case there was an abundance of evidence including considerable substantial evidence pointing to the guilt of the appellants. The identity of the appellants as the persons committing the crime charged was established to the satisfaction of the trial court and, under the principles stated in People v. Hightower, 1940, 40 Cal.App.2d 102, 106, 107, 104 P.2d 378, we are not in a position to disturb that finding.

The orders of the trial court denying motions for a new trial as to each defendant are affirmed, as is also the judgment affecting defendant Mayor.

SHINN, J., and SHAW, Justice pro tem., concur.



60 Cal.App.2d 755

PEOPLE v. TORRILLO.

Cr. 3723.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1943.

1. Criminal law ⇐1144(13)

On appeal from judgments on convictions, evidence must be viewed in light most favorable to prosecution.

2. Homicide ⇐234(1)

In prosecution for second-degree murder, evidence *held* sufficient to sustain jury's finding, implied from verdict of conviction, that defendant participated in killing.

Criminal law ⇐162

An accused's presence at time and place of another's commission of felony charged is evidence to be considered, with all circumstances immediately preceding, attending, and following perpetration of crime, as tending to show accused's complicity therein.

4. Homicide ⇐228(1)

In prosecution for second-degree murder, evidence *held* sufficient to sustain jury's finding, implied from verdict of conviction, that decedent met his death as result of criminal agency.

5. Homicide ⇐257(1)

In prosecution for assault on police officer with deadly weapon with intent to commit murder, evidence *held* sufficient to sustain jury's finding, implied from verdict of conviction, that defendant shot at such officer.

6. Homicide ⇐184

In prosecution for second-degree murder of police officer and assault with deadly weapon on another such officer with intent to commit murder, evidence that rear door of tire shop near scene of crimes was splintered before defendant's arrest in vicinity thereof by such officers was admissible as indicating that felony had been committed, so as to justify officers in arresting any suspicious characters found in vicinity.

7. Homicide ⇐174(2)

In prosecution for second-degree murder and assault with deadly weapon with intent to commit murder, evidence that wrappings from automobile tire were found on day after crimes on road by which participants therein left vicinity thereof in automobile was irrelevant.

8. Criminal law ⇐1186(4)

Error in admitting irrelevant evidence that wrappings from automobile tire were found on day after crimes on road by which participants therein left vicinity thereof was not prejudicial to defendant. Const. art. 6, § 4½.

9. Homicide ⇐174(7)

In prosecution for second degree murder and assault with intent to murder, where defendant testified that he left city wherein crimes were committed because he was afraid of being killed by his accomplice, district attorney's question on defendant's cross-examination as to whether he had read of accomplice's imprisonment was proper as bearing on defendant's consciousness of guilt while remaining outside state for about 22 years after commission of crimes.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Nick Torrillo was convicted of murder in the second degree and assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Thomas Higgins, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty Gen., David K. Lener, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was convicted after trial by jury of (1) murder in the second degree, and (2) assault with a deadly weapon with intent to commit murder.

These are appeals from (a) the judgments, and (b) order denying his motion for a new trial.

[1] Viewing the evidence in the light most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

On July 30, 1920, about 12:25 a.m., Officer Purrier, Constable of Burbank Township, was en route to meet Officer Normand, Deputy Marshal and Night Patrolman of the City of Burbank, at the corner of San Fernando Road and Tujunga Avenue in Burbank. When at the intersection of Verdugo Road and Third Street, he saw a man, later identified as Mr. Gays, standing at the intersection. This man, he noticed, ran toward a car parked on Angelino Street, which car contained two other occupants subsequently identified as defendant and Mr. Dallo. After the two officers met, they observed that the rear door to a tire shop located near the intersection of San Fernando Road and Third Street in Burbank had been splintered giving evidence of an attempted burglary. Shortly thereafter, the same automobile that Officer Purrier had previously seen, the officers observed traveling without lights on Third Street near the tire shop above mentioned. This car, the officers stopped. In the back seat of the stopped automobile was seated Mr. Gays, while defendant and Mr. Dallo were in the front seat. Mr. Dallo was the driver. Officer Purrier asked the occupants of the stopped car: "What do you boys mean driving around town this time of night without any lights on this car?" Mr. Dallo replied: "We got lights." Defendant said: "Sure, we got lights." Officer Purrier then remarked: "Why aren't you using them?" Mr. Dallo said: "They're on." Officer Purrier said: "They are not on."

Officer Purrier then ordered the occupants of the car to put up their hands. After complying with the order, Mr. Dallo said that he had to put his hand down to turn on the lights. Upon permission being granted by Officer Purrier, Mr. Dallo put one hand down and switched on the lights and then immediately turned them off.

Thereafter Officer Purrier searched each of the occupants of the car but did not find any weapons upon them. Then both officers drew their guns. Officer Normand stated: "Here is the man I want right here." Whereupon he stepped upon the running board of the car with his left foot and put his right foot over the car's door into the back seat. As he did so he replaced his gun in its holster, drew his handcuffs and placed one of them on Mr. Gays' left wrist. As this occurred, a shot was fired in the rear seat of the car. Officer Normand shrieked; exclaimed, "Oh, God!" and fell into the back of the car. At the sound of the shot Officer Purrier turned his head; as he did so, Mr. Dallo fired two shots into the officer's body which caused him to stagger back about thirty feet against a small tree. When Officer Purrier staggered away from the car, defendant raised a nickle-plated revolver and all three occupants of the car started shooting at the officer. Two additional shots struck him. Officer Purrier endeavored to secure aid at a neighboring house, and failing to do so, returned to his car where he saw the three men, one of whom was defendant, raise the body of Officer Normand from the bottom of the car and throw it in the gutter. At the same time, he heard Mr. Gays say: "Let's go hunt that other son-of-a-bitch up and finish him off. We don't want any witnesses left to this." Mr. Dallo said: "No, let's get to hell out of here as fast as we can. The whole damn town will be here in a few minutes." Mr. Gays then got out of the automobile, searched the body of Officer Normand and took the latter's gun from its holster. Defendant and Mr. Dallo started to drive away without Mr. Gays, who then ran toward Officer Purrier's car. As he did so Mr. Purrier shot and wounded him in the left leg. Mr. Gays then ran toward San Fernando Road. The car stopped at San Fernando Road and immediately thereafter proceeded to leave the vicinity of the crime.

Mr. Catlin, City Marshal of Burbank, who lived near the scene of the shooting, hearing the shots drove to the place where the crime had occurred, and found Officer Normand lying on the ground dead. On the following morning he found tire wrappings on San Fernando Road which had been taken from an automobile tire.

Defendant testified that Mr. Gays did the shooting, following which they drove to Los Angeles. Two days later defendant left Los Angeles for New York, without leaving a forwarding address, collecting wages due him, or paying his rent. He remained in New York three weeks and then went to St. Louis where he lived until the time of his arrest on December 19, 1942.

There are four questions presented for our determination which will be stated and answered hereunder seriatim.

[2, 3] First: *Was there substantial evidence to sustain the trial jury's implied finding that defendant participated in the killing of Officer Normand?*

This question must be answered in the affirmative, and is governed by the following pertinent rule of law:

Presence of a defendant at the commission of a felony by another is evidence to be considered, together with all of the circumstances immediately preceding, attending, and following the perpetration of the felony, as tending to show defendant's complicity in the crime. (People v. Erno, 195 Cal. 272, 278, 232 P. 710; People v. Yeager, 194 Cal. 452, 460, 229 P. 40; People v. Woodward, 45 Cal. 293, 294, 13 Am.Rep. 176; People v. Ho Kim You, 24 Cal.App. 451, 462, 141 P. 950.)

Applying the foregoing rule to the facts in the present case, it is apparent that the jury was justified in drawing the inference that the killing of Officer Normand was the result of a preconceived plan of defendant and his companions to resist arrest, and if necessary to take human life in order to avoid being apprehended. The jury's inference was justified by the undisputed evidence that defendant and his companions armed with revolvers were riding in an automobile after midnight, that one of their number apparently acted as a look-out and on perceiving Officer Purrier ran to the car in which his companions were seated. Later when stopped under suspicious circumstances without provocation Mr. Gays killed Officer Normand. After the fatal shots were fired, defendant and his companions rifled the body of the dying officer, pondered whether to pursue their nefarious scheme by trying to locate Officer Purrier and kill him, and then concluded to flee the scene of the crime. Defendant promptly left the State of California without giving anyone his address, collecting wages due him, or paying his room rent.

[4] Second: *Was there substantial evidence to sustain the jury's implied finding that Officer Normand met his death as the result of a criminal agency?*

This question must also be answered in the affirmative. Defendant testified that his companion, Mr. Gays, shot Officer Normand. The City Marshal of Burbank testified that shortly after the shots he found Officer Normand dead and there was blood upon his face and on the ground. The mortician who removed the dead officer's body testified that there was a bullet wound in the deceased's chest.

Clearly the foregoing evidence established the fact that the decedent came to his death as the result of being shot by Mr. Gays.

[5] Third: *Was there substantial evidence to sustain the implied finding of the trial jury that defendant shot at Officer Purrier?*

This question must likewise be answered in the affirmative. Officer Purrier testified that as he staggered against a tree after having been wounded by Mr. Gays, defendant shot at him.

This testimony, if believed by the trial jury, was sufficient of itself to sustain the jury's implied finding that defendant committed an assault with a deadly weapon with intent to commit murder. There is no merit in defendant's contention that Officer Purrier's testimony was contradicted by other evidence. (See People v. Pianezzi, 42 Cal. App.2d 265, 269, 108 P.2d 732.)

Fourth: *Did the trial judge commit prejudicial error in permitting the prosecution to introduce evidence that (a) the rear door of a tire shop near the scene of the crime was splintered, and that the following day wrappings from an automobile tire were found on San Fernando Road, and (b) Mr. Gays had been sent to prison?*

This question must be answered in the negative.

[6] (a) The evidence relative to the condition of the tire shop's door was admissible as a circumstance indicating that a felony had been committed, and therefore the officers were justified in arresting any suspicious characters found in the vicinity.

[7, 8] The evidence relative to the tire wrappings found on San Fernando Road was inadmissible since it was irrelevant. However, such error was clearly nonprejudicial and must therefore be disregarded by us. (Art. VI, sec. 4½, Constitution of the State of California; People v. Woods, 147 Cal. 265, 271, 81 P. 652, 109 Am.St.Rep. 151.)

[9] (b) After defendant testified that he had left Los Angeles because he was afraid Mr. Gays would kill him, the district attorney, on cross-examination, was permitted, over objection, to ask defendant if he had read that Mr. Gays had been sent to prison. In overruling the objection the trial judge said: "The objection is overruled. Of course the fact that he was sent to prison, if it is true, is not any evidence the jury is to consider, but merely for testing the extent of the activities of the defendant, this defendant."

Clearly the question was a proper one as having a bearing upon defendant's consciousness of guilt while he remained out of the state for approximately twenty-two years after the commission of the felony. (See People v. Yeager, 194 Cal. 452, 486, 229 P. 40.)

For the foregoing reasons, the judgments and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



60 Cal.App.2d 587

MASON v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 12417.

District Court of Appeal, First District, Division 1, California.

Sept. 27, 1943.

1. Injunction ⇐245

Fact that effective period in temporary restraining order exceeded ten-day period permitted by statute did not require persons against whom order was directed to ignore order and did not preclude them from recovering upon injunction bond their attorney fees expended in proceedings to secure dissolution of order. Code Civ.Proc. § 527.

2. Injunction ⇐245

The rule that person obtaining a temporary restraining order is "estopped" to challenge its validity in a suit against such person on his undertaking filed in connection with the order is also applicable against a corporate bondsman.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

3. Injunction ⇐245

Where corporate bondsman knew that purpose of bond was to secure persons against whom restraining order was directed from damage in event order was improperly secured and that bond was a condition precedent to securing restraining order, and bondsman issued bond without examining moving papers, and bond was used for purpose for which it was issued, corporate bondsman was "estopped" to assert that persons restrained acted unreasonably in employing attorney to present formal motions to dissolve order.

4. Injunction ⇐252(8)

Where temporary restraining order provided for its continuance until return day and until there was a decision upon order to show cause, restraining order was not one that terminated automatically on return day, hence motion to dissolve noticed for return day was not such an unnecessary act as to preclude parties restrained from recovering attorney fees in action upon bond.

5. Injunction ⇐245

Where bonding company issues bond in connection with temporary restraining order in consideration of payment of a premium, fact that no restraining order as provided by statute was issued because of erroneous time limit fixed therein did not relieve bonding company from liability because of any failure of "consideration." Code Civ.Proc. § 527.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

6. Injunction ⇐238

The obligation of a bond issued in connection with temporary restraining order was to pay damages suffered by those restrained if order was improperly issued, and such obligation was not "materially altered"

by issuance of restraining order for a period greater than ten day period permitted by statute so as to relieve bonding company from liability. Code Civ.Proc. § 527.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Alteration".

7. Injunction ⇐252(7, 8)

The amount recoverable on account of attorney fees from bonding company on a bond issued in connection with a temporary restraining order is limited to fees paid for procuring dissolution of restraining order and does not extend to fees paid for defending cause on its merits.

8. Injunction ⇐252(8)

Persons restrained under a temporary restraining order improperly issued are entitled, up to limits of bond, to recover from bonding company all fees reasonably paid to secure dissolution of order, even though other matters were also heard at same time, and whether fee was paid in connection with dissolution of order or other matters is question of fact for trial court.

9. Attorney and client ⇐140

In an action for attorney's fees, when judge is informed of extent and nature of legal services, he can determine what is a reasonable fee from his own knowledge and experience without necessity of other evidence.

10. Injunction ⇐251

In action upon bond issued in connection with temporary restraining order to recover attorney fees, where trial judge was the same judge that heard motion to dissolve temporary restraining order and other matters then presented and knew how much of argument was devoted to point relating to dissolution of restraining order, finding that fees sued for were charged to secure dissolution of restraining order and were reasonable was supported by the evidence.

11. Injunction ⇐252(8)

In action against bonding company on bond issued in connection with temporary restraining order to recover attorney fees, mere fact that work done by attorney in connection with motion to dissolve order was interwoven with matters considered in opposition to temporary injunction considered at same time did not relieve bonding company from all responsibility for attorney fees.

12. Attorney and client ⇐141

Where argument of motion to dissolve temporary restraining order was heard at same time as argument in opposition to order to show cause why a temporary injunction should not be issued and argument, exclusive of preparation, took a full day, charges totaling $500 made to secure dissolution of temporary restraining order when considered in connection with charges totalling $225 for other services in action were not excessive.

Appeal from Superior Court, Mariposa County; Andrew R. Schottky, Judge.

Action by Lloyd A. Mason against United States Fidelity & Guaranty Company to recover on bond given by defendant in connection with a restraining order secured by a third party against plaintiff and which was subsequently dissolved. Judgment for plaintiff, and defendant appeals.

Affirmed.

Stern & Grupp, of San Francisco, for appellant.

H. C. George, of Merced, for respondent.

PETERS, Presiding Justice.

Mason, respondent herein, as beneficiary of a deed of trust, and Milburn as trustee thereof, acting pursuant to the provisions of the deed of trust, properly noticed a sale of the property covered thereby for May 17, 1940, at 9:30 a.m. One Knowles, on May 16, 1940, in order to stop that sale, secured, ex parte, from a judge in Stanislaus County an order to show cause and a temporary restraining order. This order required Mason and the other named defendants to show cause on June 3, 1940, in the Superior Court of Mariposa County why an injunction restraining the sale should not be issued, and in the meantime "pending a decision upon said order to show cause" the sale of the property was temporarily restrained. As a condition of granting this restraining order the judge required that Knowles furnish an undertaking in the sum of $1,000. The bond was furnished by appellant herein. Before 9:30 a.m. on May 17, 1940, Knowles filed an action in Mariposa County to restrain the sale and to cancel the deed of trust, and

caused the order to show cause and the temporary restraining order to be served on Mason and Milburn shortly before the time set for the sale. Those parties immediately postponed the sale. On May 30, 1940, fourteen days after the issuance of the order to show cause, Mason and Milburn filed responses to the order to show cause, and also filed demurrers to the complaint, motions to strike, and motions to dissolve the temporary restraining order. The motions were noticed to be heard on June 3, 1940, the same date as the order to show cause was made returnable, which date was eighteen days after the order to show cause was issued. On June 3, 1940, the motions and demurrer were argued before Judge Schottky. That judge granted the motions to dissolve the restraining order, denied Knowles' application for a preliminary injunction, and sustained the demurrers to the complaint. The complaint was never amended, and Mason and the others named as defendants in the Knowles' complaint were given judgment by default, which judgment has long since become final.

After the restraining order has been dissolved Mason paid his attorney $350, the bill for this amount specifically reciting it was for "services rendered in procuring dissolution of restraining order." Milburn paid his attorney $150 for the same purpose. The payment made by Milburn was in fact paid by Mason, and Milburn assigned his claim for reimbursement against appellant bonding company to Mason. Mason thereupon instituted this action against the bonding company to recover the $500 thus expended to secure the dissolution of the restraining order. This action was tried before the same judge who had granted the order dissolving the restraining order. The trial court found that Mason and Milburn were "necessarily compelled" to retain attorneys to secure a dissolution of the restraining order, and that the sums paid were "the reasonable value of the services" rendered. It accordingly entered judgment for Mason for $500, from which judgment the bonding company appeals.

[1] The main contention of appellant is that the temporary restraining order was absolutely void because it provided it was to remain in effect for eighteen days, whereas § 527 of the Code of Civil Procedure provides that such ex parte order can be effective for but ten days. That section provides for the issuance of an ex parte restraining order in certain circumstances, but provides that in such event "the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order." Because the specified effective period of this temporary restraining order did exceed the ten-day-period it is urged that it was obviously void, that Mason and Milburn were not compelled to abide by its terms, and were not reasonably required to retain attorneys to secure its dissolution. It is also pointed out that the motions to dissolve were not made until fourteen days after the issuance of the order. It is the thought of appellant that, at least after May 26th, Mason and Milburn should have disregarded the restraining order and should not have incurred attorneys' fees in attacking that which it contends was already a nullity. This is a strange argument to be advanced by a defendant who, by issuing the bond, made the issuance of the allegedly void restraining order possible. If this theory were sound it would require each person served with a restraining order to make a quasi judicial determination as to the validity of the order. If it were void he would have to ignore it and could recover attorney's fees expended in securing its dissolution only if it were not void. There is no logical or legal reason why such a burden should be placed on the innocent person served with the restraining order. See Robertson v. Smith, 129 Ind. 422, 28 N.E. 857, 15 L.R.A. 273; Littleton v. Burgess, 16 Wyo. 58, 91 P. 832, 16 L.R.A. N.S., 49. While it is true that the restraining order violated the time limitations of § 527, supra, it is at least debatable as to whether or not it was valid for at least ten days, a thought that was expressed by Knowles' counsel when he noticed the discrepancy. Moreover, Mason and Milburn were in the position of having been served with a formal order of the Superior Court restraining the sale for eighteen days and thereafter until the order to show cause was determined. Even if they believed the order was void they were faced with the possibility of contempt proceedings if they violated it. Counsel for Knowles and the trial judge that issued the order had already made one mistake and there was no assurance it would not be repeated. Orderly procedure suggests that where the party

served believes the order is invalid he should take the proper steps to have it dissolved rather than resort to self help. A party should not be penalized because he resorts to orderly legal procedure rather than deciding for himself whether or not to abide by a formal court order. Even if the restraining order was completely void (a point we do not decide) it cannot be held, as a matter of law, that Mason and Milburn did not act reasonably in proceeding to secure its dissolution by formal motions to dissolve.

[2, 3] Had Knowles personally put up the undertaking here involved and were he now being sued on such undertaking, the law is clear that he, having secured the order, would be estopped to challenge its validity. See cases collected 4 Cal.Jur. p. 362, § 8; 32 Cor.Jur. p. 453, § 783; 28 Am. Jur. p. 525, § 352. There is no sound reason why a similar rule should not apply against a corporate bondsman. The evidence shows that upon application of Knowles' counsel the appellant issued its bond before the papers that were to be submitted to the judge of Stanislaus County had even been prepared. It knew that the purpose of the bond was to secure the defendants named in the restraining order from damage in the event the order was improperly secured. It knew that the securing of such an undertaking was a condition precedent to securing the restraining order. If its counsel had examined the moving papers before issuing the undertaking perhaps the error would not have occurred. It elected to issue the bond without such examination, and the bond was used for the very purpose for which it was issued. Under such circumstances, the appellant is in no legal position to now contend that respondent and Milburn acted unreasonably in moving to dissolve the order.

[4] Appellant next urges that, inasmuch as Mason and Milburn had the hearing on the motion to dissolve set for June 3rd, the same day the order to show cause was returnable, the motion to dissolve was a useless and unnecessary act, because, so it is urged, at that precise point of time the restraining order fell of its own weight, whatever the court should decide on the hearing of the order to show cause. It is urged that if, on the hearing on June 3rd, the temporary injunction had been granted, the temporary restraining order would have been supplanted, and that when it was denied, there was no ground to continue the restraining order. Therefore, so it is urged, the motion to dissolve was a totally unnecessary act. There is an obvious fallacy in the basic premise upon which this conclusion is predicated. The restraining order here involved was not one that automatically terminated on June 3rd. It provided for its continuance until June 3rd and until there was "a decision upon said order to show cause." There was no assurance to Mason and Milburn that the trial court would decide the order to show cause on the return day. The trial judge might have required briefs and might have taken ninety days from the date of the submission of the matter to decide that controversy. Admittedly, the issues involved were serious ones, and were argued a full day. For these reasons it is obvious that it was reasonably necessary for Mason and Milburn in order to protect their rights to move for a dissolution. There is nothing in Warden v. Choate, 33 Cal.App. 354, 165 P. 36, relied upon by appellant, contrary to the views herein expressed. In that case no motion to dissolve the restraining order was ever made. The party restrained simply resisted the order to show cause, and on the return date his demurrer was sustained. Of course the restraining order then fell of its own weight at the expiration of the time fixed in the order.

[5] The appellant next contends that there was no consideration for the bond, and for that reason urges it cannot be held liable thereunder. The bond recites that "Whereas, the plaintiff desires to give an undertaking for Restraining Order as provided by Section 527 of the Code of Civil Procedure . . ." Appellant urges that since no restraining order as provided by that section was ever issued, because of the erroneous time limit fixed therein, no liability can attach to it. The argument is unsound. The issuance of a proper restraining order was not the consideration for the issuance of the bond. The bonding company did not bargin to issue a bond in consideration of Knowles securing a proper restraining order under § 527. It issued the bond for a premium, which was apparently paid. Whatever rights it may have against Knowles because he secured an improper order are not involved in this case. For reasons already stated, the bonding company cannot urge such defenses against Mason and Milburn.

[6] In its closing brief appellant urges, for the first time, that it obligated itself

on a restraining order for ten days' duration, and that when the court issued one for eighteen days it materially altered its obligation without its consent. It urges that this "material alteration" discharged it from all obligations on its bond. It cites several cases for the well settled proposition that a surety is discharged by a change in its obligation not consented to by the surety. This is merely another way of restating the consideration point above considered. The obligation of the bond was not changed. The obligation was to pay damages suffered by those restrained if the restraining order was improperly issued. That is the obligation sued upon.

[7-10] The next contention of appellant is that there is no substantial evidence to support the finding that the two fees totalling $500 were charged solely to secure the dissolution of the restraining order. Appellant points out that the motion to dissolve was heard together with the order to show cause and the demurrers to the complaint, and contends that, under the evidence, the services actually were in connection with the order to show cause and the demurrers and not in connection with the motion to dissolve. It is, of course, the law that the amount recoverable on account of attorney's fees on such a bond is limited to fees paid for procuring the dissolution of the restraining order, and does not extend to fees paid for defending the case on its merits. Soule v. United States F. & G. Co., 82 Cal.App. 572, 255 P. 886; see, also, San Diego W. Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 P. 651; Curtiss v. Bachman, 110 Cal. 433, 42 P. 910, 52 Am. St.Rep. 111; Warden v. Choate, 33 Cal. App. 354, 165 P. 36. But the respondent here is clearly entitled, up to the limits of the bond, to recover all fees reasonably paid to secure a dissolution of the order, even though other matters were also heard at the same time. Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008; Handy v. Samaha, 117 Cal.App. 286, 3 P.2d 602. The question was one of fact. The trial court has found that $500 was charged to secure the dissolution of the restraining order and that such fee was reasonable. The sole question is whether there is any substantial evidence to support that finding. In this connection it should be kept in mind that the judge who tried this cause was the same judge who presided at the hearing of June 3, 1940. The trial judge knew how much of the argument that day was devoted to the point relating to the dissolution of the restraining order and how much was devoted to other matters. As a lawyer he was able to evaluate the worth of those services. It is well settled that when a judge is informed of the extent and nature of legal services, he can determine what is a reasonable fee from his own knowledge and experience without the necessity of other evidence. See cases collected 3 Cal.Jur. p. 714, § 111.

[11, 12] It is of course true that the attorneys for Mason and Milburn in preparing for the hearing of the motion to dissolve did much work that could also be used on the argument on the order to show cause and on their demurrers. Aside from the point that the restraining order exceeded the time limit fixed by § 527 of the Code of Civil Procedure, the same arguments that would defeat the application for the temporary injunction would show that the restraining order should be dissolved. The three matters were inextricably interwoven. But this fact does not relieve the appellant from all responsibility for attorneys' fees. The attorney for Mason and the attorney for Milburn explained at length what they did in preparation for the hearing of June 3rd. This included matters that were used on all three arguments. They then testified that they submitted bills totalling $500 for securing the dissolution of the restraining order, and submitted bills totalling $225 for other services rendered in the action. Under such circumstances we cannot say, as a matter of law, that the charges totalling $500 were not made to secure the dissolution of the order, or were excessive.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

60 Cal.App.2d 656

BRONGER v. POLYTECHNIC SCHOOL OF BEAUTY CULTURE, Limited, et al.

Civ. 14111.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1943.

1. Dismissal and nonsuit ⇐60(1)

It is plaintiff's duty, at every stage of proceeding, to use due diligence to expedite case to final determination, and, if he fails to do so, superior court, in exercise of its inherent discretionary powers, may dismiss action. Code Civ.Proc. §§ 583, 1190.

2. Mechanics' liens ⇐284

Dismissal of mechanic's lien foreclosure suit because of plaintiff's failure to bring action to trial in superior court until over two years after filing of complaint and date set for trial in municipal court, from which case was transferred, *held* not abuse of superior court's discretion, though federal court orders restrained plaintiff for short time from proceeding to bring case to trial. Code Civ.Proc. §§ 583, 1190.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by John Bronger against the Polytechnic School of Beauty Culture, Limited, the Charles C. Chapman Company, a corporation, and others, to foreclose a mechanic's lien. From a judgment of dismissal on defendant Chapman Company's motion, plaintiff appeals.

Affirmed.

Girard F. Baker, of Los Angeles, for appellant.

Sam L. Collins, of Fullerton, and Ben F. Gray, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Complaint to foreclose mechanic's lien was filed in the Municipal Court of Los Angeles County, January 31, 1940. Answer of the respondent defendant was filed March 4, 1940. At the instance of the plaintiff, the case was set for trial in the Municipal Court for April 1, 1940.

Upon motion by the defendant the Municipal Court April 1, 1940, made its order transferring the case to the Superior Court for trial. But no papers were filed in the Superior Court until September 8, 1942, more than two years after the filing of the complaint and the date set for trial in the Municipal Court.

After the papers were filed in the Superior Court, the case was set for trial. Then, and on November 23, 1942, motion was made by the defendant to dismiss, which motion was granted, pursuant to the provisions of Section 1190, Code of Civil Procedure.

The only question here involved is whether there was an abuse of discretion by the trial court in granting this motion. Farbstein v. Woulfe, 204 Cal. 595, 269 P. 446; Holt v. Miller, 214 Cal. 558, 6 P.2d 937, 79 A.L.R. 844; Code of Civil Procedure, § 1190; Miami Coal Co. v. Fox, 203 Ind. 99, 176 N.E. 11, 79 A.L.R. 344.

Plaintiff's affidavit in opposition to the motion to dismiss avers:

(a) That the asserted lien was for work done on a store room in a large building belonging to the respondent defendant, which resulted in the respondent defendant receiving rental which would not otherwise have been received.

(b) That defendant failed to file any notice of nonresponsibility, although the manager of the building had full knowledge of the improvements being made by the lien claimant.

(c) That the other defendant in the action, the renter of the store room, became insolvent and was adjudged bankrupt; that counsel for the plaintiff discussed with counsel for the defendant owner of the building a plan to endeavor to collect the amount of the lien from the defendant renter, who was primarily liable, but that no stipulation was signed between the parties; that temporary restraining orders in the Federal Court were issued, restraining plaintiff from proceeding with the pending action, which were in effect for a short time and were then modified to restrain enforcement of any judgment in this action. That when it became apparent plaintiff would receive no further payments from the renter defendant, plaintiff's counsel proposed a stipulation regarding delay in the prosecution of the pending action, which stipulation was refused; steps were then taken to put the pending case in condition to be tried and to set the same for trial; whereupon it was

found that the case had not as yet been transferred to the Superior Court; and, whereupon, plaintiff was again restrained by the Federal Court from taking any further action, which restraining order was dissolved October 13, 1942.

(d) That the plaintiff is willing to stipulate to an earlier date for trial than that set by the trial court.

(e) That, on information and belief, the defendant owner purchased at a bankruptcy sale all of the property of the defendant renter in the store room in question.

[1] When a motion to dismiss has been filed in accordance with section 583, Code of Civil Procedure, the duty of the plaintiff is defined in Jackson v. De Benedetti, 39 Cal.App.2d 574, at page 577, 103 P.2d 990, at page 991:

"The principles of law involved in both appeals are not complicated. Section 583 of the Code of Civil Procedure reads in part: 'The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial.' In 9 Cal.Jur., page 526, it is said: 'It is the duty of a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination. And it is clearly settled by numerous decisions that if he fails in the performance of that duty, the superior court may, in the exercise of its inherent discretionary powers, dismiss the action.' In Gray v. Times-Mirror Co., 11 Cal.App. 155, 164, 104 P. 481, 484, the court said: 'The law will presume injury from unreasonable delay. It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rest upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. It is no answer to say that the respondent did not, during the period of the delay, utter a word of protest against such delay. As we have said, it was the duty of the plaintiff to act and to act with reasonable promptness and diligence. It was not the duty of the respondent to make any move except such as the law requires it to make in response to the movements of plaintiff at the various stages of the litigation.' A clear and succinct statement of the principles controlling in a case of this character is found in Lieb v. Lager, 9 Cal.App.2d 324, 326, 49 P.2d 886, 887, where the court said:

"As has frequently been said, the duty rests upon a plaintiff at every stage of the proceedings to use diligence to expedite his case to a final determination that there may be an end to litigation. The question of diligent prosecution is one largely committed to the discretion of the lower court. Ferris v. Wood, 144 Cal. 426, 77 P. 1037. The only limitation upon the exercise of the discretionary power of the court to dismiss a cause for delay in the service of summons is that it must not be abused. Kreiss v. Hotaling, 99 Cal. 383, 33 P. 1125. Here the motion was heard upon conflicting affidavits and it must be assumed that the court below found the facts to be as asserted by the moving and prevailing party. Witter v. Phelps, 163 Cal. 655, 126 P. 593. * * * Even if it be assumed that the delay here involved did not injure the defendants, it is no excuse in itself for the tardy service, and this fact in no manner controlled the action of the court in the exercise of its discretion. Anderson v. Nawa, 25 Cal.App. 151, 143 P. 555. To say that the court is so limited is to deny its exercise of discretionary power in all cases. As we have seen, the only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. Clavey v. Lord, 87 Cal. 413, 419, 25 P. 493.'"

[2] There is nothing apparent in this case upon which an abuse of discretion of the trial court may be founded. If the plaintiff had been restrained at all times by mandate of the Federal Court from proceeding to bring his case to trial, such fact brought to the attention of the trial court undoubtedly would have been persuasive in securing relief for the plaintiff in the state court, but the most that the record

discloses is that such restraining orders were in effect for only a short time.

There being no abuse of judicial discretion, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



60 Cal.App.2d 725

CROCKER et al. v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al.

BIANCHI et al. v. SAME.

No. 12378.

District Court of Appeal, First District, Division 1, California.

Oct. 2, 1943.

Rehearing Denied Nov. 1, 1943.

Hearing Denied Nov. 29, 1943.

1. Trusts ⇐227

Where insured executed declarations of trust with respect to life policies and total permanent disability benefits and insurers refused to continue benefits on ground that insured was no longer disabled and trustee employed attorneys for reasonable compensation contingent on final adjudication of total disability, recovery of reasonable attorneys' fees from trustee was not precluded on ground that judgment against insurers was not final, in view of policy provision authorizing insurers to challenge insured's disability status.

2. Trusts ⇐227

Where insured executed declarations of trust with respect to life policies and total permanent disability benefits and insurers refused to continue benefits on ground that insured was no longer disabled and trustee employed attorneys for reasonable compensation contingent on recovery from insurers, evidence disclosing that $12,000 was paid to trustee because of attorneys' litigation against insurers did not preclude recovery of $5,000 from trustees as reasonable attorneys' fees, on ground that $12,000 recovery was merely reimbursement of accrued benefits.

3. Trusts ⇐227

Where insured executed declarations of trust with respect to two $25,000 life policies and $250 monthly total permanent disability benefits and insurers refused to continue benefits on ground that insured was no longer disabled and trustee employed attorneys for reasonable compensation contingent upon recovery from insurers and judgment was against insurers for $12,000 and insured had an expectancy of about 20 years, evidence sustained a $5,000 award against trustee as reasonable attorneys' fees.

4. Appeal and error ⇐1010(1)

Upon an award of attorneys' fees, an appellate court will not set aside the findings of the trial court or reverse the judgment rendered thereon if they are at all supported by the evidence.

5. Appeal and error ⇐984(5)

Where the trial court has fixed the compensation of an attorney upon a consideration of the evidence and its own judgment, the appellate court will not interfere unless a plain and palpable abuse of discretion has occurred.

6. Appeal and error ⇐843(2)

Point that trial court erred in refusing to postpone trial to await final determination of a pending action was "moot" where decision of pending action had since become final.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Point".

7. Trusts ⇐187

Where litigation in which claimants' services were rendered to trust fund had not been finally terminated, such claims were prematurely urged by beneficiaries, where beneficiaries sought to compel all claimants against the fund to set up their claims.

8. Interest ⇐19(1)

In an action for the reasonable value of services, the amount, character, and value of which can be established only by evidence, or by an accord, and which are not susceptible of ascertainment by computation or by reference to market rates, plaintiff is not entitled to interest prior to verdict or judgment.

9. Interest ⇐19(1)

Where cross-complaint was for recovery of reasonable value of legal services allegedly worth $6,000 and trial court allowed $5,000 after a hearing and there was no accord between attorneys and their client,

attorneys were not entitled to interest prior to entry of judgment.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Doris G. Crocker and another against the Crocker First National Bank of San Francisco and others to enjoin named defendant as trustee from paying trust funds for attorneys' fees and to compel claimants against the fund to set forth their claims and to have them adjudicated, wherein A. B. Bianchi and another filed a cross-complaint. From a judgment for cross-complainants, plaintiffs appeal.

Judgment modified, and as modified, affirmed.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for appellants.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondents Doris G. Crocker and Marjorie Catherine Mahony.

A. B. Bianchi of San Francisco, and Augustin Donovan, of Oakland, respondents in propria persona.

Franklyn M. O'Brien, of San Francisco, for said respondents.

KNIGHT, Justice.

Plaintiffs brought this action as beneficiaries of a trust fund, to enjoin the defendant bank, as trustee of said fund, from paying any of the trust funds for attorneys' fees and to compel all claimants against the trust fund to set forth their claims and have them adjudicated. The defendants Bianchi and Donovan filed a cross-complaint alleging that the bank had employed them to perform certain legal services in connection with said trust fund, that they had performed such services and that the reasonable value thereof was $6,000. Judgment was entered in their favor on the cross-complaint for $5,000, and it was ordered therein that said sum was to be paid by the trustee bank out of the trust fund. From said judgment the plaintiffs alone appeal.

The legal services for which respondents claimed compensation in their cross-complaint were performed under the following circumstances: In 1924 J. J. Mahony, then the husband of plaintiff Doris G. Crocker and the father of plaintiff Marjorie Catherine Mahony, took out two life insurance policies in the principal sum of $25,000 each, and each provided for a waiver of premium and benefits of $250 a month in case of total permanent disability. One policy was written by the Equitable Life Assurance Society, and the other by the Aetna Life Insurance Company. In 1925 Mahony became "totally disabled" and disability benefits were paid by both companies without litigation up to 1935. Meanwhile and in 1930 Mahony executed a declaration of trust to the defendant bank and caused the policies to be delivered to the bank, and caused the bank to be named as death beneficiary of the policies. In 1932 he executed another trust indenture to the same trustee bank of the disability benefits under said policies, with power to collect the same, and naming the trustor and the plaintiffs herein as beneficiaries of the trust with provision for the payment by said trustee monthly of half of said disability benefits to the trustor and half to plaintiffs. Article VI of the trust indenture provided in part: "The trustee may institute any proceeding at law or in equity in order to enforce the payment of moneys due and payable on account of the said disability payments provided by the aforesaid policies, and may do and perform any and all other acts and things which may be necessary for the purpose of collecting any of said moneys which may be due and payable under the terms of said policies * * *." Prior to the execution of the 1932 trust indenture the trustor and plaintiff Doris G. Crocker were divorced, and each has since remarried.

Under the terms of the policies the insurance companies are entitled to require proof of continued disability periodically, as often as once a year at their option, or to terminate liability at any time if the insured is able to engage in a gainful occupation. In 1935 the Equitable Life Assurance Society required the insured to furnish proof of continued disability; and an action was brought in the name of the trustee, represented by attorneys Keith and Creede, to recover accrued installments. Judgment was entered in favor of the trustee, and payment of the benefits continued until 1940. Early in that year both of the insurance companies ceased and refused to continue to make the disability payments, each claiming that the insured was no longer totally and permanently disabled, and each threatened that unless the payment of premiums was resumed forthwith it would

lapse the policy. The trustee having then no funds available in the trust, refused to advance money for premiums or costs of suit, and with the consent of the trustor employed respondents to commence and prosecute an action to establish the obligations of said companies to pay the disability benefits, to collect all disability benefits allegedly accrued under the policies, to secure the waiver of future premiums and the return of such sums as had been paid to said companies for premiums during the time the disability was claimed to have existed, and generally to conserve and protect each of said policies from lapse or default. The terms of the oral understanding relating to said employment, as found by the court, were that in the event no recovery was effected by respondents, they would take nothing for their services, advancements or costs and disbursements; that in such event all services rendered and amounts disbursed should be at their own risk; but in the event of recovery in said actions or in the event of any final adjudication of the total disability of Mahony, the agreement with respondents was that the disbursements made by them and the compensation for their services would be made out of the trust funds; "that in the event of recovery and the final adjudication of such total disability, such disbursements would be repaid, together with compensation for the services rendered, as was reasonable in the premises, taking into consideration that such payment for services was contingent as aforesaid." The trial court further found that respondents filed and prosecuted an action against each of the insurance companies, "obtained a final judgment establishing the total and permanent disability of the life owner, Jeremiah J. Mahony, and in the interim successfully arranged to save each of said policies from forfeiture or lapse by the payment by said attorneys of certain premiums; by reason of all whereof, on or about the last week of December, 1941, an immediate recovery was effected in cash for accrued disability benefits and return premiums in ar amount approximately upwards of Twelve Thousand Dollars ($12,000.00)". "That in addition to said moneys, the said cross-complainants [respondents], by judgment and stipulations, further established an obligation on the part of each of said insurance companies to pay into the said fund and to the said defendant trustee, on January 3, 1942, each an additional sum of Two Hundred and Fifty Dollars ($250.00) and monthly thereafter a similar sum during the existence of said disability and the life of Jeremiah J. Mahony and the waiver of premiums during said time; that said Jeremiah J. Mahony was approximately fifty-one years of age and that his expectancy is approximately twenty years; that in the light of such contingencies, the services rendered by cross-defendants [cross-complainants], as aforesaid, established a contingent obligation of a value in excess of One Hundred Thousand Dollars ($100,000.00); that in connection with the services rendered by cross-complainants, as aforesaid, they expended and disbursed a sum in excess of One Thousand Dollars ($1,000.00)." The court further found that such services were of the reasonable value of $5000, and judgment was entered as stated for that amount.

[1] Appellants first contend that there is no evidence to support the trial court's finding that respondents had obtained a final judgment establishing the total and permanent disability of Mahony. In this regard they argue that all that was obtained was a judgment for $1,500 against the Equitable, but this judgment did not purport to adjudicate any future liability; in other words, that it established the liability of the companies up to the date of the judgment, but did not establish any future liability, and therefore the insurance companies may at any future time again contest the disability status of the insured; consequently there was no "final judgment establishing the total and permanent disability" of the insured which was the condition precedent to recovery by respondents. There is no merit in the point. In view of the provisions of the policies that the insurance companies could challenge the disability status of the insured as often as once a year, it was obviously impossible to ever obtain a judgment of permanent disability which would prohibit the companies from afterwards challenging that status; and it would seem only reasonable, therefore, that the phrase "total and permanent disability" as used in the findings, in the contract of employment, and as understood by the parties thereto, must mean "total and permanent disability" as defined in the policies. Respondents did obtain a final judgment against the Equitable in the sum of $1,500 based upon the 1941 "total and permanent disability" of the

insured, and by stipulation arrived at a similar result in connection with the Aetna policy; furthermore, they collected all moneys due by reason of such disposition to January 3, 1942.

[2-5] Appellants contend that the amount allowed as attorneys' fees is entirely unwarranted by the services actually rendered; that the recovery of "upwards of $12,000" was merely a reimbursement of payments of accrued and accruing disability benefits by the insurers in compliance with the obligations of the policy. The evidence disclosed by the record is amply sufficient, however, to support the conclusion that it was because of the litigation instituted and carried on by respondents and the legal services performed by them in connection therewith for the enforcement of the obligations of the policies that the $12,000 was paid. Furthermore, all of the witnesses testified as to the value of the services being in excess of the amount awarded, and appellants introduced no evidence upon the question. Upon an award of fees "an appellate court will not set aside the findings of the trial court or reverse the judgment rendered thereon if they are at all supported by the evidence"; and "where the trial court has fixed the compensation of an attorney upon the consideration of the evidence and its own judgment, the appellate court will not interfere unless a plain and palpable abuse of its discretion has occurred." Mayock v. Splane, 56 Cal.App.2d 563, 132 P.2d 827, 832, quoting from 3 Cal.Jur. 718.

[6] Appellants urge also that the trial court erred in refusing to postpone the trial of the present action to await final determination of an action then pending involving the question of the validity of the trust indenture; but this point has now become moot for the reason that the validity of the indenture has since been sustained and the decision so holding has become final. Mahony v. Crocker, 58 Cal. App.2d 196, 136 P.2d 810.

[7] By way of an amended and supplemental complaint, appellants brought in two additional claimants, namely, the law firm of Chickering and Gregory, and the trustee bank, each of whom asserted a claim for compensation for services rendered in connection with the administration of the trust fund, but the court declined to pass upon the merits of their claims in this action, and the court's ruling is assigned as error. The contentions made in this behalf are without merit. In this respect the trial court found on evidence legally sufficient to support the finding that such claims were prematurely urged; that such services were in no way duplications but were separate from and in addition to the services rendered by respondents herein; that the services rendered by said claimants were unrelated to the establishment and collection of the disability benefits, but were rendered in connection with the administration of the trust and in the action brought by the insured involving the validity of the trust indenture, and which had not then been finally determined. The court then went on to hold that the claims of the law firm and the bank trustee should be denied without prejudice and held in abeyance until the final determination of that action and until the further order of the court, and that the determination and payment thereof should be restrained in the interim. The only complaint made by appellants with reference to the refusal of the trial court herein to pass upon the merits of those claims is that appellants will be put to the annoyance and expense of later litigation in connection therewith. But the claimants themselves are not complaining, and it is apparent that the proper time for the adjudication of those claims is after the litigation in which the services were rendered is finally terminated.

[8, 9] The judgment herein was entered on July 2, 1942, and provided for the payment of interest at 7% on the fee of $5,000, as allowed by the trial court, from January 1, 1942. The rule is, however, that in an action to recover the reasonable value of services rendered, the amount, character and value of which can be established only by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates, the plaintiff is not entitled to interest prior to the verdict or judgment. Shellenberger v. Baker, 101 Cal.App. 615, 281 P. 1102; Gray v. Bekins, 186 Cal. 389, 199 P. 767; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719. Here the cross-complaint was for the recovery of the reasonable value of services performed, which respondents alleged were reasonably worth $6,000, and the trial court after hearing the evidence allowed $5,000. It is apparent, therefore, that respondents were not entitled to in-

terest thereon prior to the entry of judgment. Respondents contend that on December 31, 1941, there was an accord between them and the trustee bank, but there is no finding to that effect, nor in our opinion would the evidence justify such a finding.

In accordance with the views above expressed, the judgment is modified by striking therefrom the provision allowing interest prior to the entry of judgment, and as thus modified the judgment is affirmed, the respondents to recover costs.

PETERS, P. J., and WARD, J., concur.



60 Cal.App.2d 713

DAVIS et al. v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA et al.

DAVIS v. BIOFF et al.

Civ. 13838.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1943.

As Modified on Denial of Rehearing Oct. 21, 1943.

Hearing Denied Nov. 29, 1943.

1. Associations ⇐10

In any proper case involving expulsion of a member from a voluntary unincorporated association, the only function which courts may perform is to determine whether association has acted within its powers in good faith, in accordance with its laws and the law of the land.

2. Trade unions ⇐4

Where trade union, before expelling plaintiffs, made formal charges which were served upon plaintiffs and gave plaintiffs timely notice of dates and places of their respective trials and trials were apparently fairly conducted, plaintiffs were not denied "due process" in their expulsion.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

3. Trade unions ⇐4

Where expelled union members were served with formal charges against them and given timely notice of dates and places of their respective trials, their absence from the trials did not affect validity of proceeding.

4. Trade unions ⇐4

In action to compel reinstatement of expelled union members, evidence sustained conclusion that charges upon which members were expelled were made and presented in good faith as required by law.

5. Associations ⇐10
Trade unions ⇐4

Unincorporated associations including trade unions have natural right of self-preservation, and may with propriety expel members who show their disloyalty by joining a rival organization.

6. Trade unions ⇐4

The constitution and by-laws of a voluntary association, such as a trade union, is measure of authority conferred upon organization to discipline, suspend or expel its members, and is the contract between the organization and its members, limiting the power to regulate conduct of its members.

7. Trade unions ⇐4, 7

Provision of trade union constitution authorizing international president or his representative to take over operation of local union during period of emergency gave international representative jurisdiction of local union's membership as well as its affairs, hence compliance with constitutional provision that charges against a member must be filed with secretary and tried before trial committee or executive board was not required of international representative who occupied all such offices.

8. Trade unions ⇐7

Public policy requires that safeguards be set up in organic law of trade unions against arbitrary and groundless establishment of a period of emergency by which international president can take control of local union.

9. Trade unions ⇐4

Where local union was being administered during emergency by international representative and so far as safely could be done trial of members who caused emer-

gency followed regular course provided for such trials and international representative appointed impartial trial board and proof of members' guilt was complete and unchallenged, members were not prejudiced by failure to read charges at a meeting of the local, and could not complain that trial committee's report received approval of representative without being presented to a meeting of local union.

10. Trade unions ⇐4

Trade unions are not bound to use strict regularity of legal proceedings in enforcement of disciplinary laws.

11. Trade unions ⇐4

In reviewing proceedings taken by union relating to enforcement of disciplinary laws, courts will disregard technicalities and not interfere, because of a departure from form, unless it appears that accused has been denied a full opportunity to defend himself and that union has not exercised its powers fairly and in good faith.

12. Trade unions ⇐4

Where trade union was being administered by international representative during emergency as provided by constitution, international representative had power to expel members found guilty by a trial board of acts which brought about the emergency, notwithstanding that ordinary procedure would have permitted members of local to determine whether punishment should be by fine or expulsion.

13. Trade unions ⇐3

The rule "expressio unius, exclusio alterius", as applied to the construction of constitution and by-laws of trade union must be subordinated to primary rule that intent prevails over the letter.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius, Exclusio Alterius".

14. Trade unions ⇐4

The fact that one provision of union constitution does not authorize international president to try a member of a local during an emergency cannot be construed as denying international president that right under terms of another section.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Action by George H. Davis and Henry MacIsaac against I.A.T.S.E. (the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada), etc., and others and action by George H. Davis against William Bioff and others and the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, etc., and others for mandatory injunctions restoring plaintiffs in each action to their membership in defendant union and for other relief. Judgment for defendants, and Henry MacIsaac in the first case and George H. Davis in the second case appeal.

Affirmed.

Thomas A. Joyner, Reginald L. Dyer, and Theodore E. Bowen, all of Los Angeles, for appellants.

Bodkin, Breslin & Luddy and Michael G. Luddy, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The plaintiffs, George H. Davis and Henry MacIsaac, were, but no longer are, members of the defendant International Alliance of Theatrical Stage Employes and Motion Picture Machine Operators of the United States and Canada, an unincorporated association. Plaintiffs are no longer members of the Alliance because they were expelled from that organization following trials upon charges that they had joined an organization which was opposed to the best interests of the Alliance and by so doing had conducted themselves in a manner detrimental to the advancement of the purposes which the Alliance pursues. There is no doubt that the plaintiffs were guilty of promoting an organization which, had it been successful, would have defeated the purposes of the organization of which they were members and that their guilt was proven at their trials. They contend, however, that the trials were not held in conformity with the procedure prescribed by the constitution of the Alliance, and, of even more consequence, that the determination of the penalty which they should suffer was not left to the local organization of the Alliance, as it should have been, but was undertaken by one who had no authority. By these two cases, consolidated for trial, plaintiffs sought mandatory injunctions restoring them to membership, damages for their losses due to their loss of membership and declaratory relief. From the judgment denying them

any relief, plaintiffs have appealed. We are of the opinion that the judgment should be affirmed.

[1-5] A succinct statement of the general principles governing this case we find in Smith v. Kern County Medical Ass'n, 1942, 19 Cal.2d 263, 265, 120 P.2d 874, 875: "In any proper case involving the expulsion of a member from a voluntary unincorporated association, the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land. [Citing cases.]" No complaint is or with any seriousness could be made by the plaintiffs that due process was lacking in their expulsion, for formal charges were made and served upon each of them and they were given timely notice of the dates and places of their respective trials and, so far as appears, the trials were fairly conducted. Neither plaintiff took advantage of the opportunity afforded him to attend his trial and defend himself, but his absence does not affect the validity of the proceeding. Smith v. Kern County Medical Ass'n, supra, 19 Cal.2d 263, 268, 269, 120 P.2d 874. The evidence supports the conclusion that the charges were made and pressed in good faith. An organization has the natural right of self preservation, and may with propriety expel members who show their disloyalty by joining a rival organization. Neto v. Conselho Amor, etc., 1912, 18 Cal.App. 234, 122 P. 973; and see Smith v. Kern County Medical Ass'n, supra, 19 Cal.2d 263, 270, 120 P.2d 874.

[6] The real question in the case thus comes to this: Were the plaintiffs tried and expelled in accordance with the constitution and by-laws of the Alliance. "The constitution and by-laws of a voluntary association is the measure of the authority conferred upon the organization to discipline, suspend or expel its members. The provisions of the constitution and by-laws become the contract between the organization and its members, limiting the power to regulate the conduct of its members." Smetherham v. Laundry Workers' Union, 1941, 44 Cal.App.2d 131, 136, 137, 111 P.2d 948, 951.

The plaintiffs are able to point to several provisions of the Alliance's constitution which touch upon the subject of disciplinary trials, and with truth say that in the conduct of their trials the procedure there prescribed was not followed. Specifically plaintiffs note that section 6 of Article XVI requires that the charges shall be filed with the secretary of the local union, whereas in fact they were filed with one Gatelee, who was an international representative. By the terms of section 8 of the same article the charges should have been, but were not, read at a regular meeting of the local union. The presiding officer, it is further provided, shall refer the charges to a trial committee or the executive board. Gatelee, we find, appointed three members of the local union of the Alliance as a trial committee, and plaintiffs' trials were conducted before this committee. Sections 12, 20, 21 and 23 provide that the trial committee, after hearing all the evidence, shall reduce its findings as to the guilt or innocence of the accused, and its recommendation as to the penalty, to writing and report to the next meeting of the local union. The local, then, without debate, shall vote to approve the report or not to do so; and if it is approved, then the local determines the penalty. The trial committee followed the steps outlined, except that its reports were made to Gatelee, and he and not the local union approved the reports, which found the plaintiffs guilty and recommended expulsion, and it was he who then signed formal "sentences," expelling the plaintiffs from the Alliance. Section 13 of Article XXI, which article is entitled "Privileges and Duties of Membership," adds this provision to those upon which the plaintiffs place reliance: "No member of this Alliance shall be expelled * * * unless such member has been accorded a fair trial in the manner set forth in Article XVI of this Constitution."

The defendant Alliance does not deny that had plaintiffs' trials been held during normal times, in the life of the local union, the manifest departures from the orthodox trial practice would give the plaintiffs cause for complaint, but it points out that the trials were not held during normal times, but under conditions which made applicable other provisions of the constitution than those relied upon by the plaintiffs. Particular attention is drawn to the fact that an emergency had been declared to exist in the local union, and it points to sections of its constitution which, it argues, control during an emergency period. In Article VII, Section 16, it is provided under what circumstances and in what manner an emergency may be found to exist. We must assume, the record being silent on the matter, the plain-

tiffs having introduced no evidence whatever to the contrary, that the state of emergency under which the Alliance was undoubtedly acting during the period of plaintiffs' trials had been justifiably and regularly determined to exist.

We find it provided in section 16, Article VII of the constitution of the Alliance:

"b. Where reliable and creditable information is brought to the knowledge of the International President indicating that a condition exists in an affiliated local union whereby the actions of the officers or members thereof endanger the property rights or interests of this Alliance, of any affiliated local union thereof, or of individual members thereof and where, because of the imminence or irreparable injury thereto, the ordinary procedure prescribed by this Constitution and By-laws would, in the opinion of the International President, prove too slow, cumbersome, and inadequate to completely protect the rights and interests so endangered; then the International President has the right and is hereby empowered, with the consent of the General Executive Board, to declare the existence of a state of emergency in the said local union. * * * the International President or his duly accredited representative shall have the power during the continuance of said emergency to take over all books, records, monies, credits, and property of such union of every nature whatsoever and to administer the same according to his best judgment for the benefit of such local and this International; to collect dues, fines and other revenue to which said local may be entitled and to incur and pay all just bills and obligations of said local union out of its funds in his hands; to adjust disputes between employers and members of such local union and enter into working contracts for its members which said contracts shall be valid, legal and binding upon said union and the members thereof after the expiration of said emergency until the expiration thereof; and in general, to conduct the affairs of said union in the same manner as it might have conducted its own affairs in the absence of such emergency. * * *

"During the continuance of such emergency, all of the rights, powers, and privileges granted to any local union, its officers or members, to conduct its affairs, granted or guaranteed to said local union by its charter, or by this Constitution or any By-Laws enacted hereunder, shall be suspended and any other provisions of this Constitution or the By-Laws enacted hereunder and any provision of the charter, Constitution or By-Laws of any such local union inconsistent with the powers herein granted to the Executive Board of this Alliance, the International President, Vice-President or International Representative appointed to conduct the affairs of such local union are hereby declared to be entirely inoperative and of no force and effect during the continuance of such emergency and until such emergency shall have terminated and such termination shall have been expressed by resolution of the General Executive Board.

"The sole authority for the conduct of the affairs of such local union during such emergency shall be the orders, rules, mandates, and decisions of the International President, the Executive Board and the Vice-President or International Representative appointed to conduct the affairs of said local union, provided, however, that any officer or member of such union in good standing shall have the right to appeal from any such order, mandate or decision on account of which he feels aggrieved, to the General Executive Board and from the decision of said Board to the delegates of this Alliance when assembled in convention as provided in the Constitution in case of appeals from decisions of the President."

Some other provisions of this Constitution should be known. By section 3 of Article XII the International President of the Alliance is given power to appoint "one or more International Representatives as the occasion shall arise to represent him in any capacity and for any purpose in which he himself could act." Earlier, in section 13 of Article VII, the International President is authorized "to delegate any of his powers * * * to the International Representatives by him appointed. * * *" Mr. Gatelee, whose name was mentioned in our statement of plaintiffs' theory of the case, appears on the scene as such an International Representative.

Plaintiffs, of course, recognize the existence of section 16 of Article VII, with its provisions which govern in the event of an emergency, and as we have noted they do not combat the fact that there was a period of emergency reigning during the period when the charges were filed against them and they were tried and expelled

from the Alliance. They point, however, to the provision of section 4 of Article II of the constitution which was their contract with the Alliance, that gives each local union "full and complete control over its own membership and affairs," and argue that all that section 16 of Article VII does, during an emergency, is to deprive a local of control over its affairs, leaving it in control of its membership, and as a consequence the provisions of Article XVI, which govern trials, still govern though an emergency exists.

[7, 8] Without characterizing plaintiffs' construction of the several provisions of the constitution as unreasonable, we decline to accept it because we are of the opinion that the interpretation adopted by the voluntary association, whose actions we are asked to undo, is the more reasonable. An analysis of the terms of the sections, which we have quoted, in support of our statement, seems to us a superfluous act. Plainly, all of the officers of the local union, during an emergency, are supplanted by the International Representative appointed to take charge of the local, so that the various steps which they are to take cannot be done by them. If the emergency in a local is caused, as appears to have been the case here, by action participated in by a large number of the members of the local, it would be a futile interpretation which excluded from the affairs, which are taken over by the parent organization, the discipline of the members whose disloyalty is causing the emergency. By provisions of the constitution to which we have not heretofore referred, and concerning which it is not necessary that we do more than make reference, safeguards against the arbitrary and groundless establishment of a period of emergency are set up, as public policy requires. Supreme Lodge of the World v. Los Angeles Lodge No. 386, 1917, 177 Cal. 132, 136, 169 P. 1040. When questioned, as was not done in these cases on appeal, the steps by which an emergency is determined to exist should be critically examined because of the great power over local unions that is then placed in the hands of the chief executive of the international union. But granted the state of emergency in a local union, power is properly lodged where it will prove effective and that, the constitution provides, is in the hands of the International President and his representative.

[9-12] So far as could safely be done, from the viewpoint of one charged with protecting the interests of the Alliance, plaintiffs' trials followed the regular course provided for them. Gatelee, of course, during the emergency, held all the offices temporarily vacated during the suspension of their regular occupants, so that it was in conformity with section 6 of Article XVI that the charges were filed with him instead of the regular secretary of the local. The charges were not read at a meeting of the local, as provided by section 8, Article XVI, but the section forbids any debate or discussion following the reading, and the principal purpose of the reading seems to be to enable the prosecution to secure the names of witnesses. In any event we deem the failure to comply with section 8 to have worked no prejudice to plaintiffs. "* * * associations of the kind here involved are not bound to use the strict regularity of legal proceedings, and, in reviewing the proceedings taken by such organization relating to the enforcement of its disciplinary laws, the courts will disregard technicalities and not interfere, because of a departure from form, unless it appears that the accused has been denied a full opportunity to defend himself and the organization has not exercised its powers fairly and in good faith. [Citing cases.]" McConville v. Milk W. D. Union, 1930, 106 Cal.App. 696, 701, 289 P. 852, 854. Gatelee, the only acting officer, was the proper one to appoint the trial committee. Neither he nor the trial members of the trial committee were revealed to have had any animus toward the plaintiffs before they heard the evidence, and the evidence produced at the trials amply sustained the charges. Because the proof of the plaintiffs' guilt was complete and unchallenged, they can hardly complain to a court of equity that the trial committee's report received the approval of Gatelee without being presented to a meeting of the local Neto v. Conselho Amor, etc., supra, 18 Cal.App. 234, 239, 122 P. 973; Kramer v. Slovenian Ladies Soc., 1936, 14 Cal.App.2d 384, 58 P.2d 176. This leaves only one irregularity which can be said to have substance, and of course it does. While the members of the local could not honestly have done other than confirm the conviction, they could, within an honest exercise of the discretion ordinarily to be exercised by them, have determined that

punishment to be imposed upon the plaintiffs should have been a fine instead of expulsion. It is because at this stage of the proceedings Gatelee used his judgment instead of submitting the problem to the local that we have found it necessary to determine whether or not he had that right. As already stated, it is our conclusion that the interpretation adopted by the officers and executive board of the Alliance, and approved by the trial court, that he had the right is a reasonable one, and we decline to substitute a different interpretation.

[13, 14] The Alliance relies not only upon the provisions of its Constitution already referred to, in support of its dismissal of the plaintiffs, but calls attention also to section 5 of Article VII, dealing with the judicial power of the International President, and so of his representative. So far as it touches upon the facts of this case the section provides:

"The International President shall have original jurisdiction to try charges against individual members of this Alliance:

"a. When charges have been preferred against a member to his local union and the local union has wrongfully neglected or refused to take cognizance of them; or

"b. When charges are preferred against a member of a dissolved or suspended local union."

It would not be an unreasonable interpretation to say that during the emergency, the local, whose officers and powers had been suspended, was itself suspended, within the meaning of this section. However, we can accept plaintiffs' construction, which is that section 5 of Article VII refers to a suspension of a local in a manner not covered by section 16, Article VII, without disturbing the conclusion we have heretofore expressed. Section 5, by plaintiffs' interpretation, would make provision for disciplinary action at a time when the local would not, or because its powers were formally suspended, it could not, discipline its members, but would not cover the situation existing during an emergency. The rule, expressio unius, exclusio alterius, "is frequently a helpful rule; but it is always to be subordinated to the primary rule that the intent shall prevail over the letter." Gallagher v. Campodonico, 1931, 121 Cal. App.Supp. 765, 774, 5 P.2d 486, 490; and see Sobey v. Molony, 1940, 40 Cal.App.2d 381, 389, 104 P.2d 868. If section 5 of Article VII itself does not authorize the International President to try a member during an emergency, it is not to be interpreted as denying him that right under the terms of section 16, of the same article, whereby he is given very extensive powers when an emergency has arisen. Membership in the Alliance is, generally speaking, gained through and dependent upon membership in a local. We are of the opinion that its constitution makes provision for a method of disciplining local members adequate to the various conditions which may prevail.

The judgment appealed from is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



60 Cal.App.2d 645

COOMBS v. MINOR et al.
Civ. 14055.

District Court of Appeal, Second District, Division 1, California.
Sept. 30, 1943.

Rehearing Denied Oct. 26, 1943.
Hearing Denied Nov. 22, 1943.

1. Limitation of actions ⇐49(1), 103(3)

An action against widow individually and as administratrix of decedent's estate for money had and received and to declare a trust as to money entrusted to decedent for safekeeping was not barred by two year statute of limitations on ground that action was not brought within two years from time money was given to deceased, since no action accrued against widow, either individually or as administratrix, until death of decedent. Code Civ.Proc. § 339, subd. 1.

2. Executors and administrators ⇐430

Where money entrusted to deceased by plaintiff was kept in a safe deposit box held in joint tenancy by deceased and his wife, which money was commingled with other money and all of which was taken in possession by deceased's widow upon his death and deposited by her in her name individually and not as administratrix of deceased's estate, the widow, as an individual, was liable to plaintiff for money had and received.

3. Money received ⇐5

An action for "money had and received" may be maintained even though not founded upon allegations showing an express privity of contract between the parties, since there is a duty to surrender the money to the rightful owner, and the law will imply the promise to do so and thereby create the requisite contractual privity. Civ.Code, § 2216.

See Words and Phrases, Permanent Edition, for all other definitions of "Money Had and Received".

4. Trusts ⇐103(1)

"Confidential" and "fiduciary relations" are synonymous and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation" and "Fiduciary Relation".

5. Trusts ⇐103(1)

While the degree of intimacy requisite to establishment of a constructive trust is found as a general rule only where the parties are related by affinity, consanguinity or contract, it may exist where the bond between them is merely one of friendship.

6. Trusts ⇐103(1)

Where plaintiff and deceased had lived together as man and wife for many years prior to death of deceased who had separated from his lawful wife with expectation of marrying plaintiff, plaintiff following deceased's advice as to her property and investments, a "confidential relation", necessary to the enforcement of a constructive trust as to money entrusted to deceased by plaintiff, was established. Civ.Code, § 2216.

7. Trusts ⇐33, 35(1)

An enforceable "trust" is created where personal property is transferred pursuant to an oral agreement whereby the transferee promises to hold the goods, securities or money in trust for the benefit of the transferor or a third person, and all of transferor's statements made to trustee previous to acceptance of trust are deemed to be a part of the declaration of trust. Civ. Code, § 2216.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

8. Trusts ⇐358(1)

Where the subject matter of a trust is money, and trustee has died, rights of beneficiary are in a measure dependent upon ability to identify the money as a particular fund or to trace it into specific property, but the moneys are identifiable although they may not have been kept as a separate or independent fund or deposited as a special account.

9. Trusts ⇐352

The enforcement of a trust, subject matter of which is money, is not affected by the fact that the trustee mingled trust moneys with his own funds, since if trustee had at all times a sum in excess of that which is due the beneficiary, it will be presumed that he kept the trust fund intact.

10. Trusts ⇐372(3)

Evidence that plaintiff had given deceased money for safekeeping during lifetime of deceased who placed money in safe deposit box subject to plaintiff's demand where it was mingled with deceased's own funds, and that deceased's widow, individually and as administratrix of the estate, took possession of money found in deposit box on deceased's death, was sufficient to establish a trust in the money for plaintiff's use and benefit. Civ.Code, § 2216.

11. Trusts ⇐371(2)

Complaint in a suit to enforce a trust should set forth the facts which are essential to plaintiff's cause of action, and in an action to establish a voluntary trust, where allegations of trust and confidence were not incorporated in a cause of action, defendant's objection to admission of plaintiff's testimony, as to that cause of action, should have been sustained. Civ.Code, § 2216; Code Civ.Proc. § 1880.

12. Trial ⇐330(5)

In action in three counts for money had and received and to establish a trust, the error in entering judgment for plaintiff on

a count which was defective was harmless, where other counts were sufficient to sustain judgment.

13. Trial ⇐330(5)

Where a complaint contains several causes of action, one of which is sufficient to sustain the judgment, the judgment will not be reversed even though other counts are defective.

14. Witnesses ⇐167

An action to enforce a trust against personal representative of deceased trustee is not founded upon a "claim or demand against the estate" within the meaning of statute disqualifying claimant from testifying against representative as to matter occurring before decedent's death. Civ.Code § 2216; Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim or Demand Against the Estate".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by P. E. Coombs against Minnie Minor, as administratrix of the estate of Albert Fonda Minor, deceased, and Minnie Minor, as an individual, for money had and received and to declare a trust. From a judgment for plaintiff and from an order denying motion for new trial, defendants appeal.

Affirmed.

Samuel J. Rosenthal, of Los Angeles, for appellants.

George P. Kinkle and John S. Hunt, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Defendant Minnie Minor, individually and as administratrix of the estate of Albert Fonda Minor, deceased, appeals from a judgment in favor of plaintiff Coombs which was rendered in the instant action for money had and received and to declare a trust.

The complaint sets up three causes of action: The first alleges that within two years prior to his death, Albert Fonda Minor became indebted to plaintiff for money had and received for her use and benefit in the sum of $12,100; that defendant, individually and as administratrix, has taken said money into her possession and control and is indebted to plaintiff therefor.

The second cause of action alleges that on July 10, 1939, plaintiff placed the sum of $4,600 in the hands of decedent, and on February 10, 1941, she placed $7,500 in the hands of decedent, upon his express promise and agreement to hold and safely keep said money for her use and benefit and upon her request to return the same to her; that decedent represented to plaintiff that he had so arranged his affairs that said money would be returned to her immediately upon his death; that defendant Minnie Minor, individually and as administratrix, has such money in her possession and holds the same as trustee for the use and benefit of plaintiff.

The third cause of action alleges that plaintiff and Albert Fonda Minor for many years prior to the latter's death, and particularly on July 10, 1939, and February 10, 1941, had sustained toward each other a relation of trust and confidence; that decedent had advised plaintiff on numerous occasions regarding her business affairs and plaintiff relied implicitly upon such advice; that on July 10, 1939, as to the sum of $4,600, and on February 10, 1941, as to the sum of $7,500, decedent represented that if plaintiff would place said money in his possession he would keep it for her and return it upon her demand, and that he would so arrange his affairs that such sum of money would be returned to plaintiff upon his death; that, relying upon such representation, plaintiff placed said money, aggregating the sum of $12,100, in decedent's possession; that since the death of said Albert Fonda Minor, neither of said sums of money has been returned to plaintiff, but that Minnie Minor, as administratrix, and as an individual, has taken possession thereof and now holds the whole thereof, as trustee for the use and benefit of plaintiff.

In each of said causes of action, it is alleged that plaintiff filed her claim against the estate of Albert Fonda Minor, deceased, for the money alleged to be due her, but that said claim was rejected by Minnie Minor, as administratrix; also, that defendant, Minnie Minor, the widow of Albert Fonda Minor, claims an interest in said money and has possession thereof, or some of it, in her capacity as an individual, as distinguished from her capacity as administratrix of her husband's estate.

The answer denies generally the allegations of the complaint and sets up as affirmative defenses: (1) the statute of limitations; (2) the statute of frauds; (3) a re-

lease or compromise; and (4) that the complaint does not state facts sufficient to constitute a cause of action against Minnie Minor, individually, or as administratrix.

As to the first cause of action, the court found in favor of plaintiff and against defendant individually; and, as to the second and third causes of action, the court found in favor of plaintiff and against defendant, individually and as administratrix, and rendered judgment for the sum of $12,100, less $632.10, paid by defendant as personal property taxes, or the sum of $11,467.90.

This appeal is prosecuted by Minnie Minor, individually, and as administratrix of the estate of Albert Fonda Minor, deceased, upon the grounds: (1) The evidence is insufficient to sustain the judgment; (2) the court erred in the admission and exclusion of evidence; (3) the court abused its discretion in failing to set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence on the motion for a new trial.

In connection with appellant's first contention, it is urged: The evidence is insufficient to sustain the finding that appellant Minnie Minor, as an individual, is indebted to respondent in the sum of $11,467.90, on the first cause of action, because, if decedent were indebted to respondent for money had and received for her use and benefit, then only the estate would be liable, and that Minnie Minor, as an individual, can be held liable only on the theory of and upon a cause of action properly alleging a trust. It is also argued that the first cause of action as to Minnie Minor, as decedent's widow, and as an individual, is barred by subdivision 1, section 339, Code of Civil Procedure, as to the $4600 alleged to have been paid to decedent on July 10, 1939, the complaint herein having been filed on February 13, 1942, more than two years thereafter.

[1] Insofar as the statute of limitations is concerned, no action accrued against appellant, either individually or as administratrix, until the death of the trustee, Albert Fonda Minor, which occurred on April 6, 1941. With respect to the application of the statute of limitations to a voluntary trust in personalty, such as the one here under consideration, it is stated in 25 Cal. Jur. 277, § 137, as follows: "* * * where it appeared that the equitable owner made demand to the executor, the court held that the statutory period ran from the time of demand. Where the plaintiff is in effect a creditor, the trust funds not being identifiable, it has been held that the statutory period commences to run from the time of the first publication of the notice to creditors. Other decisions, however, hold that the running of the statute has its inception at the death of the trustee."

It is therefore obvious that the first cause of action is not barred by the provisions of subdivision 1, section 339, Code of Civil Procedure.

[2] The money alleged to belong to respondent was kept in a safe deposit box in the Washington & Vermon Branch of the Bank of America, which was held in joint tenancy by decedent and appellant, his wife. This money was commingled with other money kept in said box, all of which was taken into possession by appellant after her husband's death, and was deposited by her in the same bank in a savings account standing in her name individually and not as administratrix.

In view of such circumstance, the finding that Minnie Minor, as an individual, is indebted to respondent on the first cause of action is proper.

[3] An action for money had and received "may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity. [Board of Highway] Commissioners v. Bloomington, 253 Ill. 164, 97 N.E. 280, Ann.Cas.1913A, 477; Kreutz v. Livingston, 15 Cal. 344; Colusa County v. Glenn County, 117 Cal. 434, 49 P. 457; Whittle v. Whittle, 5 Cal.App. 696, 91 P. 170." Freitas v. Freitas, 31 Cal.App. 19, 20, 159 P. 613.

Appellant contends that "the evidence is insufficient to sustain the finding that appellants hold as trustees, for the use and benefit of respondent, the sum of $11,467.90 upon the third cause of action", for the following reasons: (1) There was no fiduciary relationship; (2) there was no proof of indicia of a trust; (3) the evidence was weak and unsatisfactory and that evidence to establish a trust in personalty must be clear and convincing.

The record herein reveals that respondent and Albert Fonda Minor, under the names of Mr. and Mrs. P. E. Coombs, had lived together in various apartments in Los Angeles for several years prior to Mr. Minor's death; that respondent knew Mr. Minor was a married man, but he had stated to her that he was not living with his wife and expected to obtain a divorce from her and marry respondent. Respondent testified that during all of this period she consulted with Mr. Minor every day regarding her affairs and he gave her advice upon which she relied. She further testified, and this is corroborated by the testimony of her sister-in-law, Margaret Coombs, that on or about July 10, 1939, she placed the sum of $4,600 in currency in the hands of Mr. Minor, at which time it was agreed between them that he was to hold the money for respondent and invest it in the theatre business; that she never received any portion of it back and had not made demand for its return prior to Mr. Minor's death; that on many occasions subsequent to July 10, 1939, Mr. Minor had referred to this currency as respondent's money and they both discussed investing it in the theatre business; that at one time Mr. Minor brought her a card for her signature which she believed gave her access to the safe deposit box where her money supposedly was kept by Mr. Minor.

Respondent also testified that on February 10, 1941, while the intimate and confidential relationship between her and Mr. Minor existed, she gave him $7,500 for safekeeping. This money was delivered to respondent in the office of Mr. Minor's attorney, Mr. Bernard Brennan, who testified that it was given to respondent "in compensation for the time she would be indisposed in effecting a cure of this disease that she had contracted from him, and to compensate her for her medical expenses and so forth * * * that he felt a moral obligation to pay her the money and he wanted to do it"; that Mr. Minor had the money in an envelope and counted it out, and Mr. Brennan prepared a receipt for the same which was signed in his presence by respondent. As to this transaction, respondent testified that she had the money in an envelope when she and Mr. Minor left Mr. Brennan's office and that she turned to Mr. Minor and said: "Al, what shall I do with this", and Mr. Minor replied: "Prudence, the sensible thing is to let me have it and I will put it in the safe deposit box with the rest of your money". This was agreed upon and the next morning Mr. Minor took the money to the Washington & Vermont Branch of the Bank of America, and when he returned to his automobile where respondent had remained while he was in the bank, he said: "Prudence, you have no reason to worry whatever. Whenever you want that smear of money it is yours."

Mr. Brennan also testified that in the presence of himself, Mr. Maupin, his investigator, and respondent, Mr. Minor made the statement that he had a considerable amount of money, that he and respondent were partners, and that Mr. Brennan need not worry about getting his fee in connection with legal services he was rendering for a relative of respondent, who was involved in a traffic violation. With respect to this same incident, Mr. Maupin testified that when Mr. Brennan wondered who was to pay his fee, Mr. Minor said: "You need not worry about that. Miss Coombs is a partner of mine. Has invested money with me * * * I have got plenty of money of hers." This witness further testified he had a conversation with Mr. Minor, relative to the $7,500 he had given to respondent in Mr. Brennan's office, at which time Mr. Minor told him that he and respondent were "the same as husband and wife * * * she is the only one that has any interest in me * * * there isn't any amount of money that can pay her for what she has done for me. * * * I want to see that she is taken care of"; that he had put the $7,500 in some safe deposit box and that respondent had a key to it.

As heretofore stated, after the death of Mr. Minor the sum of $14,570 was found in the safe deposit box at the Washington & Vermont Branch of the Bank of America, which sum of money was taken into the possession of appellant Minnie Minor and deposited in a savings account in the same bank in her own name as an individual.

[4] It is urged that neither the close friendship of respondent and decedent, nor their illicit cohabitation, is sufficient to establish a confidential relation in a legal sense.

In Re Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588, the court defined the term "confidential relation" as follows: "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another."

In discussing such relationship in Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31, 34, an action to establish a constructive trust based upon an oral promise to reconvey real property, it is stated: "The cases are clear that where there is some sort of a status between the grantor and grantee, and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey. Thus actual trust and confidence, plus the relationship of parent and child, is sufficient (citing numerous cases); even where the relationship is meretricious. Cole v. Manning, 79 Cal.App. 55, 248 P. 1065. * * * and where the grantor and grantee had 'relations of great confidence' and were later married. Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750; Id., 37 Cal.App. 263, 173 P. 1011. * * * In Stewart v. Shearman, 22 Cal.App.2d 198, 70 P.2d 702, however, it was held that cotenants stand in a confidential relationship to one another."

[5] The following is taken from 25 Cal. Jur. pp. 129, 131, 163, 164, §§ 7, 8 and 33: "While the requisite degree of intimacy is found as a general rule only where the parties are related by affinity, consanguinity or contract, it may possibly exist where the bond between them is merely one of friendship. Cox v. Schnerr, 172 Cal. 371, 378 [156 P. 509]; Palladine v. Imperial Valley, etc. [Ass'n], 65 Cal.App. 727, 745 [225 P. 291]; Bradley Co. v. Bradley, 37 Cal.App. 263, 267 [173 P. 1011]; Feeny v. Smiley, 115 Cal.App. 597 [2 P.2d 220]. * * * If the parties are not related in any degree which the law recognizes as a basis for an inference that confidence was reposed, the transferor must show that the requisite degree of intimacy existed as a matter of fact between him and the transferee. * * * to the maintenance of a suit to enforce the defendant's oral promise it certainly is not essential that the parties should have been related by affinity or consanguinity. The trust may be enforced where it appears that they were merely friends. Hays v. Gloster, 88 Cal. 560, 26 P. 367; Sanguinetti v. Rossen, 12 Cal.App. 623, 107 P. 560."

[6] Applying the foregoing rules of law, the evidence is sufficient to establish a relation of trust and confidence between respondent and decedent.

[7-9] In connection with her point that there was no proof of indicia of a trust, while conceding that "generally speaking the law does not require that the identical money be kept", appellant urges that the contents of the safe deposit box discloses no indicia of a trust because the money was not found in either of the envelopes described by respondent, nor in the denominations or quantitative packages described by her; also, because her name had not been added to the title of the box, either in joint tenancy or otherwise, there was nothing to indicate that she had any interest therein.

"* * * an enforceable trust is created where personal property is transferred pursuant to an oral agreement whereby the transferee promises to hold the goods, securities or money in trust for the benefit of the transferor or a third person. The circumstance that the agreement rests in parol affects, not the propriety of giving effect to a disclosed intention to create a trust, but only the question as to whether such an intention is definitely and certainly disclosed. All of the statements of the transferor which were made to the trustee previously to the acceptance of the trust are deemed to be part of the declaration of trust.

"Proof being made that the defendant received the property pursuant to a promise or oral agreement to hold it for or to transfer it to the plaintiff, suit may be maintained to enforce the plaintiff's ownership." 25 Cal.Jur. 156, § 27, and authorities there cited. See, also, Corato v. Corato's Estate, 201 Cal. 155, 255 P. 825.

"Where the subject matter of the trust was money, and the trustee was insolvent or has died, the rights of the beneficiary are in a measure dependent upon his ability to identify the money as a particular fund or to trace it into specific property. The rules which have been formulated in respect of oral and constructive trusts apply also, it seems, to trusts that are created by formal appointment. If the trustee has died, and the trust moneys cannot be identified or traced, the beneficiary should present the claim to the trustee's executor or administrator. If, however, the money is identifiable, a presentation of the claim is not indispensable to a recovery. * * * Again, if the trustee or his estate is insolvent, the right of the beneficiary to have his claim preferred to those of general creditors is dependent upon his ability to identify or trace the money.

"For these purposes trust moneys are held to be identifiable although they may not have been kept as a separate or independent fund or deposited as a special ac-

count. Nor is an enforcement of the trust affected by the fact that the trustee mingled trust moneys with his own funds. * * * The theory is that if the trustee had at all times a sum in excess of that which is due the beneficiary, it is to be presumed that he kept the trust fund intact." 25 Cal.Jur. 356, § 201.

See, also, Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861, and Mitchell v. Dunn, 211 Cal. 129, 294 P. 386. In the latter case it was stated (page 136 of 211 Cal., page 389 of 294 P.): "The rule is now settled in this state that, when the money of the trustor can be traced into a particular fund, or deposit, though it be mingled with other money, the beneficiary may enforce the trust. Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987."

[10] In the instant case, the evidence produced to establish the trust in the money kept by decedent in his safe deposit box mingled with his own funds is clear and convincing, instead of being weak and unsatisfactory, as contended by appellant, and also that appellant Minnie Minor, individually and as administratrix, holds the stated sum of money as trustee for the use and benefit of respondent. The record is replete with testimony of the many declarations made by Mr. Minor during his lifetime that he had placed respondent's money in his safe deposit box subject to her demand and that he had plenty of money belonging to her.

Appellant also urges that the evidence is insufficient to sustain the finding that appellant Minnie Minor holds as trustee for the use and benefit of respondent, the sum of $11,467.90 on the second cause of action, because a voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another, Sec. 2216, Civ. Code, and since the second cause of action does not allege such relationship of trust and confidence, the court should have sustained appellant administratrix' objection under section 1880 of the Code of Civil Procedure to respondent's testimony as to said second cause of action.

[11] The complaint in a suit to enforce an alleged trust should set forth the facts which are essential to the plaintiff's cause of action. Since the trust herein may be denominated a voluntary trust—"an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another", sec. 2216, Civ. Code—it would appear that the allegation of trust and confidence should have been incorporated in the second cause of action. Because of such imperfect pleading, appellant's objection to the admission of respondent's testimony, as to that particular cause of action, should have been sustained.

[12] However, this error is immaterial in so far as the judgment herein is concerned, because as stated in 21 Cal.Jur. 66, § 40: "One good count in a complaint is sufficient to sustain a judgment (Lucas v. San Francisco, 28 Cal. 591), and upon appeal the judgment will be presumed to be based upon that count." Again, in 14 Cal. Jur. 990, § 69, it is said: "Since there is but one form of civil action under the code the court may grant any relief embraced within the issues. The fact that a party has misconceived the relief to which he is entitled does not alone justify a total denial of relief, but a plaintiff may recover if his complaint states any cause of action entitling him to any relief, either at law or in equity." See, also, Estrin v. Superior Court, 14 Cal.2d 670, 676, 96 P.2d 340.

[13] Where a complaint contains several causes of action, one of which is sufficient to sustain the judgment, the judgment will not be reversed even though the other counts are defective. Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 340, 103 P.2d 188; Hall v. Dekker, 45 Cal. App.2d 783, 787, 115 P.2d 15.

[14] In passing, it should be noted that an action to enforce a trust against the personal representative of a deceased trustee is not founded upon a claim or demand against the estate within the meaning of subdivision 3, section 1880, of the Code of Civil Procedure, disqualifying a claimant or assignor from testifying against the representative as to any matter of fact occurring before decedent's death. Humes v. Humes, 56 Cal.App.2d 126, 132, 133 P.2d 39, and cases therein cited.

Because of the conclusions reached herein, it is not deemed necessary to discuss other points raised by appellant.

The purported appeal from the order denying appellant's motion for a new trial is dismissed.

The judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

60 Cal.App.2d 669

In re REYNOLDS' GUARDIANSHIP.
Civ. 6957.

District Court of Appeal, Third District, California.

Sept. 30, 1943.

Hearing Denied Nov. 22, 1943.

1. Guardian and ward ⇐2

The powers of a probate court in respect to guardianship are analogous to those formerly vested in courts of chancery.

2. Statutes ⇐222

Statutes are not presumed to alter the common law otherwise than the act expressly provides.

3. Guardian and ward ⇐2

The statute providing that relation of guardian and ward is confidential, and is subject to provisions of law relating to trusts, means that guardian is trustee of his ward and exercises a delegated rather than an expressed trust as an arm of the court and subject to its control in the discharge of his duties. Probate Code, § 1400.

4. Statutes ⇐225¾

Where a statute has been construed and is enacted in the same or substantially the same terms, the Legislature is presumed to be familiar with its construction and to have adopted it as part of the law unless a definite construction is expressly required.

5. Guardian and ward ⇐2

In guardianship matters, probate court acts for and on behalf of the child and must regard as a paramount consideration the interest and welfare of the child. Probate Code, §§ 1400, 1406.

6. Guardian and ward ⇐8

The section of Probate Code which limits the imposition by probate court of control or regulatory restrictions upon the guardian to the time of the order of appointment, and then only with consent of such person, merely provides that the court may impose restrictions not otherwise obligatory subject to the consent of the guardian. Probate Code, § 1512.

7. Guardian and ward ⇐2

Jurisdiction of probate court in a guardianship proceeding is a continuing one, and, as arm of the court, the guardian in his duties acts under the authority of the court which appointed him, and no other court has power to interfere with that continuing control. Probate Code, §§ 1400, 1406, 1500, 1512.

8. Guardian and ward ⇐2

If circumstances subsequent to original order appointing guardian make it desirable and conducive to comfort and well-being of child that a modification thereof be made, probate court, to correct the situation, has jurisdiction to order that regulations be imposed upon the guardian. Probate Code, §§ 1400, 1406, 1500, 1512.

9. Guardian and ward ⇐2

The powers of probate court continue throughout life of a guardianship and may be invoked whenever the circumstances presented make necessary a modification of original decree appointing the guardian, as against contention that probate court is without jurisdiction to impose restrictions not contained in original order of appointment and that only recourse is removal of the guardian under provisions of Probate Code. Probate Code, §§ 1400, 1406, 1500, 1512, 1580.

10. Guardian and ward ⇐29

To deprive a guardian of his trust, a showing of sufficient cause must be made.

11. Guardian and ward ⇐29

Whether a showing of sufficient cause to deprive a guardian of his trust has been made is a question of fact to be determined in trial court's discretion.

12. Guardian and ward ⇐2

The discretion of probate court in exercise of its power of supervision over a guardian must not be arbitrary, but rather it is a general discretion to be exercised within reason and with due regard to the rights of all concerned. Probate Code, §§ 1400, 1406.

13. Guardian and ward ⇐2

Probate court may not substitute its judgment for that of guardian unless it plainly appears that a case has been made justifying its interference with discretion of the guardian as to what is for the best interests of the ward. Probate Code, §§ 1400, 1406.

14. Guardian and ward ⇐29

The order regulating control of minor by his guardian, who was also his paternal grandfather, by providing certain times at which custody of the child should be turned over to maternal grandparents, was within jurisdiction of probate court and would not

be disturbed, in absence of a showing of an abuse of discretion. Probate Code, §§ 1400, 1406, 1500, 1512.

15. Appeal and error ⇐1010(1)

Unless evidence in support of trial court's judgment is so slight as to indicate a want of ordinary good judgment or that there are no reasonable inferences to be drawn from the evidence to support the judgment, such order will not be disturbed on appeal.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Proceeding in the matter of the guardianship of the person and estate of Ralph L. Reynolds, a minor. From an order regulating control of the minor by his guardian and paternal grandfather, C. F. Reynolds, C. F. Reynolds appeals.

Affirmed.

Peters & Peters, of Chico, for appellant.

Ware & Ware, of Chico, for respondent.

PEEK, Justice.

This appeal is from an order of the trial court regulating the control of the minor by his guardian and paternal grandfather, C. F. Reynolds. The order provided that respondents, Dr. and Mrs. Landis, the maternal grandparents, should have the right of custody of said minor from 9 o'clock A. M. each Saturday until 10 o'clock A. M. the following Sunday; that they should have the right to visit said minor in the home of the guardian at reasonable times and upon such reasonable notice as the guardian might require, and the further right to take the minor on two vacations during each summer, each vacation not to exceed one week or be within one month of the other, and upon reasonable notice to the guardian. The order further states that it is made expressly subject to the health of the minor, and reserves jurisdiction in the court to make other and further regulations upon application of either party after ten day's notice.

Appellant and Mrs. Reynolds reside in the city of Chico during the winter months, while during the summer and harvest season they reside at their ranch in Tehama county, a distance of approximately 27 miles from Chico. The respondents, Dr. and Mrs. Landis, also reside in the city of Chico, where the doctor is a practicing physician and surgeon. A summer home is maintained by them at Lake Almanor.

Shortly after appellant's appointment as guardian on November 10, 1941, difficulties arose between the grandparents concerning respondents' visits with their grandchild at the home of appellant. Further difficulties developed concerning the taking of the child on vacations to respondents' summer home.

As a culmination of these misunderstandings respondents filed a petition "for instructions to guardian" wherein they prayed that the court order the guardian to show cause, if any, why an order should not be made requiring the guardian to permit the minor to visit with them. After a hearing upon the petition the court made its order as above set forth.

Appellant contends that the court by its order usurped and encroached upon his rights as guardian in his relation to the ward; that the court was without authority, after issuance of the original order appointing the guardian, to modify or impose conditions different than those set forth in the original order, and that the subsequent order is against public policy, as a guardian is in "loco parentis" to the ward, and his discretion in relation to the ward cannot be limited nor assigned to one not in a like position.

It is respondents' answer to such contention that the trial court in entering the subsequent order acted within its jurisdiction, for "in the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court", Sec. 1400, Probate Code, subject to the qualification that the court "is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare", Sec. 1406, Probate Code, and that under the law of this state as repeatedly applied, such judgment, if based upon sufficient evidence and if not in abuse of sound discretion of the trial court will not be disturbed on appeal.

Appellant, however, argues that section 1500 of the Probate Code, which provides that "every guardian has the care and custody of the person of his ward and the management of his estate, or the care and custody of the person of his ward or the management of his estate, according to the order of appointment * * *", and section 1512, which limits the imposition by

the court of control or regulatory restrictions upon the guardian, to the time of the order of appointment, and then only "with the consent of such person", are controlling; that therefore, as the original order of appointment contained no such restrictions, the trial court was without jurisdiction in the subsequent proceeding to impose such regulations as are embodied in the contested order of the court. He further contends that respondents' interpretation of the statutes is in error in that section 1400 is a general section and has no particular import other than that the management by the guardian shall be in the manner provided by law; that the remaining pertinent part of section 1512, which provides that "when a person is appointed guardian of a minor, the court, * * * may insert in the order of appointment conditions not otherwise obligatory * * *", is the enforcing statute providing the legal method by which the court may regulate the guardian, and which according to the terms thereof may be done only at the time the original order appointing the guardian is made.

Respondents, however, reply that limitations upon the court's authority are primarily in relation to the management of estates, wherein the limitations are established by statutes conferring upon the guardian express statutory rights and duties in connection with the estate. It is their further argument that the rights and limitations of guardians in connection with the person of the ward are far less specifically defined by statute and must therefore be further subject to the control of the courts under section 1400 because they are less limited and circumscribed by law.

[1] In view of the questions raised it becomes necessary to determine first, whether or not the court had authority to make such order, as is contended by appellant, and second, whether the order usurps the rights of the guardian in his relationship with the ward. Although such questions present a problem of first impression in California no useful purpose would be served to restate at length the derivation of the present guardianship laws of this state in view of the many illuminating cases (Lord v. Hough, 37 Cal. 657), wherein the courts have had the historical element directly under consideration. Suffice it to say that in such matters our probate courts stand in the same position as the court of chancery, which court Blackstone described as being "the supreme guardian and has superintendent jurisdiction over all of the infants of the Kingdom." This rule has found approval in our Supreme court in the case of Sullivan v. Dunne, 198 Cal. 183, 244 P. 343. The court there stated that the powers of a probate court in respect to guardianship are analogous to those formerly vested in the courts of chancery.

It must be conceded that in the main the divisions of the probate code wherein the sections in question, 1400, 1406, 1500 and 1512, as adopted in 1931, are found, are but a re-enactment of our original guardianship laws, which in turn are but a statutory codification of the common law. Section 2 thereof specifically states that "the provisions of this code so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

[2] Statutes are not presumed to alter the common law otherwise than the act expressly provides, and it is therefore of importance to determine whether or not the particular sections in question are in derogation of or an innovation upon the common law. Baker v. Baker, 13 Cal. 87, 88; In re Estate of Elizalde, 182 Cal. 427, 188 P. 560.

[3] Following this yardstick and referring to the cited sections of the code, we find that the phraseology contained in sections 1400 and 1406 is but a modern version of Blackstone Commentaries. Section 1400 also provides in part that "the relation of guardian and ward is confidential, and is subject to the provisions of law relating to trusts." Early approval of this rule and further illustration of the analogy between the common and our statutory law are found in the case of Lord v. Hough, supra, wherein the court, citing the English case of Beaufort v. Betty, 1 P.Will 702, said: "It was contended that the Court could not interfere, until the guardian had, in fact, abused his trust. * * * this limitation upon the power of the Court was denied by the Lord Chancellor, who remarked, * * * *that preventive was better than punitive justice,* * * * *'That if any wrong steps had been taken, which might not deserve punishment, yet, if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians, or if the guardians chose to make use of methods that might turn to the prejudice of the infant,*

the Court would interpose, and order the contrary, and that this was grounded upon the general power and jurisdiction which it had over all trusts, and a guardianship was most plainly a trust.'"

This provision in the code also has been construed to mean that the guardian is therefore the trustee of his ward and exercises a delegated rather than an expressed trust as an arm of the court and subject to its control in the discharge of his duties. Fox v. Minor, 32 Cal. 111, 112, 91 Am.Dec. 566.

That this is the general and accepted rule is further amplified in 20 Am.Jur. p. 41, sec. 61: "A guardian acts, as has been shown, as an arm or officer of the court from which it follows that the office or trust is administered under judicial control, and the guardian may be regulated and controlled in the management and disposition of the property and person of the ward." So, also, it is stated in 31 Corpus Juris, 990, sec. 9: "An infant is considered as a ward of the court having jurisdiction of his person, particularly of courts of equity; and the institution of any proceedings affecting his person is sufficient to make him a ward of the court. The matter of his custody is subject to control by the court, exercising its judicial discretion. * * * The controlling situation in such matter is the best interest of the child. *Any order or decree affecting his custody is subject to future control and modification by the court,* as subsequent conditions and circumstances may require for his welfare." (Italics ours.)

[4] It is also a familiar rule that where a statute has been construed and is enacted in the same or substantially the same terms, the legislature is presumed to be familiar with its construction and to have adopted it as part of the law unless a definite construction is expressly required. Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54.

[5] We find nothing in the cases cited at variance with this rule. Rather we find consistent reiteration of the basic principle that "in guardianship matters the court acts for and on behalf of the child and must regard as a paramount consideration the interest and welfare of the child. To this every other consideration must yield." (In re Guardianship of Smith, 1 Coffey Prob. Dec. 169), and that "the anxious purpose of courts in deciding the relative rights of litigants * * * to the custody of infants, and to the accomplishment of which all other considerations are usually held to be secondary, is the welfare and best interest of the [child]." Woerner Am.Law of Guardianship, 20.

From an examination of the cases wherein the sections (1500 and 1512) relied upon by appellant have been under consideration. it would appear that the determination of the court was based upon questions of form and procedure, and rightfully so, for such sections come within the division of the code relating to estate management. Derrer v. Superior Court, 129 Cal.App. 154, 18 P.2d 371; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206; Browne v. Superior Court, 16 Cal.2d 593, 107 P.2d 1, 131 A.L.R. 276. The sections cited by respondent, however, 1400 and 1406, have been viewed by the courts in the light of the equities involved. As was stated in Matter of Lee, 165 Cal. 279, 281, 131 P. 749, 45 L.R.A. N.S., 91, in construing the original provisions contained in the Civil Code, "Section 246 of the Civil Code limits the discretion of the court, and declares that that discretion shall be exercised in favor of 'what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare.'" See also In re Guardianship of Pomin, 137 Cal.App. 432, 30 P.2d 624; In re Guardianship Estate of Howard, 218 Cal. 607, 24 P.2d 486.

But appellant contends that even if the court could impose regulations and restrictions upon the guardian, such restrictions would have to be reasonable, not something "which he neither anticipated nor undertook as guardian and is therefore a direct and oppressive interference with his legal right and duty of custody and control of the ward," in that to comply with the order he would have to return to Chico every Saturday in order to have the ward available for respondents.

If our conclusion be correct it would be of little consequence whether the order complained of was anticipated or not by the guardian or whether to him it appeared as oppressive interference with his custody and control of the ward. The answer which immediately presents itself to the first complaint is that we know of no power compelling him to be guardian should he not so desire, and secondly, we find nothing in the order of the court compelling appellant to return to Chico each week end

from his ranch in Tehama county so that the ward would be available for respondents on Saturday morning.

[6] Nor do we find favor in appellant's suggested construction of section 1512 of the Probate Code. That section merely provides that the court *may* impose regulations *or restrictions not otherwise obligatory* subject to the consent of the guardian. A simple and apt illustration of the purpose and intent of that section would be that of a guardianship wherein the court in the order of appointment provided for a payment by the guardian of a certain sum per month for the support of the ward. Obviously such obligation was not something made mandatory upon him by the mere fact of the guardianship, and therefore was "not otherwise obligatory" as provided by the code.

But the same cannot be said of that which has to do with "what appears to be for the best interest of the child" as provided in section 1406 of the Probate Code, or, as stated in section 1400 of said code, *"in the management and disposition of the person * * * committed to him, a guardian may be regulated and controlled by the court."* If this were not true, then of what conceivable value would be sections 1400 and 1406, or for that matter of what value at all our long and well established principle that the paramount consideration is the interest and welfare of the child and "to this every other consideration must yield." In re Guardianship of Smith, supra. Therefore to say, as is contended by appellant, that the only recourse is removal of the guardian under the provisions of section 1580 of the Probate Code is to do violence to such basic concept. Likewise if appellant's contentions were correct of what value would be the statement found in Lord v. Hough, supra, that "preventive was better than punitive justice", with the added emphasis that if wrong steps were taken by the guardian in which there was the slightest inference that the infant was likely to suffer therefrom, the court would interpose, and order to the contrary?

[7] In the present case the trial court, in the first instance, found that the minor child could best be served by the appointment of a guardian, and as a result of such determination appellant was so appointed. The issues involved in that proceeding are no longer pending but the guardianship itself is not concluded—not until the guardian has been discharged. Jurisdiction of the court in this respect is a continuing one, and as an arm of the court the guardian in his duties acts under the authority of the supervision of the court which appointed him. "* * * No other court, we believe, has power to interfere with that continuing control * * *; no other court could * * * instruct him as to his duties." Browne v. Superior Court, 16 Cal. 2d 593, 107 P.2d 1, 3, 131 A.L.R. 276; See also 16 Am. & Eng. Ency. of Law, 31; Lord v. Hough, supra; Matter of Ross, 6 Cal. App. 597, 599, 92 P. 671.

[8] If circumstances subsequent to the original order make it desirable and conducive to the comfort and well-being of the child that a modification thereof be made, the court, to alleviate or correct the situation, has jurisdiction to order that regulations be imposed upon the guardian, such as directing that a relative or other person should have access to the child whose custody is decreed in the guardian. Estate of Ross, supra; Hill v. Hill, 49 Md. 450, 33 Am.Rep. 271; Woerner Am.Law of Guardianship, 159; Matter of Welch, 74 N.Y. 299; People v. Walts, 122 N.Y. 238, 25 N.E. 266.

Even to the extent as stated in Fitzpatrick's Guardian v. Baker, 227 Ky. 788, 14 S.W.2d 181, 182, wherein the court ordered that the wards be left temporarily with persons other than the guardian: "The guardian of an infant occupies a very important relation toward him [ward]. He has the right to control and direct his education, and this may change the course of the infant's life; for as the twig is bent so often the tree is inclined * * * he should not so act as to deny them [wards] the friendship of their relatives without good cause."

In the case of In re Lippincott, 96 N.J.Eq. 260, 124 A. 532, 533, strikingly similar to the present case, wherein the only relief asked by the petitioners, the ward's maternal grandparents, was that the orphaned child, then in the custody of the paternal grandparents, be awarded to them for a portion of his time, there was presented to the trial court the identical problem as is presented herein. And likewise, there as here, the case was one of first impression. In the opinion of the New Jersey court granting petitioners custody for two months each summer, the Vice Chancellor said: "It [custody] must be granted, if at all,

under the broad inherent jurisdiction of this court, in analogy to the power of the state as parens patriæ. The interest of the state in the children thereof is so broad as to almost defy limitations." The court further said in its opinion: "His grandparents are all advanced in years, and probably none of them can rationally expect to live for a great while longer, certainly not until this boy attains his majority. Should the respondents [petitioners] have the misfortune to die first, it will be of inestimable advantage and benefit if there shall have been cemented between him and the petitioners that devotion and love that is materially fostered by the association of one with those in whose affection he should hold a prominent place." The court of appeals in Lippincott v. Lippincott, 97 N.J.Eq. 517, 128 A. 254, 256, in affirming the judgment of the trial court and after a very concise statement of the history of guardianship from Biblical times to the present showing a continuity of the well established principles of guardianship, stated: "The only inquiry, therefore, before the learned Vice Chancellor, was as to how the best interests of the infant could be subserved, and we think his disposition of the matter was equitable and correct. That it will be for the material and moral interests of the child in its parental isolation to know and enjoy the affection and love of its mother's people will be conceded by all who are so fortunate as to be able to revive the delectable memories of a youth so placed. The situation thus presented is not without its consoling compensation, for, as if by an ordinance of nature, the companionship of parental old age brings to the confiding nature of roseate youth the balmy benediction of an expiring day, the mellow and indelible memories of a family recessional."

[9] Other jurisdictions also have passed upon the question of the continuing powers of the court to control and supervise a guardian. As stated in Re Nicoll, 1 Johns Ch., N.Y., 25: "This court has the care and protection of infants during their minority" and the power of the court to intervene for the protection of the infant was not the creature of statute but is the inherent power in the court derived from the common law. People v. Mercein, 8 Paige, N.Y., 47, 55. Therefore it would appear from the consistent line of cases in this state and elsewhere that the jurisdiction of the probate court in the matter of guardianship is by the very nature thereof broad, comprehensive and plenary; that such powers continue throughout the life of the guardianship and may be invoked whenever the circumstances presented make necessary a modification of the original decree.

We must assume that the trial court herein has likewise determined that the interest and welfare of the minor could best be served by awarding to respondents a certain portion of the ward's time.

At the hearing of the petition evidence was introduced tending to show that such order would be for the material and moral well being of the child. Yet we find that the real emphasis throughout the entire controversy has been placed upon the alleged arbitrary and ill-founded objections of the guardian to the alleged reasonable requests of the respondents as set forth in their petition, such thought apparently being founded upon the invalid premise that the grandparents stand in the same position to the child as did his deceased parents. We cannot agree with such concept of the law of guardianship. But whatever the underlying cause of their disagreement, in the final analysis "the good of the child is regarded as the controlling force * * *, and the courts will always look to this, rather than to the whims and caprices of the parties." Crater v. Crater, 135 Cal. 633, 67 P. 1049, 1050; Mack v. Mack, 91 Or. 514, 179 P. 557.

The trial court has determined that it possessed jurisdiction sufficient to warrant its intervention in the guardianship, and in light of the evidence produced it cannot be said that its implied findings thereon are without support.

[10-13] However, to deprive a guardian of his trust a showing of sufficient cause must be made. Lord v. Hough, supra. Necessarily such a question is one of fact and not of law to be determined in the discretion of the trial court. Clark v. Superior Court, 20 Cal.App. 305, 309, 128 P. 1018. The discretion of such court in the exercise of its power of supervision must not be arbitrary or capricious; it is a general discretion to be exercised within reason; not in disregard of, but with due regard to, the rights of all concerned. Lord v. Hough, supra. It is also true that a court may not substitute its judgment for that of the guardian unless it plainly appears that a case has been made justifying its interference with the discretion of the

guardian as to what is for the best interests of the ward. Latterman v. Guardian Life, etc., 280 N.Y. 102, 19 N.E.2d 978, 127 A.L.R. 450.

[14] Appellant has not shown wherein there has been such an abuse of discretion on the part of the trial court. Rather he has chosen to stand upon a strict interpretation of the law, which if concurred in by this court would nullify our well established principles of guardianship.

[15] It is, therefore, elementary to add that unless the evidence in support of the judgment of the trial court is so slight as to indicate a want of ordinary good judgment or that there are no reasonable inferences to be drawn from the evidence to support the judgment, such order will not be disturbed on appeal.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



60 Cal.App.2d 699

In re TAITMEYER'S ESTATE.

CADWELL v. BROCKMAN.
Civ. 12469.

District Court of Appeal, First District, Division 1, California.

Oct. 1, 1943.

1. Husband and wife ⇐274(1)

The statute relating to succession where there is no issue of marriage between decedent and a predeceased spouse, and community property has been held by decedent in joint tenancy, refers to the entire interest and manifests an intention that the whole should go to the issue of the predeceased spouse. Probate Code, § 228, as amended by St.1939, p. 2992.

2. Descent and distribution ⇐14
Husband and wife ⇐274(1)

Statutes regarding succession to community property where there is no issue, and regarding succession to separate property of a deceased spouse leaving no issue, are not limited in scope to community property and provide that on death of survivor of marriage, intestate and without issue, the property shall go to family of spouse through whose efforts estate was accumulated. Probate Code, §§ 228, 229, as amended by St.1939, p. 2992.

3. Husband and wife ⇐274(1)

Under statutes regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, lineal descendants of predeceased spouse succeed to all property of surviving spouse in which predeceased spouse owned an interest, and, if there are no lineal descendants of either spouse, the property is divided equally between the respective families of the two spouses by whose efforts it was accumulated. Probate Code, §§ 228, 229, as amended by St. 1939, p. 2992.

4. Descent and distribution ⇐14

If property originally comes to predeceased spouse by acquisition before marriage, or by gift, devise, or bequest subsequent to marriage, such property should descend on death of surviving spouse entirely to family of predeceased spouse or other than the family of surviving spouse under statutes regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue. Probate Code, §§ 228, 229, as amended by St.1939, p. 2992.

5. Descent and distribution ⇐1

In absence of a will, the right of inheritance depends upon operation of law

6. Descent and distribution ⇐1

The right of inheritance in California, subject to constitutional limitation, rests upon Probate Code, and there is no general constitutional limitation upon succession, but it is entirely within the control of the Legislature. Probate Code, § 200.

7. Constitutional law ⇐70(3)

The wisdom of legislative action is not a subject for judicial criticism.

8. Constitutional law ⇐186, 190

Neither the Federal Constitution nor the Constitution of California prohibits the enactment of retrospective laws, but a retrospective act may not be given effect to deprive one of a completely vested property right. Const. art. 1, § 1.

9. Joint tenancy ⇐1, 6

The right of survivorship is the chief characteristic that distinguishes a "joint tenancy" from other interests in property, and the surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created, and, while both joint tenants are alive, each has a specialized form of a life estate with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

10. Descent and distribution ⇐11
Husband and wife ⇐274(1)

A husband's joint tenancy interest in property purchased with community funds did not vest in his widow, and, upon her death intestate, the property did not vest in her heir alone, where husband was survived by child. Probate Code, §§ 228, 229, as amended by St.1939, p. 2992.

11. Descent and distribution ⇐14
Husband and wife ⇐274(1)

Statutes regarding succession to community property when there is no issue and regarding succession to separate property of a deceased spouse leaving no issue are applicable only when acquisition of title to property depends upon one dying without disposing of it by will. Probate Code, §§ 228, 229, as amended by St.1939, p. 2992.

12. Descent and distribution ⇐1

If there is no will, it must be assumed that decedent intended that property should be disposed of by operation of law, since owner can prevent property from becoming subject to the laws of succession by disposing of it by will.

13. Descent and distribution ⇐14
Husband and wife ⇐274(1)

The statutes regarding succession to community property where there is no issue, and regarding succession to separate property of a deceased spouse leaving no issue, manifest an intention to make certain that all property which "came to" decedent as a gift, by descent, devise, or bequest, or by right of survivorship in a joint tenancy or homestead, which had been community property of decedent and a previously deceased spouse, or had been the separate property of the predeceased spouse should go first to the child or children of the deceased spouse and, if none, then in a specified manner, "came to" meaning that the acquisition occurred through any channel that had its inception and continued protection by operation of law. Probate Code, §§ 228, 229, as amended by St.1939, p. 2992.

See Words and Phrases, Permanent Edition, for all other definitions of "Came To".

14. Descent and distribution ⇐14
Husband and wife ⇐274(1)

Under statutes relating to succession of community and separate property, separate property of a predeceased spouse goes to those of the lineal, and if none to those of collateral, consanguinity, and if the property was community the direct line of succession is first preferred. Probate Code, §§ 228, 229, as amended, St.1939, p. 2992.

15. Descent and distribution ⇐14
Husband and wife ⇐274(1)

Under statutes relating to succession of community and separate property, when decedent died intestate, without issue or spouse, property which came to her as a surviving joint tenant with her previously deceased spouse, and which had been originally acquired with community funds, and proceeds of predeceased spouses' life policy the premiums of which had been paid from community funds, went to the issue of the predeceased spouse, rather than to decedent's next of kin. Probate Code, §§ 228, 229, as amended St.1939, p. 2992.

16. Descent and distribution ⇐6

The law of the case in effect at the time of decedent's death intestate controls descent and distribution.

Appeal from Superior Court, City and County of San Francisco; Timothy I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Martha Taitmeyer, deceased, by Helen Cadwell against Virginia M. Brockman as administratrix of the estate of Martha Taitmeyer, deceased. From a decree settling the administratrix' final account and ordering distribution, petitioner appeals.

Reversed in accordance with opinion.

John Langer and Howard Magee, both of San Francisco, for appellant.

R. L. Husted, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a decree settling final account and ordering distribution in the matter of the estate of Martha Taitmeyer. The decree directed one-half of the estate to be distributed to appellant, the stepdaughter of decedent, and one-half to respondent, the decedent's sister and administratrix of her estate.

The major issue on appeal is: Where the intestate decedent held in joint tenancy with her previously deceased spouse property purchased with community funds, does the whole or only one-half thereof go to the child of such previously deceased spouse?

The facts, set forth in appellant's opening brief and conceded by respondent to be correct, are as follows:

"Appellant is admittedly the issue of the marriage between O. F. Taitmeyer and his first wife. On the death of the latter, Mr. Taitmeyer married Martha Taitmeyer, * * * and during this latter marriage, community property was acquired which was used in the purchase of two pieces of real property taken as joint tenants in the name of husband and wife. Mr. Taitmeyer * * * died on the 14th day of October, 1935 and thereafter the joint tenancy was terminated by Court decree. Decedent also collected $3,000 in life insurance on a policy on the life of Mr. Taitmeyer, premiums on which were all paid from community funds.

"Between the date of her husband's death and her later death, decedent reduced the balance due on principal on the real property previously held in joint tenancy by $1000.00, but this payment was made from the proceeds of the life insurance policy on her husband's life. The real property in question was sold in the course of probate of decedent's estate, and the entire residue for distribution consists of $2182.14 in cash.

"Decedent died intestate on November 19, 1941, without issue; leaving an estate composed of real property formerly held in joint tenancy and on which part of the proceeds of the life insurance amounting to $1000.00 had been paid. Respondent is the sister and nearest of kin to the decedent who claims one-half of the decedent's estate and admits appellant's right to the other one-half. The Superior Court awarded one-half of the estate to respondent and one-half to the appellant."

Appellant contends that under the provisions of Probate Code sections 228 and 229, decedent's entire estate, consisting of property purchased with community funds and held in joint tenancy with her previously deceased spouse, should go to appellant as the child of such previously deceased spouse.

The sections pertinent to that issue, as amended in 1939, Stats.1939, Chap. 1065, p. 2992, are as follows: "If the decedent leaves *neither spouse nor* issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, *and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead,* such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendents by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of *said* deceased spouse and to their descendents by right of representation." "If the decedent leaves *neither spouse nor* issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, *or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent,* such property goes in equal shares to the children of the deceased spouse and to their descendents by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descend-

ents by right of representation." (Amendments of 1939 italicized.)

Both of the above sections apply to the law of succession where there is no issue of the marriage between decedent and a predeceased spouse, and where the property had been held by decedent in joint tenancy. Section 228 applies when the property was of a community character; section 229, when it was separate property.

In the present proceeding it is admitted that the property held by the spouses in joint tenancy was in fact purchased with community funds; but respondent contends that when such funds are used in the purchase of property taken in the name of the husband and wife as joint tenants, the parties immediately acquire an interest therein which becomes the separate property of each. In other words, that an undivided one-half interest vested immediately in the wife and that when the husband died his half interest vested in her by reason of being the survivor of the joint tenancy interest. In support of the contention that a one-half interest vests immediately, respondent cites Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118, which will be referred to later, and In re Kessler, 217 Cal. 32, 17 P.2d 117.

[1] The amendments of 1939 to sections 228 and 229 were undoubtedly enacted to eliminate confusion that existed with regard to their interpretation. It may have been necessary only to include the joint tenancy provision in section 229, which covers separate property, but it is also found in section 228. The reasonable explanation seems to be that the legislature intended to ignore the fact that a vested one-half interest as separate property may be created, and viewed the property in its original form as community property, and consequently it may be assumed that in section 228 the legislature was referring to the entire interest, and intended that the whole, apart from any possible interest therein, should go to the issue of the predeceased spouse. Successive changes made in the statutes on this subject have been before reviewing courts for interpretation, and the conclusions reached in the principal decisions thereon are enlightening as to the purpose of the present amendment.

Considering the interests of relatives of each spouse, but not a child of a predeceased spouse, the court, in Re Estate of Rattray, 13 Cal.2d 702, 708, 91 P.2d 1042, 1046, said: "We are of the opinion that a study of the history of these two sections since the original enactment of subdivision 8 (mistakenly numbered subdivision 9) of section 1386 of the Civil Code in 1880, and an understanding of the obvious purpose behind the enactment of these two provisions, controlling, in the absence of issue or testamentary disposition, the descent and distribution of property of a decedent which had been either the community property of the spouses or the separate property of a predeceased spouse, compels the conclusion that section 228 and section 229 of the Probate Code should be read and construed together." The court thereupon set forth the history of the two sections, the various changes enacted, and reiterated its conclusion (page 713 of 13 Cal.2d, page 1048 of 91 P.2d) "that there has been a consistent attempt to work out a reasonable, consistent scheme of distribution wherein upon the death of a decedent intestate without issue, instead of the whole property going to the relatives of the last surviving spouse, the property should go back to the relatives of the spouse from which title was derived. The scheme in general, as was fair and reasonable, provided that the separate property of a predeceased spouse should go back in its entirety to the relatives of said predeceased spouse, and that the community property of the spouses should be shared equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition."

In the Kessler case, supra, not dealing with lineal descendents, the court said (page 34 of 217 Cal., page 118 of 17 P.2d): "The controlling question is whether the taking and holding of community property by husband and wife as joint tenants changes the character of such property. The contention of appellants that its community character is left unchanged is answered in the case of Siberell v. Siberell [214 Cal. 767], 7 P.2d 1003, wherein this court held that in such a case a true joint tenancy is created in which the interest of each spouse is separate property. See, also, Delanoy v. Delanoy [216 Cal. 23, 27], 13 P.2d 513 [Id., 216 Cal. 27, 13 P.2d 719, 86 A.L.R.1321]; 20 Cal.L.Rev. 546. It necessarily follows that, as to all of the property involved herein which was held by the parties as joint tenants, the wife succeeded to the husband's separate inter-

est by right of survivorship, and, upon her death, her heirs alone were entitled to share therein."

In the Siberell case, 214 Cal. 767, 7 P.2d 1003, cited in the Kessler case, the court said (page 773 of 214 Cal., page 1005 of 7 P.2d): "First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate." In the Siberell case the court was not considering sections 228 and 229.

In Re Estate of Harris, 9 Cal.2d 649, page 657, 72 P.2d 873, page 877, in which no child appeared, the following is found: "Prior to the 1931 amendment, whereby the word 'gift' was added to said section 229 of the Probate Code, the relatives of a predeceased spouse were entitled to inherit in the estate of the surviving spouse, such property as had been the separate property of the predeceased spouse and had come to the decedent from such spouse by descent, devise, or bequest. In 1931, the Code Commission, as they said, 'in order to make the section logically complete,' added the word 'gift'. The result was that upon the death of the surviving spouse the relatives of a predeceased spouse became entitled to inherit under said provisions such property as had been the separate property of said predeceased spouse and had come to said surviving spouse by inter vivos gift from said predeceased spouse."

In Re Estate of Frary, 26 Cal.App.2d 83, page 86, 78 P.2d 760, page 761, where the daughter of a predeceased wife appeared, the court, using as authority Siberell v. Siberell, supra, said: "While the transfer of separate property into a joint tenancy status may often constitute a gift inter vivos (see Bell v. Moloney, 175 Cal. 366, 165 P. 917; George v. Daly, 83 Cal. App. 684, 257 P. 171; Tilden v. Tilden, 81 Cal.App. 535, 254 P. 310), this is not necessarily the case where a husband and wife use that form of contract to transfer or change their respective interests in property earned during the marriage into a joint tenancy. In a very real sense the parties in such a case are not making a gift to each other but each is retaining an interest which is separate property and which may ripen into the absolute ownership of all of the property if he survive the other. We think that such a situation should not be held to constitute a gift within the meaning of section 229 of the Probate Code, but it is rather a contractual change in the status of the property and in the rights of the parties. Not only is this change brought about by contract, each of the parties contributing an interest in property theretofore held by him, but the resulting condition permits both parties to retain the equal enjoyment of the entire property during their joint lives, and then leaves the property to whichever one may survive the other."

In Re Estate of Lissner, 27 Cal.App.2d 570, 574, 81 P.2d 448, 449, no child appearing, the rule stated in Re Estate of Harris, supra, that "the creation of a joint tenancy between husband and wife in the separate property of either constitutes a gift from one to the other, and that upon the death of the surviving spouse the property covered by the joint tenancy is to be distributed to the heirs of the predeceased spouse, under section 229, Probate Code, just as the court did in this case," was followed.

In Re Estate of Allshouse, 13 Cal.2d 691, page 698, 91 P.2d 887, page 890, dealing with foreign property brought into a community property state, and where the son of a predeceased spouse was respondent, it was held that personal property owned by the husband prior to, or acquired after, his marriage, by gift, devise, descent or bequest, was his separate property, and that upon the death of the wife "The ownership was in essence that of the very type of property which it is the intent and purpose of section 229 to return to the husband's family upon death of the wife intestate and without issue." As applied to the facts of that case, the opinion also stated (page 699 of 13 Cal.2d, page 891 of 91 P.2d): "Had the husband brought the property to this state, or had he become domiciled here, the rule would be different, for it is well settled that foreign property, when subjected to the laws of a community property jurisdiction, may be reclassified thereunder." The decree in the Allshouse case was reversed, the court saying (pages 701, 702 of 13 Cal.2d, page 892 of 91 P.2d): "Therefore even if it can be said that dece-

dent's interest in the Missouri real property in fact originated in a gift to her by the husband of his separate property, the creation of the tenancy by the entirety followed by transmutation into a California joint tenancy, must be held to have broken the chain of the gift so far as application of the statutes of succession of the community property jurisdiction is concerned."

In the same volume (13 Cal.2d), in Re Estate of Rattray, supra, the court said (page 716, page 1050 of 91 P.2d): "As we read Section 228 of the Probate Code it provides that that portion of the estate of a decedent who died intestate without issue, which has been the community property of said decedent and a predeceased spouse, which has come to said decedent by gift, devise, descent or bequest from such predeceased spouse, or belonged or went to the decedent by virtue of its community character on the death of such predeceased spouse, goes in equal shares to the relatives of the predeceased spouse and the relatives of the deceased designated in said section." It should be noted that in the Rattray case no issue of a predeceased spouse was involved. Filed on the same date as the Rattray decision, and using that case as authority, In re Estate of Slack, 13 Cal.2d 721, 91 P.2d 1052, held that in the estate of a widow dying intestate, without issue, leaving property ascertained to be community property of the widow and her predeceased husband, who also died without issue, his nieces and nephew were entitled to share with the sisters, nieces and grandnieces of the deceased widow. See, also, Sears v. Rule, 45 Cal.App.2d 374, 114 P.2d 57; In re Estate of Brandel, 44 Cal.App.2d 735, 112 P.2d 976; In re Estate of Brady, 171 Cal. 1, 151 P. 275; In re Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A.L.R. 1318; In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27; In re Estate of McCauley, 138 Cal. 546, 71 P. 458; In re Estate of Simonton, 183 Cal. 53, 190 P. 442; Siberell v. Siberell, supra; Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513; In re Estate of Mercer, 205 Cal. 506, 271 P. 1067; In re Estate of Hill, 179 Cal. 683, 178 P. 710; Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117.

[2-4] The latest judicial expression on this subject called to our attention is In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231, where the son of a predeceased spouse appeared as respondent, the court saying (page 563 of 21 Cal.2d, page 233 of 134 P.2d): "The question for decision concerns the character of the property left by Mrs. Perkins. The respondent claims all of her estate as separate property of her deceased husband which she acquired by gift from him. By its second judgment the probate court sustained the respondent's contention as to all of her property except a portion valued at $4,313, which had come to her by bequest." This decision though filed in 1943, construed sections 228 and 229 as each read prior to the 1939 amendments and as applicable to property acquired by a husband and wife in a common-law state and brought into the State of California by the surviving spouse, who died here. The discussion in the Perkins case relative to In re Estate of Allshouse is not pertinent to the facts herein. However, at pages 569, 570 of 21 Cal.2d, page 236 of 134 P.2d, the court said: "Sections 228 and 229 together provide for the succession of all property in which the predeceased spouse had some interest. Their scope is not limited to community property, and they have been construed as providing that upon the death of the survivor of the marriage, intestate and without issue, the property should go to the family or families of the spouse or spouses through whose efforts the estate was accumulated. [Citing cases] By these sections, the court has said, the Legislature intended that a lineal descendant of the predeceased spouse should succeed to all property of the surviving spouse in which the predeceased spouse owned an interest; if there were no lineal descendants of either spouse, the property should then be divided equally between the respective families of the two spouses by whose efforts it was accumulated. If, however, the property had originally come to the predeceased spouse by other means than his efforts during the existence of the marriage, such as acquisition before marriage, or by gift, devise, or bequest subsequent to the marriage, then the Legislature intended that such property should descend, upon the death of the survivor, entirely to the family of the predeceased spouse."

In re Kessler, supra, relied upon by respondent, to the effect that where the property had been community property before being held in joint tenancy none of the property went to the heirs of the predeceased spouse, is seldom mentioned in the decisions cited.

[5, 6] In the absence of a will, the right of inheritance is dependent upon operation of law. Estate of Donahue, 36 Cal. 329; Larrabee v. Tracy, 39 Cal.App.2d 593, 104 P.2d 61. The right of inheritance in this state, subject to constitutional limitation, rests upon provisions of the Probate Code. McCaughey v. Lyall, 152 Cal. 615, 93 P. 681. There is no general constitutional limitation upon the law of succession. "* * * the law of succession is entirely within the control of the Legislature." In re Estate of Perkins, supra, 21 Cal.2d page 569, 134 P.2d page 236. "Succession is the acquisition of title to the property of one who dies without disposing of it by will." Probate Code, sec. 200.

[7] Upon the well-established rule that the right of inheritance and the law of succession are statutory, the Legislature in 1939 with the evident purpose of clarifying or changing the rule in sections 228 and 229, amended them as heretofore indicated. The wisdom of legislative action is not a subject for judicial criticism.

[8] As applied to the facts of this case, the question arises whether, under the terms of the amendment, the surviving spouse became "vested" with the whole of the joint tenancy interest or with one-half thereof, or did the property "vest" in the surviving spouse at all. In other words, what does "vested * * * by right of survivorship" mean as used in the code sections. The wording of the sections is ambiguous. As used therein, does it mean that when the community property is placed in joint tenancy, its community character is destroyed and it becomes separate property; that such separate property rights vest completely and that upon the death of the husband the wife succeeds to the husband's interest by "right of survivorship"? If so, then the Legislature, in enacting the amendment, did not have the constitutional right to devest the wife of her property, as such action would be an arbitrary and unreasonable invasion of the vested rights of the wife. Const. of Calif., Art. I, sec. 1. "Neither the federal Constitution nor the Constitution of California prohibits the enactment of retrospective laws" (Southern Cal. Edison Co. v. Johnson, 55 Cal.App.2d 638, 645, 131 P. 2d 43, 47; American States Water Service Co. v. Johnson, 31 Cal.App.2d 606, 88 P.2d 770), but a retrospective act may not be given effect to deprive one of a completely vested property right. 5 Cal.Jur., pp. 728, 729, sec. 129, and pp. 751, 752, sec. 145.

[9] At this point it may not be amiss to give consideration to the word "vested" particularly as applied to a joint tenancy. In Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118, the question was raised whether a judgment lien on the interest of one joint tenant prior to execution severs the joint tenancy. At pages 219, 220 of 52 Cal.App. 2d, at page 119 of 126 P.2d, this court said: "The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. Green v. Skinner, 185 Cal. 435, 197 P. 60. While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives."

The Siberell case, supra, cited in the Kessler case, so far as the present point is concerned, is in fact somewhat a reiteration of views expressed in Re Estate of Gurnsey, 177 Cal. 211, at pages 215, 216, 170 P. 402, 404, the court said: "In Hannon v. Southern Pac. R. Co., 12 Cal.App.[350], 355, 107 P. 335, the subject was treated at greater length. It was there shown that at common law the title to the joint property did not pass to and 'vest in the survivor' upon the death of his cotenant, but that 'each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his cotenant'; that 'it simply "remained" to him,' and came to him 'wholly from the original grant,' so that after the death of one, the other, in pleading his title, could allege a conveyance by the original grantor to himself, without mention of the cotenant, citing Coke on Littleton, § 286, and 1 Washburn on Real Property, [page] 646, and concluding with the following: 'It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant, or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant.' This is the legal effect of a joint tenancy at common law and under our Code, and it would, of course, prevail without regard to the actual intent of the donor who created it." McDougald v. Boyd, 172 Cal. 753, 159 P. 168. The Siberell case, supra, does not

hold that, on the creation of a cotenancy, each tenant is vested with a one-half interest in the property, and that upon the death of one the whole is "vested" in the survivor. The gist of the holding in the Siberell case is that a community interest and a joint tenancy cannot exist at the same time, and that the use of community funds in the acquisition of property held in joint tenancy is simply an indication of an agreement that the property is no longer community property but takes on the characteristics of a joint tenancy. "Upon the creation of the joint tenancy ownership, each owned their interest therein as separate property." In re Estate of Harris, supra, 9 Cal.2d page 659, 72 P.2d page 878; Tomaier v. Tomaier, 50 Cal.App.2d 516, 123 P.2d 548.

[10] In view of the holding herein that the predeceased husband's joint tenancy interest did not vest in the decedent wife at the time of his death, the contention of respondent that as a matter of law upon the wife's death the property vested in her heirs alone, cannot be upheld.

[11] Some color may be given to the last theory discussed as it must be held that during the life of the wife she could have disposed of the property as she desired. This is not the question presented on this appeal. Sections 228 and 229 are applicable only when the acquisition of title to the property depends upon one dying without disposing of it by will.

[12] Assuming, as respondent contends, that upon the death of her spouse certain rights to their property in whole or in part vested in the wife, she could have sold it and disposed of the proceeds, given it away, directed its disposition by will, etc. In such event the property vested conditionally; that is, she had the right to its enjoyment and upon her death it was subject to her testamentary disposition. In re Estate of Flood, 55 Cal.App.2d 410, 130 P.2d 811; In re Estate of Putnam, supra. If there was no will, it must be assumed that decedent intended that the property should be disposed of by operation of law; that is, in accordance with statutory rules of succession. The owner of property can prevent the property from becoming subject to the laws of succession by disposing of it by will. 16 Am.Jur., pp. 776, 777, 778, secs. 10 and 12.

[13] So far as the facts of this case are concerned, the use of the words "vested in" in the two sections in question may be treated as surplusage or, if construed, must be interpreted as meaning "came to" as those words are used in the same sections. When the sections are read together it appears that in amending the act it was the intention to make certain that all property (In re Estate of Rattray, supra) which "came to" decedent as a gift, by descent, devise or bequest or by right of survivorship in a joint tenancy or homestead, which had been community property of decedent and a previously deceased spouse, sec. 228, or had been the separate property of the predeceased spouse should go first to the child or children of the deceased spouse and if none, then as the sections direct.

The expression "came to" in this instance, if given the meaning that the acquisition happened or occurred through any channel that had its inception and continued protection by operation of law (Shippen v. Izard, Pa., 1 Serg. & R. 222), is appropriate and indicates th apparent intention in the enactment of the amendments, particularly when the consequences that would follow respondent's interpretation are considered, namely, that a sister of decedent would share equally with the daughter of a predeceased spouse. This is not in accord with the plan or scheme as evidenced by the two sections in their entirety for the disposition of property where there is no issue of a predeceased spouse.

The provision in each section is subject to the proviso that decedent leave no issue. Under such circumstances there does not seem to be any injustice in giving property to a child if it had been separate property of a parent, and the rule enacted by the Legislature that if a decedent dies without issue the property which had been community property should go to the child of a predeceased spouse is not subject to criticism.

[14] It should be noted that separate property of the predeceased spouse goes to those of lineal (In re Estate of Perkins, supra), and if none to those of collateral, consanguinity. Sec. 229. If the property was of community character, the direct line of succession is first preferred; that is, to the child or children of the predeceased spouse, otherwise one-half goes to the parents or descendants of each spouse by right of representation. Sec. 228. It is the origin rather than the present title

which the amendments seek to make the test in determining the rights of the parties.

[15] We are of the opinion that when the decedent died intestate, without issue or spouse, the property which came to her as a surviving joint tenant with her previously deceased spouse, and which had been originally acquired with community property funds, should go wholly and entirely to the issue of the predeceased spouse rather than to the decedent's next of kin, this being the legislative intent in enacting the 1939 amendments. This conclusion is reached with due consideration given to cases relied upon by respondent.

[16] In re Kessler, citing section 228, was decided upon the authority of Siberell v. Siberell, supra, and Delanoy v. Delanoy, supra. Siberell v. Siberell was an action involving division of property by a decree of divorce. Delanoy v. Delanoy was an action based upon fraud. In neither case was the court called upon to consider sections 228 or 229. In re Estate of Frary, citing In re Estate of Putnam, it was held in effect that the creation of a joint tenancy destroys the force of the provision in section 229 upon the theory that it is not necessarily the rule that when a form of contract changes the respective interests of the spouses in the property a gift inter vivos occurs. The Siberell, Frary, Kessler and Putnam cases were decided before the amendment. The law of the case in effect at the time of decedent's death controls. In re Estate of Flood, supra.

In re Estate of Perkins, supra, in effect decides this appeal, but when in addition thereto the 1939 amendments are considered it must be determined that respondent, the sister of decedent, had no vested right, as that term is used in the sections, to inherit. She simply had an expectancy and should not be heard to object if the probate statutes negative her claimed right.

In view of the conclusion reached on the main issue on appeal, it is not necessary to discuss the question of the $1,000 life insurance, as the daughter of the predeceased spouse is entitled to the entire estate.

The order settling final account and decreeing distribution is reversed. The trial court will direct a final account and a decree of distribution in accordance with the views expressed herein.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 624

PEOPLE v. KERSTEN.

Cr. 3705.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1943.

Hearing Denied Oct. 28, 1943.

1. Evidence ⇐594

A witness' uncontradicted testimony as to particular fact is not necessarily binding on trial court, which may consider inherent improbabilities in witness' statement, his manner while testifying, and all circumstances surrounding such fact.

2. Bail ⇐79(2)

On appeal from order denying motions to set aside order forfeiting bail bond for defendant's failure to appear on day set for pronouncement of judgment on his plea of guilty, trial court's finding, denying credence to defendant's testimony that he was hit by automobile in city wherein court sat and did not remember where he was until he had been in jail in another distant city for four days, cannot be disturbed, in absence of evidence of circumstances surrounding automobile accident and circumstances or dates of defendant's incarceration in jail.

3. Bail ⇐79(1)

Where continuances of hearing on defendant's application for probation and of pronouncement of judgment and sentence on his plea of guilty of crimes charged, including prior felony convictions, were granted at his request, and his bail bond was filed long after expiration of five days following such plea, arguments that court lost jurisdiction to sentence defendant and that surety on bond was not obligated to guarantee defendant's presence in court thereafter were not available to defendant and surety on appeal from order denying their motions to set aside order forfeiting bond. Pen.Code, §§ 1191, 1203.

4. Bail ⇐79(2)

A surety on defendant's bail bond is presumed to know that, under California courts' decisions, defendant can waive time for pronouncing judgment on his plea of guilty.

5. Bail ⇐75

The trial court did not lose jurisdiction to sentence defendant on his plea of guilty of crimes charged, including prior felony convictions, by granting his requests

for continuances of hearing on his application for probation and of pronouncement of judgment and sentence, and surety on defendant's bail bond was obligated to produce defendant at time ordered by court, though defendant was not entitled to probation. Pen.Code, §§ 1191, 1203.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Hubert R. Kersten pleaded guilty of robbery and burglary, and from an order denying motions by him and the surety on his bail bond to set aside an order forfeiting the bond, movants appeal.

Affirmed.

See, also, 138 P.2d 780.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and J. H. O'Connor, County Counsel, and John P. Wright, Asst. County Counsel, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

This appeal is being prosecuted by defendant Kersten and by his surety on a bail bond from an order denying their motions to set aside an order which had been entered declaring a forfeiture of the bond.

Defendant was arraigned in the superior court on an information charging him with robbery and the action was set for trial for April 3, 1941, at which time an amended information was filed charging defendant with burglary and with four prior felony convictions. Defendant entered a plea of guilty, admitted the prior convictions and requested permission to file an application for probation. This request was granted. It was stipulated that the court should determine the degree of the offense from the report of the probation officer. On motion of defendant the matter of the hearing on the application for probation and the pronouncement of judgment and sentence was continued from time to time until January 15, 1942. Defendant was released on the bond in question on June 17, 1941. The reason advanced by defendant for requesting the continuances was that he claimed to be working on an invention which would be of service to the United States government in the prosecution of the war. Although the clerk's minutes of April 3, 1941, showed defendants admission of the prior convictions, it was stipulated on January 15, 1942, that the court should then determine the allegations concerning the four prior convictions from the reports submitted by the probation officer. The court thereupon found each allegation concerning the prior convictions to be true. Counsel for defendant then told the court that it was his honest opinion that defendant's invention had merit and he again requested a continuance for ninety days. The court thereupon continued the matter of passing upon the application for probation and the pronouncement of judgment to April 2, 1942. The defendant did not appear on April 2, 1942, and the court ordered his bail forfeited. Within ninety days thereafter appellants presented the motions to set aside the order declaring the bail forfeited.

Two grounds are specified as the basis for the motions to set aside the order of forfeiture. It is alleged that at the time of the order of forfeiture defendant was "legally insane and mentally incapable to know what he was doing and was therefore mentally unable to perform any of the acts required by the bail". At the hearing on the motions defendant testified that before April 2, 1942, he "got hit by an automobile at Highland and Sunset" in the city of Los Angeles and that he did not remember where he was until he had been in jail in the city of Detroit for four days. When asked if he had been able to notify the bonding company or anyone as to his whereabouts he replied: "I didn't think anything about it. I didn't know I was out on bond". Defendant further testified that the date he was struck by the automobile was March 16 or March 17, 1942.

[1, 2] Appellants assert that according to the uncontradicted testimony of defendant it was physically impossible for him to appear in court on April 2, 1942, and for this reason the order of forfeiture should have been vacated. The testimony of defendant was such that the court was not compelled to accept it as true or be guided by it. There are exceptions to the general rule that the uncontradicted testimony of a witness to a particular fact is binding on the court. The trial court may give consideration to inherent improbabilities in the statement of a witness, the manner of the witness while testifying and all of the circumstances surrounding the particular fact which is the subject of the inquiry. The statement of defendant in the present

instance was very meager. The circumstances surrounding the automobile accident were not presented to the court, nor were the circumstances or the dates of the incarceration of defendant in Detroit. It was the function of the court to determine what credit should be given to the testimony of defendant and there is no justification on this appeal for disturbing its finding denying credence to the testimony.

[3-5] As a second ground for asking the trial court to set aside the order of forfeiture appellants assert that defendant Kersten "at all times within which he was required by law to be present for sentence was present and that his subsequent absence at times other than those required by law were with the knowledge and consent of the state." Appellants point out that the trial court was informed before the continuances were granted that defendant admitted the prior convictions; that he was therefore not eligible for probation; and that under the provisions of section 1191 of the Penal Code judgment must be pronounced within not less than two nor more than five days after a plea of guilty. They argue that the court lost jurisdiction to sentence defendant after the expiration of five days; that the appealing surety company was not obligated to guarantee the presence of defendant after the court had lost jurisdiction to sentence him; and that the surety company was entitled to believe when preparing the bond that the court would follow the provisions of section 1191 of the Penal Code and of section 1203 of the Penal Code, which requires that probation cannot be granted to one who has suffered a prior conviction of a felony. These arguments are not available to appellants, for all of the continuances were made at the earnest request of defendant. Indeed, the bond was filed after defendant's request for a continuance had been granted and long after the expiration of the five day period following the plea of guilty and the admission of the prior convictions. The surety company is presumed to know that under the decisions of California courts a defendant in a criminal action can waive time for pronouncing judgment. The court did not lose jurisdiction by granting defendant's requests for continuances and the surety company was obligated to produce defendant at the time ordered by the court or pay the penalty fixed in the bond. Moreover, section 1191 of the Penal Code provides that the time for pronouncing judgment may be extended by the court "until any proceedings under section 1203 of this code have been disposed of". The application for probation made under section 1203 was presented at the request of defendant and at his request no disposition had been made of it before the date of the forfeiture of the bond. Although under the terms of section 1203 defendant was not entitled to be placed upon probation, he nevertheless had been accorded the right to file an application and the proceedings under the section were before the court and not disposed of.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.



60 Cal.App.2d 616

GAYER v. WHELAN, District Attorney.

Civ. 2867.

District Court of Appeal, Fourth District, California.

Sept. 28, 1943.

1. Costs ⇐230

Generally, prevailing party on appeal is entitled to his costs as an incident of the judgment on appeal. Code Civ.Proc. § 1034; Rules of the Supreme Court and District Courts of Appeal, § 26.

2. States ⇐215

Statutes which before amendment provided that when state is a party and costs are awarded against it costs must be paid out of state treasury did not authorize imposition of costs in any case but merely specified source from which they should be paid when authorized by other statutes. Code Civ.Proc. § 1028.

3. Counties ⇐208

A county enjoys same immunity from suit and from liability as the state.

4. Costs ⇐96

Where legislature distinguished between state and counties in statutes providing for payment of costs, district attorney

was a "county officer" for purpose of determining his liability for costs in action brought against him in his official capacity. Code Civ.Proc. §§ 1028, 1029.

See Words and Phrases, Permanent Edition, for all other definitions of "County Officer".

5. Counties ⇐140, 228

The amendment to the Code section providing that costs may be awarded against the state on same basis as against any other party has no application where only county or a county officer acting in his official capacity is a party. Code Civ.Proc. § 1028, as amended in 1943.

6. Counties ⇐228

Statute providing that when costs are awarded against county they must be paid from county treasury does not authorize award of costs against county in absence of other statutory authority but merely designates source from which costs, if otherwise authorized, shall be paid. Code Civ. Proc. § 1029.

7. Counties ⇐228

Statutes pertaining to actions for claim and delivery do not authorize award of costs against a county or its authorized agent in an action of that character against county. Code Civ.Proc. §§ 509–521.

8. Costs ⇐96
Counties ⇐228

Where district attorney in official capacity as a county officer seized pin-ball machines, in good faith, believing them to be seizable as lottery and gambling devices, neither county nor district attorney was liable for costs in claim and delivery action brought for recovery of machines. Code Civ.Proc. §§ 509–521, 1029.

Action by I. B. Gayer against Thomas Whelan, District Attorney of San Diego County, for possession of pinball machines seized as lottery or gambling devices. A judgment for plaintiff was affirmed on defendant's appeal, 138 P.2d 763. On defendant's motion to recall remittitur to strike provision for costs.

Motion granted and remittitur modified.

Thomas Whelan, Dist. Atty., in pro, per., and Duane J. Carnes, Deputy Dist. Atty., both of San Diego, for appellant.

Arthur Mohr, of Los Angeles, and Ralph E. Swing, of San Bernardino, for respondent.

GRIFFIN, Acting Presiding Justice.

The original proceeding herein was an action in which plaintiff sought to recover 14 pin-ball machines which defendant, in his capacity as district attorney of San Diego County, had seized and proposed to destroy under the provisions of section 355a of the Penal Code. The action was decided in favor of plaintiff. See Gayer v. Whelan, 59 Cal.App.2d 255, 138 P.2d 763.

Defendant and appellant, as District Attorney of San Diego County, now moves to recall the remittitur in this action, issued August 17, 1943, because of a provision therein awarding costs to respondent. The motion is predicated upon the theory that at the time of the issuance of the remittitur there was no provision in the law awarding costs against the state or county, and that in as much as defendant was acting in his capacity as District Attorney of San Diego County, he too was immune from the payment of costs on the same theory.

[1] It is a general rule that the prevailing party on an appeal shall be entitled to his costs as an incident of the judgment on appeal. Sec. 1034, C.C.P.; Sec. 26, Rules for the Supreme Court and District Courts of Appeal.

Section 1028 of the Code of Civil Procedure, as it existed prior to amendment in 1943, provided that: "When the State is a party, and costs are awarded against it, they must be paid out of the State treasury." And as amended in 1943 [Stats. 1943, chap. 165, sec. 1] it provides that: "Notwithstanding any other provisions of law, when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for the support of the agency on whose behalf the State appeared."

Section 1029 of the Code of Civil Procedure was not similarly amended. It still provides that when a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

[2] Construing section 1028, supra, as it existed prior to the 1943 amendment, it has been held that ordinarily costs are not allowed against the State in the absence of express statutory legislation, and section

1038 (now 1028) of the Code of Civil Procedure, which provides that when the State is a party and costs are awarded against it, they must be paid out of the state treasury, does not authorize the imposition of costs in any case, but merely specifies the source from which they shall be paid when authorized by statute; and that in a proceeding for forfeiture of an automobile used for unlawful transportation of narcotics, that it is improper to allow costs against the State in the absence of statutory authorization. People v. One Plymouth Sedan, 21 Cal.App.2d 715, 69 P.2d 1011. To the same effect is People v. One 1937 Plymouth 6, 40 Cal.App.2d 38, 104 P.2d 372.

In Innes v. McColgan, 52 Cal.App.2d 698, 126 P.2d 930, this court held that under section 1034 of the Code of Civil Procedure the State is entitled to costs where it is the prevailing party, though costs could not have been awarded against it had the other party prevailed, and that permission to sue the State is in the nature of an offer which must be accepted as made and that if a statute merely gives permission to sue the State through its officers acting in their official capacity, the action so authorized is subject to existing statutes and rules applicable to such a form of action.

[3] The County enjoys the same immunity from suit and from liability as the State. City of Los Angeles v. Los Angeles County, 9 Cal.2d 624, 629, 72 P.2d 138, 113 A.L.R. 370; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016. Appellant argues that the District Attorney is a state officer acting in his official capacity, and that as such he is not subject to the imposition of costs of litigation, citing Gamble v. Utley, 86 Cal.App. 414, 260 P. 930; Fleming v. Hance, 153 Cal. 162, 94 P. 620; Singh v. Superior Court, 44 Cal.App. 64, 185 P. 985.

[4, 5] It was held in the Gamble case that the district attorney was a constitutional officer, as applied to the facts of that case; in the Fleming case that he was a public officer representing the sovereign power of the people of the state; and in the Singh case that although he was a county officer, he was a part of the political organization which is an agent of the state, and therefore an executive officer of the state, within the meaning of section 67 of the Penal Code. The last case mentioned did not directly hold that the district attorney was a state officer, but held in view of the fact that the legislature did not make any provision relating to the bribing of an executive county officer, as distinguished from an executive state officer, the term executive officer of the state was all inclusive. In the instant controversy, the legislature did distinguish between a state and a county officer in adopting two separate sections in respect to costs. Section 1028 applies to costs when the state is a party and section 1029 applies to costs when a county is a party. It therefore seems only reasonable, under section 1029, that it was intended that the office of the district attorney, for the purpose of determining the question here presented, would fall in the classification of a county officer. Therefore, the 1943 amendment to section 1028 is not applicable where only the county is a party or its officers acting in their official capacities.

[6] Construing section 1029, supra, as applied to the facts related, and in harmony with the cited decisions, we must conclude that if the district attorney was not acting in his individual capacity or right but in that of the county of San Diego, and the county was the real party in interest, then, no costs may be imposed against such county, acting through its authorized agent, unless authorized by express statutory legislation. People v. One Plymouth Sedan, supra.

[7] Sections 509 to 521 of the Code of Civil Procedure, pertaining to actions for claim and delivery, contain no express statutory legislation allowing costs against the county or its authorized agent. In Lamberson v. Jefferds, 116 Cal. 492, 48 P. 485, a question arose as to a county officer being held liable for costs in an action involving the legality of a claim against the county, wherein the auditor refused to allow the claim which had been approved by the Board of Supervisors. It was there held that the County Auditor, in refusing to issue a warrant, was acting for the county but if the County Auditor refused to issue a warrant improperly, and where there was no just cause to doubt the validity of the claim, he would have no just claim against the County for reimbursement, and he may therefore "justly be cast in costs".

[8] In the instant case the plaintiff himself instituted the original proceeding and brought it against Thomas Whelan, not as an individual, but against him in his official capacity as district attorney of San Diego County. It was in this official capacity that he answered the complaint and judgment went against him as such dis-

trict attorney. It was only in that capacity that he could and did appeal. He apparently was not acing therefor in his own individual right, but in that of the County. It cannot be here said that in taking and retaining the property in question he was acting arbitrarily. He apparently was acting in good faith, fully believing that he was within his legal rights as such public officer in so doing. This conclusion is strengthened by the fact that the Supreme Court itself, by a divided vote of four to three, denied a hearing in the decision of this case on its merits. In this action, the county was not liable for costs nor was the District Attorney in his official capacity as such. Scheerer v. Edgar, 67 Cal. 377, 7 P. 760; Lamberson v. Jefferds, supra.

It is therefore ordered that the remittitur be recalled; that the sentence "The respondent to recover costs on appeal" be stricken out; and, as so changed, that the remittitur be returned to the trial court.

MARKS, J., concurs.



METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.

Civ. 2475.

District Court of Appeal, Fourth District, California.

Sept. 30, 1943.

Hearing Granted Nov. 22, 1943.

1. Eminent domain ⇐246(3)

Where answers set out mineralization of land sought to be condemned, and after expert witnesses had testified on question of value of such mineral deposits, a compromise was reached resulting in elimination of this question from the cases, there was a total "abandonment" of the proceedings so far as condemnation was sought of the minerals.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

2. Costs ⇐3

The right to costs is entirely statutory.

3. Witnesses ⇐28(1)

The statute empowering trial court in any proceeding to appoint and fix the compensation of expert witnesses applies to condemnation proceedings and was intended to provide means for a fair and complete ascertainment of facts involved. Code Civ.Proc. § 1871.

4. Eminent domain ⇐265(3)

A party in a condemnation proceeding can recover, as taxable "costs", ordinary witness fees only for experts employed by him who were not appointed by the trial court. Code Civ.Proc. § 1871.

5. Witnesses ⇐28(1)

The statute empowering trial court in any proceeding to appoint and fix compensation of expert witnesses covers both the time spent by the witness in investigating the issues previous to trial and the time spent by him as a witness at trial. Code Civ.Proc. § 1871.

6. Eminent domain ⇐265(5)

Where condemnation proceeding after landowners' expert witnesses had testified on value of tin ore deposits was abandoned as to condemnation of tin ore and witnesses had not been appointed by the court, payment of witness' charges as experts was not authorized on ground that instruction and education of landowner's counsel was a "necessary expense" within statute relating to allowance of costs and disbursements on abandonment of condemnation proceedings but payment of ordinary witness fees was authorized under statute relating to compensation of expert witnesses. Code Civ.Proc. §§ 1255a, 1871.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Expense".

7. Eminent domain ⇐265(5)

The "disbursements including expenses and attorneys' fees", recovery of which is provided for on abandonment of condemnation proceedings, are limited to those necessary expenses that have been recognized as "costs" that may be properly taxed where experts have not been appointed by the court. Code Civ.Proc. § 1255a.

See Words and Phrases, Permanent Edition, for all other definitions of "Disbursement Including Expenses and Attorney's Fees".

8. Appeal and error ⇐719(1)

Order striking items of compensation for expert witnesses would not be dis-

turbed on ground that ordinary witness fees of the experts might have been allowed as costs to defendants where such question was not raised on appeal and the amount involved was small. Code Civ. Proc. § 1871.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Condemnation proceeding by the Metropolitan Water District of Southern California against E. Bennett Adams and others. From a judgment striking items from their cost bills, defendants Lawrence and Gertrude E. Holmes appeal.

Affirmed.

See, also, 100 P.2d 357, 19 Cal.2d 463, 122 P.2d 257; 134 P.2d 882.

Miguel Estudillo, of Riverside, Oliver O. Clark, of Los Angeles, and C. L. McFarland, of Riverside, for appellants.

James H. Howard, and Charles C. Cooper, Jr., both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order taxing costs in a condemnation proceeding in which the plaintiff, in two consolidated actions, sought to condemn private property of the defendants for public use in the construction of Cajalco Reservoir.

After judgment the defendants filed cost bills in which they sought compensation for the services of expert witnesses at the rate of $100 per day for time spent in preparing for the trial, and while attending the trial, besides money for expenses during both periods. The trial court struck these items from the cost bills and the defendants Lawrence and Gertrude E. Holmes have appealed. We will hereafter refer to Mr. and Mrs. Holmes as the defendants.

[1] The answers of defendants set out the mineralization of certain portions of the land sought to be condemned, and alleged that its highest and best use was in connection with tin ore which existed in subsurface veins. After seventeen trial days had been spent on the question of the value to be placed on these mineral deposits, and each of four expert witnesses had testified, a compromise was reached which resulted in the elimination of this question from the case and a partial abandonment of the condemnation proceedings. This was in effect a total abandonment of the proceedings in so far as condemnation was sought of the minerals lying three hundred feet or more below the surface of the ground. This eliminated from the cases the question of the valuation of the property because of the existence of these mineral deposits as it is conceded that the valuable deposits lay below that depth. Also certain surface rights were reserved to enable the mining operations to reach subsurface deposits. The reservation of these surface rights does not affect the question here presented.

It is admitted that the four experts employed by defendants were qualified to advise them and their counsel and to testify on the questions involved. Two of them had actual experience during the latter part of the last century in mining tin on property adjoining that of defendants. The others had gained knowledge of tin ores and their removal either by observation or actual mining operations in Bolivia or in Cornwall, England. The deposits in those countries were similar to those which it is claimed exist under the surface of defendants' property.

The four witnesses whose fees and expenses are involved here are George W. Bryant, Ralph H. Shaw, C. O. Sanford and Rush T. Sill. While two cost bills were filed they present the same questions. A consolidation of them will illustrate the nature of the fees claimed:

"Expense account other than while a witness in court."...	$ 384.95
"Expense account while a witness in court."	158.35
"Compensation for time other than as a witness in court." ..	7,755.00
"Compensation as a witness in court".	3,862.50
Total	$12,160.80

One cost bill sought only "Compensation for time other than as a witness in court" for three of these witnesses in the total sum of $1030. In addition it claimed as costs the following item: " 'Report on Tin Ore in California' (Purchased from California State Mineralogist) $2.38."

The trial court refused to tax as costs any of the foregoing items and this appeal from that order followed.

Defendants claim to be entitled to the costs alleged in their cost bills, exclusive of

the "Report on Tin Ore in California", under the provisions of section 1255a of the Code of Civil Procedure. Plaintiff seeks to support the order under the general rules governing taxing costs and the provisions of section 1871 of the Code of Civil Procedure.

The pertinent provisions of section 1255a of the Code of Civil Procedure are as follows: "Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

Section 1871 of the Code of Civil Procedure contains the following:

"Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil, criminal, or juvenile court, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable. * * *

"Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees."

It is admitted that the general provisions of law governing the taxing of costs do not apply here and that this decision must be governed by the quoted provisions of the two sections as interpreted by the decisions of our courts.

[2] The general rules governing the allowance of costs is thus stated in Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503, 507, as follows: "The right to recover costs is entirely statutory and 'the measure of the statute is the measure of the right'. [In re] Estate of Johnson, 198 Cal. 469, 245 P. 1089. * * * Certainly the statute does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation. The code authorizes the allowance of costs only, and the inclusion of 'necessary disbursements' in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowable as an item of 'costs'. Bond v. United Railroads, 20 Cal.App. 124, 128 P. 786." See, also, Miller v. Highland Ditch Co., 91 Cal. 103, 27 P. 536; Murphy v. F. D. Cornell Co., 110 Cal.App. 452, 294 P. 490.

[3] Part of the problem presented here was before the court in City of Los Angeles v. Clay, 126 Cal.App. 465, 14 P.2d 926, 927, where the defendant sought to recover the fees of his experts who had appraised his property in a condemnation proceeding. The proceeding was dismissed after the trial. This constituted its abandonment under the provisions of section 1255a of the Code of Civil Procedure. In holding that defendant could recover nothing paid to these witnesses in excess of ordinary witness fees, the court said: "We are cited to no authority which can be said to justify the conclusion that section 1871 [Code of Civil Procedure] is not applicable here, or that a party has the power which is elsewhere vested in the court to determine what expert evidence may be required, and thus to include the cost thereof as a necessary expense in preparing for trial. We have no doubt that this section does apply to condemnation proceedings, and that it was intended by the Legislature to provide means for a fair and complete ascertainment of facts involved, in this as well as any other proceeding wherein its provisions are used. We conclude that the charge made for expert witnesses other than as ordinary witnesses should be disallowed the more readily because as to such expenses section 1871 entirely safeguards a defendant in condemnation proceedings from loss in case of abandonment by the plaintiff. Under its provisions it is only necessary that a party who desires to use experts should satisfy

the court of this necessity and secure an order appointing one or more such witnesses and allowing reasonable and proper compensation for their services. It cannot be assumed, contrary to the admissions of all parties to the present appeals, that the witnesses in question were not such as were entitled 'to the ordinary witness fees only.' It is conceded by the respondents that their experts were called by them, and, their category having been defined by legislative enactment, it does not permit of another characterization by judicial interpretation."

Although a dissenting opinion was filed in the Clay case the Supreme Court denied a petition for hearing. This decision has been followed in City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 25 P.2d 224; City of Long Beach v. Anderson, 139 Cal.App. 130, 33 P.2d 875; and City of Long Beach v. Anderson, 139 Cal.App. 789, 33 P.2d 876. A petition for hearing of the last cited case was denied by the Supreme Court.

[4-7] From the foregoing authorities it would seem to be the settled law in California that a party in a condemnation proceeding can recover, as taxable costs, "ordinary witness fees only" for experts employed by him and who were not appointed by the trial court "to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required". Sec. 1871, Code Civ. Proc. It is to be noted that the section covers both the time spent by the witness in investigating the issues previous to the trial and the time spent by him as a witness at the trial. As there was no order of court appointing these experts the statute does not authorize the payment of their charges as experts, but only ordinary witness fees. We are referred to no statute nor decision authorizing taxing as costs the expenses of expert witnesses either before or during the trial. The "disbursements, including expenses and attorney fees", recovery of which has been provided for in section 1255a, Code Civil Procedure, have been limited to those necessary expenses that have been recognized as "costs" that may be properly taxed under the decisions already cited, where, as here, experts have not been appointed by the court. As recovery of costs is a matter to be regulated or permitted by statute it would seem that there is no authority of law for the allowance, as costs, of the expenses and fees claimed for these witnesses in excess of their ordinary witness fees.

Defendants argue that this case presents unusual problems that should bring it without the foregoing rule. They point out that there is little or no tin mined in the United States and no general knowledge here concerning that industry; that, generally, the Bar in this country neither knows nor has convenient and accessible means of acquiring knowledge of geological structures carrying tin or the values to be placed on them or the methods of mining and reducing the ore; that the cases here involved the condemnation of valuable tin deposits; that it was necessary for counsel to be fully informed on all of the questions involved so they could present the evidence to the court in an orderly and intelligent manner and cross-examine adverse witnesses who might be produced by the plaintiff. It is argued that the instruction and education of counsel along these unfamiliar lines should be regarded as necessary expenses of defendants in preparing for trial and in trying the case.

This argument presents rather startling implications when carried through to its conclusion. Experience has taught us that many times even learned counsel may be employed in cases requiring special preparation in entirely unfamiliar subjects with which he must become acquainted in order to present his client's case intelligently. In those cases he must pursue the study of unfamiliar subjects and often has to consult those learned in them. For the purpose of trying the case he may become a temporary specialist in the subject involved. Such situations are not uncommon in the practice of the profession.

Some attorneys are familiar with the rules of practice governing the condemnation of private property for public use. Others seldom are retained in such cases during a lifetime at the Bar but still have the right to accept a retainer in any one of them. Condemnation actions present questions of law, evidence, and procedure peculiar to themselves. An attorney employed for the first time in one of them must acquaint himself with those rules. This is a necessary part of his preparation for the trial. Can it be said that this education in preparation for trial is one of the "necessary expenses incurred in pre-

paring for trial" that may be recovered as costs in addition to the reasonable attorney fees recovery of which is allowed by the statute? We think not, for the attorney should pay for his own education and this expense to him should be covered by his attorney's fee.

We can find no distinction in reason between the education of an attorney in his first condemnation case in the rules governing the trial of such cases and the education of the learned and experienced counsel for defendants in the somewhat unusual field of the geology of deposits of tin ore, their value and the methods of mining and reducing them. Both come within the field of specialized instruction and education of the attorney in the preparation for and trial of a case and should be paid for by the attorney whose expense of this special education should be covered by his fee. The danger of adopting any other rule is illustrated by one of the cost bills filed here in which claim was made, but now abandoned, for the cost of "Report on Tin Ore in California", a publication evidently purchased in the course of this education of counsel.

[8] It would seem that ordinary witness fees of the four experts might have been allowed as costs to defendants while those witnesses were actually in necessary attendance at the trial. Corona Foothill Lemon Co. v. Lillibridge, 12 Cal.App.2d 549, 55 P.2d 1210. However, this question is not raised on appeal and as the amount involved is small we are not disposed to disturb the order on that account.

The order is affirmed.

GRIFFIN, Acting P. J., concurs.

DAVENPORT v. STRATTON.
L. A. 18664.

Supreme Court of California.

Sept. 28, 1943.

Rehearing Granted Oct. 25, 1943.

1. Appeal and error ⇐886
Trial ⇐343

Where jury found for defendant, it impliedly found that no amount was due plaintiff from defendant, hence even though finding for defendant was unsupported by evidence there was no finding which would support a judgment in favor of plaintiff, and neither District Court of Appeal nor Supreme Court could remodel finding of jury upon that issue. Code Civ. Proc. § 956a; Const. art. 6, § 4¾, adopted in 1926.

2. Appeal and error ⇐1122(2)

Where a jury is a matter of right and has not been waived, appellate courts will not make findings contrary to the conclusions of jury. Code Civ.Proc. § 956a; Const. art. 6, § 4¾, adopted in 1926.

3. Judgment ⇐256(1)

Upon trial of an action in which parties are entitled to and do not waive a trial by jury, except in cases where trial court directs a verdict or renders judgment notwithstanding the verdict, judgment must be supported by findings on all material issues and any judgment rendered without such support is erroneous. Code Civ.Proc. § 956a; Const. art. 6, § 4¾, adopted in 1926.

4. Appeal and error ⇐1207(4)

A judgment rendered in favor of plaintiff upon direction from an appellate court after an adverse verdict by jury would be unsupported either by verdict or findings and would on appeal therefrom be reversed. Code Civ.Proc. § 956a; Const. art. 6, § 4¾, adopted in 1926.

5. Trial ⇐420

Where plaintiff, although defendant made motion prior to submission of case for directed verdict, opposed such motion but did not at such time make similar motion and proceeded to argue case to jury, there was a waiver of plaintiff's right to directed verdict.

6. Judgment ⇐199(1)

Where plaintiff waived right to directed verdict by failing to make motion therefor prior to submission of case, court properly denied motion subsequently made by plaintiff for judgment notwithstanding verdict. Code Civ.Proc. § 629.

7. Appeal and error ⇐756

Appellant sufficiently complied with court rule requiring statement of questions involved on rule in civil actions to be set forth on first page of opening brief. Rules for Supreme Court and District Courts of Appeal, rule 8, § 2.

8. Appeal and error ⇐901

Where appellant claims that there is no evidence to support finding or judgment, and respondent asserts that there is some evidence, the duty devolves upon him to direct court's attention to such evidence.

9. Guaranty ⇐36(8)

Contract of guaranty having been executed in consideration of the execution of a lease, the lease and the guaranty must be construed as one instrument amounting to a single contract upon which the liability of the guarantors to the extent of their obligation was coextensive with that of the lessee.

10. Guaranty ⇐36(8)

Where lease authorized alterations after default by tenant and a reletting of premises as so remodeled, guarantor on contract of guaranty executed in consideration of execution of the lease was bound by terms of lease in that respect.

11. Contracts ⇐50

Where sufficient consideration for a contract is shown by evidence and is revealed to be the actual consideration, it is sufficient to give legality to contract, even though different consideration appears in the writing.

12. Guaranty ⇐16(2)

Guarantor on contract of guaranty executed in consideration of execution of lease was not relieved of responsibility thereunder because of failure to receive $1 named as consideration for execution of guaranty.

13. Guaranty ⇐9

Guarantor on contract executed in consideration of execution of lease was not relieved from liability because lease was not physically attached to contract of guaranty or not signed until after guaranty contract, where contract itself recited that it was annexed to and formed part of agreement referring to lease.

14. Guaranty ⇐9

Fact that lease was not actually annexed to and did not accompany contract of guaranty executed in consideration of execution of lease at time contract of guaranty was presented to guarantor for signature did not destroy the legal unity of the two agreements.

15. Contracts ⇐40

Where there is a merger by reference of separately executed written instruments, actual annexation is not essential.

16. Guaranty ⇐7(3)

Contract of guaranty executed in consideration of execution of lease, being absolute in form, was binding on the guarantors without notice of acceptance.

17. Guaranty ⇐46(1)

Guarantors of lease were not entitled to notice of default by tenant where contract of guaranty unequivocally bound its makers to answer for default of tenant without requiring notice of any such default from landlord.

18. Guaranty ⇐27

Under rule of "strictissimi juris" with regard to contracts of guaranty, the obligations of the guarantor are strictly construed in his favor.

See Words and Phrases, Permanent Edition, for all other definitions of "Strictissimi Juris".

19. Guaranty ⇐53(1)

Acceptance of lower rental for one month amounted only to a mere gift from lessor to lessee and did not constitute a material alteration of written contract of guaranty of lease so as to relieve guarantor of liability thereon.

20. Guaranty ⇐56

Leniency extended by lessor to lessee in the payment of rent without changing time when, under lease, the payment of rent due might be demanded, does not constitute an extension of time for payment that would relieve guarantor on contract of guaranty of lease.

21. Guaranty ⇐53(2)

Reletting by lessor after dispossession of lessee in default did not amount to "assignment", so as to relieve guarantor of lease from liability since, when tenant was ejected and dispossessed by legal proceedings, the lease was at an end and all that remained was a liability, not for rent, but for damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment".

22. Guaranty ⇐70

Delay of lessor in service and execution of writ of dispossession after obtaining it did not discharge guarantor from liability under contract of guaranty of lease.

23. Landlord and tenant ⇐195(1)

When a tenant repudiates his lease and abandons the premises, the landlord may rest upon his contract and sue for each installment of rent as it falls due.

24. Landlord and tenant ⇐195(2)

Where landlord took possession of premises and relet the same upon default of tenant in accordance with authority of lease, he could not thereafter recover in installments, but was required to bring action at expiration of original term. Code Civ.Proc. § 337.

25. Landlord and tenant ⇐195(2)

Ordinarily, the releting of leased premises on default of lessee is tantamount to an "election" to terminate lease and hold tenant for damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Alice Davenport against George W. Stratton to recover from defendant as guarantor upon a lease damages allegedly resulting from failure of lessee to perform covenants of lease. Judgment for defendant and order denying motion for judgment notwithstanding verdict, and plaintiff appeals.

Judgment reversed and appeal from order dismissed.

Prior opinion, 132 P.2d 588.

Mathes & Sheppard and Gordon F. Hampton, all of Los Angeles, for appellant.

James V. Brewer, of Los Angeles, for respondent.

CURTIS, Justice.

A hearing was granted in this case after decision by the District Court of Appeal

for the purpose of giving further consideration to the question of the power of an appellate court in an action of this character to direct the trial court to render a judgment for the plaintiff after reversing the judgment in favor of the defendant.

The action was one in which a trial by jury was not only a matter of right, but was one in which a jury trial was had, and the verdict of the jury was in favor of the defendant. The District Court of Appeal reversed the judgment on the ground that the verdict was unsupported by the evidence, with direction to the trial court to render its judgment in favor of the plaintiff in the sum of $11,835.17 together with interest.

In support of this action of the District Court of Appeal the appellant relies upon two cases from the courts of this state, one by this court, Gise v. Fidelity & Casualty Co., 188 Cal. 429, 206 P. 624, 22 A.L.R. 1476, and the other by the District Court of Appeal, State Mut. Bldg. & Loan Ass'n v. Los Angeles County, 30 Cal.App.2d 383, 386, 86 P.2d 372, and also one from the State of New York, American Taximeter Co. v. Smith, Sup.App.L., 199 N.Y.S. 578.

The case of Gise v. Fidelity & Casualty Co., supra, was an action instituted by the plaintiff to recover from the defendant the sum of approximately $500, costs incurred by the plaintiff in defending a proceeding before the Industrial Accident Commission for compensation claimed by an employee of plaintiff for injuries sustained by the employee while in the service of the employer. The defendant was an insurance carrier of the employer and refused to defend said proceeding, claiming that the employer had voided the terms of the insurance policy by employing the injured employee who was a minor. The defendant insurance company in the Gise case interposed both an answer and a cross-complaint. In the latter pleading it sought to recover the amount of the award which the Industrial Accident Commission had by its order directed the insurance company to pay to the injured employee in the proceeding before the Industrial Accident Commission, the exact amount of which, as fixed by the Industrial Accident Commission, was $1,590.21. The trial court held that neither party to the action could recover. Upon appeal this court affirmed the judgment, that plaintiff take nothing by said action, but reversed the judgment against defendant on its cross-complaint. On a petition for rehearing, this court modified its judgment in a direction to the trial court to enter judgment in favor of defendant in the sum of $1,590.21, on the ground that there was no dispute about the fact that this amount had been paid by the defendant in payment of the award in favor of the injured minor.

This case presents the only instance in which this court in its entire history has directed the trial court to enter judgment under circumstances similar to those in that case. This case may well be distinguished from the long line of decisions to the contrary cited by the respondent, a few of which we will later discuss, by the fact that the amount for which the defendant in that case sued was not in dispute and had been fixed and determined by the Industrial Accident Commission, and was therefore res judicata between the parties to that suit, each of which was a party in the proceeding before the Industrial Accident Commission.

The case of State Mutual Building & Loan Ass'n v. Los Angeles County, supra, the other case from this state relied upon by the appellant, was one for the refund of taxes alleged to have been illegally collected. There was no denial of the amount of taxes sued for, but the defendant contended that they were illegally collected. The trial court gave judgment in favor of the defendant. Upon appeal, the judgment was reversed "with directions to the trial court to enter judgment in favor of plaintiff in each of said actions." [30 Cal.App.2d 383, 86 P.2d 374.]

In the present case, there was an express denial that there was any amount due plaintiff or unpaid by defendant.

The case from the New York court requires no special mention. Its decision is supported by no citation or authority. It consists of only a few lines and the court evidently was of the opinion that the amount involved was so small that a new trial would cost more than the amount involved.

These three cases are all that the industry of counsel has been able to produce in support of their contention.

[1] As already noted, the present action was not only one in which a jury trial was a matter of right, but was a case which was actually tried by a jury. The amount due from defendant under the

terms of the lease was expressly put in issue by the pleadings. The jury by its verdict in favor of the defendant impliedly found that no amount was due plaintiff from the defendant. The District Court of Appeal held that this finding was unsupported by the evidence. There is therefore no finding as to the amount due plaintiff and surely none which would support a judgment in favor of the plaintiff. Neither the District Court of Appeal nor this court has any authority to remodel the finding of the jury upon that issue.

"The jury having found by their verdict that both defendants were jointly liable, we cannot remodel that verdict or make a new one, fixing a several liability for the whole sum on one of them. When a verdict is not supported by the evidence, the law provides several modes of correcting the error. Code Civ.Proc. §§ 647, 650, 652(6), 662, 956. In such a case appellate courts will not make verdicts or findings contrary to the conclusion of jury or court [citing authorities], but will remand the cause for a new trial." McMahon v. Hetch-Hetchy, etc., R. Co., 2 Cal.App. 400, 84 P. 350, 351. That case was decided prior to the amendment of the Constitution (sec. 4¾ of art. VI), or the adoption of section 956a of the Code of Civil Procedure giving to the appellate courts, in proper cases, power to make findings in non-jury cases.

[2] After the adoption of said constitutional amendment, and the enactment of section 956a of the Code of Civil Procedure, the rule in effect has been and now is that in cases where a jury is a matter of right and has not been waived, appellate courts will not make findings contrary to the conclusions of the jury. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Taylor v. Bunnell, 211 Cal. 601, 296 P. 288.

"Under sections 632 and 633 of the Code of Civil Procedure findings are, unless waived, necessary in civil actions * * * when a trial of a question of fact is had by a court sitting without a jury. It has been said that the right to findings is a substantial one, as important, under the statute, as that of trial by jury under the constitution." 24 Cal.Jur. 931, citing Matter of Danford, 157 Cal. 425, 108 P. 322; Frascona v. Los Angeles Ry. Corp., 48 Cal.App. 135, 191 P. 968; Cuneo v. Cuneo, 40 Cal.App. 564, 181 P. 229; Pierson v. Pierson, 15 Cal.App. 567, 115 P. 461.

In Tucker v. United Railroads, 171 Cal. 702, 704, 154 P. 835, 836, it was held that "The pleadings clearly raised the issue [contributory negligence], and the court was bound to find upon the question whether or not deceased was guilty of contributory negligence proximately causing her death. The failure of the court to make a finding responsive to this issue was error." This court reversed the judgment on the trial court's failure to make a finding on that issue and one other.

[3, 4] It would seem that the mere statement of the rule would not require any citation of authority to support it, that, upon a trial of an action in which the parties were entitled to and did not waive a trial by jury, except in cases where the trial court directed a verdict or rendered judgment notwithstanding the verdict, the judgment must be supported by findings upon all material issues, and any judgment rendered without such support is erroneous. Applying this rule to the present case, if on this appeal, this court should direct the trial court to render a judgment in favor of the plaintiff after an adverse verdict by the jury, the judgment so rendered would be unsupported either by verdict or findings and would on appeal therefrom be reversed.

We have accordingly deleted from the opinion of the District Court of Appeal those parts of said opinion which relate to or which provide for the entry of judgment in favor of the plaintiff by the trial court. The remainder of said opinion we adopt and together with our own discussion of the power of the reviewing court to direct entry of judgment by the trial court in favor of the plaintiff-appellant, as hereinbefore set forth, will constitute the opinion of this court in the action now before us. That portion of the opinion of the District Court of Appeal which we adopt as a part of our own opinion is as follows:

This action was commenced by plaintiff, as assignee of the lessor under a lease, to recover from a guarantor upon such lease damages allegedly resulting from the failure of the lessee to perform the covenants of the lease.

From an examination of the record, we epitomize the facts as follows: 11 West 42nd Street, Inc., hereinafter referred to

as the lessor, is a corporation organized under the laws of the State of New York. On February 1, 1929, this corporation, without guarantors or security for performance, leased to one Albert De Windt certain premises designated as offices numbered 1454-1456 located at 11 West 42nd Street, New York. Occupancy commenced under this lease February 16, 1929, and was to continue for a period of five years, two and one-half months, or until April 30, 1934. The rental under this lease was $3,000 per annum, payable in monthly installments of $250 commencing the first of May, 1929; the lease providing that no rent was to be charged until the last-named date.

On April 5, 1929, lessee De Windt made application to the lessor for the rental of additional space. Considering the lessee's financial responsibility inadequate to warrant leasing to him an additional portion of the premises, the lessor requested lessee De Windt to provide guarantors. In compliance with such request, lessee named Stanley E. Comstock and respondent herein, George W. Stratton, as proposed guarantors. On April 8, 1929, both Stratton and Comstock signed the following contract of guaranty:

"Annexed to and forming part of agreement dated April 8, 1929, between 11 West 42nd Street, Inc., as Landlord, and Albert De Windt, as Tenant, which agreement refers to lease dated February 1, 1929, between 11 West 42nd Street, Inc., as Landlord, and Albert De Windt, as Tenant.

"That in consideration of the landlord entering into the said agreement dated April 8, 1929, hereto annexed, and the sum of One (1) Dollar to each of us paid and other good and valuable considerations, receipt of which is hereby acknowledged, we do hereby jointly and severally covenant and agree, to and with 11 West 42nd Street, Inc., the said landlord above named, and the landlord's legal representatives, successors and assigns, that if default shall at any time be made by Albert De Windt, the said tenant, in the payment of the rent, or the performance of the covenants contained in the said lease dated February 1, 1929 and/or the said agreement dated April 8, 1929, hereto annexed, on the tenant's part to be paid and performed or should the landlord institute summary proceedings or any other action or proceedings for the recovery of the possession of the said premises, by reason of the nonpayment of the rent or otherwise, that we jointly and severally will well and truly pay the said rent or any arrears thereof, or any other sum or sums provided to be paid by the tenant under any of the terms of the said lease dated February 1, 1929, and the said agreement dated April 8, 1929 hereto annexed, that may remain due unto the said landlord or that may become due, and any or all damages that may arise in consequence of the nonperformance of said covenants, or any of them, without requiring notice of any such default from the said landlord, and without requiring any proceedings to be taken against said tenant for the collection of said amount or amounts. This guarantee agreement is intended to apply to and to affect both the said lease dated February 1, 1929, and the said agreement dated April 8, 1929, hereto annexed."

Fortified with this guaranty as added security, the lessor executed a new lease with lessee, De Windt. Such lease bore date of April 8, 1929, and covered the enlarged premises. The term of this lease was for five years with an annual rental of $6,000 payable at the rate of $500 per month commencing May 1, 1929 and terminating April 30, 1934. The last-mentioned lease adopted by reference all of the general provisions contained in the original lease of February 1, 1929.

Because the enlarged premises were not suitable for occupancy on May 1, 1929, the lessee did not take possession until some few days later, and the lessor charged a rental of $426.02 for the month of May, instead of the agreed rental of $500. Thereafter, however, the tenant paid $500 rent for each of the months of June, July and August, 1929.

When the lessee failed to pay the September rent, the lessor commenced dispossession proceedings against him in the Municipal Court of the City of New York, as a result of which said court ordered possession of the demised premises restored to the lessor, and issued a warrant for removal of the lessee therefrom, which warrant was executed November 4, 1929. At this time the balance of the unpaid rental for the remainder of the term amounted to $28,000.

In contemplation of the possible default of the lessee in the payment of rent and the consequent restoration of the premises to the lessor, the lease contained the following provision hereinafter referred to as clause "Twenty-first":

"That if the rent, additional rent or any other sum payable hereunder or any part of installment thereof shall be unpaid when due * * * then in any of such events, the Landlord may reenter and/or repossess the demised premises and remove all persons and property therefrom by summary proceedings. * * * In any such case or in any other case in which the Landlord shall resume possession of the demised premises by summary proceedings or otherwise, the Landlord at its option may repair, subdivide, alter or change the character of the demised premises and from time to time as the Landlord shall deem best, may let the demised premises or any part or parts thereof for the whole or any part or parts of the residue of the original term thereof, and receive the rents therefor, applying the same, first, to the payment of any and all expenses which the Landlord may have incurred in recovering possession of and in repairing or altering and in letting the demised premises and in collecting such rents and then to the fulfillment of the covenants of the tenant hereunder, and the over-plus, if any, shall be paid to the tenant after all the liabilities and obligations of the tenant under this lease have been terminated. After the Landlord shall have re-entered or resumed possession of the demised premises in any of the contingencies or by any of the methods provided for in this lease, the Tenant, notwithstanding such re-entry or repossession by the Landlord, shall pay to the Landlord at the times herein fixed for the payment of the several installments of rent and of the several items of additional rent and other sums that may or would have become payable hereunder, such part of the amount of any such installment of rent or of any such item of additional rent or of any such other sums as shall remain unpaid after the application as aforesaid of the rents theretofore collected by the Landlord from such reletting. The Tenant shall make such payments whether the demised premises remain vacant or shall have been relet by the Landlord as provided for above. * * * No re-entry and/or repossession of the demised premises by the Landlord, whether by summary proceedings, or otherwise, shall be deemed to absolve or discharge the Tenant from any liability hereunder. * * *"

After eviction of the tenant De Windt from the premises, the lessor listed the vacancy with its own salesmen; with other real estate brokers, and as well, advertised the rentable premises in New York newspapers. Thereafter, on December 26, 1929, a portion of the premises numbered as offices 1446-1450 were leased to Beauty Culture, Inc. To meet the needs and demands of such new tenant, the lessor made certain alterations on the premises, such as closing an archway opening into the offices 1454-1456; removal of a steel and glass partition, and changing the entrance door into the corridor by increasing the size of the vestibules. The cost of these alterations approximating $100 is not sought to be recovered herein. From this tenant the lessor received in rentals the total sum of $10,266.80.

The lessor was unable to rent the remainder of the surrendered premises until April 8, 1931, and to meet the requirements of this new tenant, the lessor likewise made changes in the arrangement of the quarters, but does not seek to recover the cost of such alterations amounting approximately to $1,200. As an inducement to this last-named tenant, the lessor granted free rent from May 1st to September 30, 1931. Thereafter total rental in the sum of $5,900.03 was collected by the lessor. The lease to De Windt upon which respondent appears as a guarantor required the tenant to pay a total sum of $30,000 as rental for the term of the lease. De Windt paid $2,000 of this sum which, added to the total re-rentals of $16,166.83, left an unpaid balance at the conclusion of the rental term, April 30, 1934, of $11,833.17. It was to recover this amount that plaintiff instituted this action on March 30, 1937. Trial was had before a jury which returned a verdict in favor of defendant Stratton. From the judgment entered upon such verdict and from the trial court's order denying a motion for judgment notwithstanding the verdict, plaintiff prosecutes this appeal.

[5, 6] The appeal from the order denying plaintiff's motion for judgment notwithstanding the verdict must be dismissed because the motion made herein for a directed verdict was not timely. Although defendant made such a motion prior to the submission of the case to the jury and plaintiff opposed such motion, the latter did not at that time make a similar motion, but on the contrary, proceeded to and did argue the case to the jury, submitted instructions which were given to the jury

and then, after the jury had retired and deliberated for some time in charge of the bailiff, plaintiff presented for the first time her motion for a directed verdict. This course of action on the part of plaintiff amounted to a waiver of her right to a directed verdict, and the court properly denied plaintiff's belated motion therefor. Manifestly, the court committed no error in denying the motion subsequently made by plaintiff for judgment notwithstanding the verdict. Sec. 629, Code Civ.Proc.

[7] Respondent urges a dismissal of the appeal from the judgment on the ground that appellant failed to comply with section 2, rule VIII of the Rules for Supreme Court and District Courts of Appeal, which requires that a statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief. Having in mind the limited space allowed by our rule, we are satisfied that counsel for appellant, under the circumstances of this case, has substantially complied with the Judicial Council requirement and has stated in the opening brief the general nature of the essential question submitted to this court.

[8] Appellant's main ground of appeal is that, under the evidence presented in this case, he was clearly entitled to recover from the guarantor the unpaid balance of the tenant De Windt's rent, and that the judgment in favor of defendant is without legal support in the evidence. We are persuaded that in this claim appellant must be sustained because, stripped of all technicalities with which the law surrounds leasehold interests, the clear intention of the parties was this: Plaintiff's assignor negotiated a lease with one De Windt, but required as a consideration for executing such lease that the tenant obtain two guarantors, one of whom was the defendant herein. The liability assumed by defendant as such guarantor was simply that should the tenant Albert De Windt at any time default in payment of the rent, the guarantors would pay such rent or any arrears thereof, in the amount as well as in the manner provided by the terms of said lease, which document, it might also be added, specifically stated that the guarantors executed the contract of guaranty in consideration of the execution by the landlord of the lease in question. That the tenant defaulted in the payment of his rent is undenied and the claimed amount of such default under the terms of the lease is unquestioned. Respondent contends that appellant has failed to call to the court's attention all of the evidence favorable to the verdict and judgment, and that we must so assume in the light of the asserted meagerness of the statement of the evidence contained in appellant's brief. However, when appellant claims, as herein, that there is no evidence to support a finding or judgment, then there is nothing for him to print, and when a total absence of evidence to support a verdict and judgment is claimed and respondent asserts that there is some evidence, the duty devolves upon him to direct the court's attention to such evidence. Lange v. Curtin, 11 Cal.App.2d 161, 165, 53 P.2d 185.

[9] In recognition of this obligation, respondent does direct our attention to evidence showing that after the tenant was dispossessed, the landlord made certain alterations in the premises, all of which allegedly rendered the premises unadaptable to use by one tenant, and therefore less rentable and less valuable after being so altered. This course of conduct on the part of the landlord, respondent argues, served to relieve the guarantors. In support of this claim respondent cites the case of Salomon v. Cawston Ostrich Farm, 43 Cal. App. 465, 185 P. 314. However, the cited case impresses us as not being pertinent or having any application to the case at bar, for the reason that, insofar as the decision in the case relied upon by respondent is concerned, there was contained in the lease there under consideration no provision permitting the landlord to re-enter the premises and make the changes complained of. In fact, it is stated in the aforesaid decision that the appellant relies upon the doctrine announced in New York that "The spirit of the agreement required him to lease again the same subject which he had demised to the first lessee." 43 Cal.App. at page 468, 185 P. at page 315. Again, it is stated in the same decision (43 Cal.App. at page 468, 185 P. at page 315): "The respondent maintains that its obligation as a guarantor could not be extended beyond the terms of the guaranty." In the case with which we are here concerned, however, the "Twenty-first" clause of the lease contains the specific provision for a re-entry by the lessor; the making of physical changes and alterations at the option of the lessor;

reletting the premises as so remodeled, and then holding the defaulting tenant for the unpaid balance after any such reletting and remodeling. The contract of guaranty having been executed in consideration of the execution of the lease, the lease and the guaranty must be construed to be but one instrument, amounting to a single contract upon which the liability of the guarantors, to the extent of their obligation, was coextensive with that of the lessee. Reios v. Mardis, 18 Cal.App. 276, 281, 122 P. 1091. The cases seem to be in harmony that where, as here, the lease and the guaranty each constituted consideration or an inducement for the other, the two instruments are not to be treated as though they were two separate instruments, but under such circumstances, for the purpose of interpretation, the instruments are to be considered as one. Throughout the guaranty, we find provisions of the lease being adopted therein by incorporation and reference and in one of such provisions in the guaranty, we find the statement: "This guarantee agreement is intended to apply to and to affect both the said lease dated February 1, 1929, and the said agreement dated April 8, 1929, hereto annexed."

[10] Respondent guarantor was therefore bound by the terms of the lease he guaranteed, and the last-named instrument authorized the landlord after defaut by the tenant to make the alterations concerning which complaint is here made.

[11, 12] Respondent's claim that, because he did not receive the $1 named as consideration for the execution of the guaranty, he is relieved of responsibility thereunder is without merit, for the reason that the underlying and real consideration for executing the guaranty was the execution by the lessor of the lease, and where a sufficient consideration for a contract is shown by the evidence and is revealed to be the actual consideration it is sufficient to give vitality and legality to the contract, even though a different consideration appears in the writing. Bowman v. Union Trust Co. of San Diego, 41 Cal. App.2d 397, 403, 106 P.2d 913.

[13] Equally without merit is respondent's contention that, because the lease was not physically attached to the contract of guaranty, or was not signed until after the guaranty contract, the guarantors were released from liability. The contract of guaranty itself recites that it was "Annexed to and forming part of agreement dated April 8, 1929, between 11 West 42nd Street, Inc., as Landlord, and Albert De Windt, as Tenant, which agreement refers to lease dated February 1, 1929 between 11 West 42nd Street, Inc., as Landlord and Albert De Windt, as Tenant * * * that if default shall at any time be made by Alfred De Windt, the said tenant, in the payment of the rent or the performance of the covenants contained in the said lease dated February 1, 1929 and/or the said agreement dated April 8, 1929, hereto annexed * * * under any of the terms of the said lease dated February 1, 1929, and the said agreement dated April 8, 1929 hereto annexed. * * * This guarantee agreement is intended to apply to and to affect both the said lease dated February 1, 1929 and the said agreement dated April 8, 1929, hereto annexed."

[14, 15] Furthermore, the fact that the lease was not actually annexed to and did not accompany the contract of guaranty at the time the latter was presented to the respondent for his signature, did not operate to destroy the legal unity of the two agreements. Where there is a merger by reference of separately executed written instruments, actual annexation is not essential. Beedy v. San Mateo Hotel Co., 27 Cal.App. 653, 660, 661, 150 P. 810.

[16, 17] Respondent was not entitled to notice of acceptance of the guaranty herein because the same was absolute in form, and being unconditional and absolute, it was binding on the guarantors without notice of acceptance. Thorpe v. Story, 10 Cal.2d 104, 117, 118, 73 P.2d 1194; Union Bank v. Coster's Ex'rs, 3 N.Y. 203, 213, 53 Am.Dec. 280. Neither was the lessor required to give notice to the grantors of default by the tenant, because the contract of guaranty unequivocally bound its makers to answer for the default of the tenant "without requiring notice of any such default from the said landlord." It would be difficult, indeed, to phrase a waiver of notice in language more lucid, explicit or plain.

[18-20] It is next urged by respondent that he was discharged from liability under the contract of guaranty by reason of claimed alterations in the contract guaranteed. In this respect, respondent sets forth that for the month of May, 1929, the rent was reduced from $500 to $426.02, and that an extension of time was granted for the

payment of the first month's rent; that in June default occurred in the payment of that month's rent, and the landlord extended the time for payment thereof until June 11th, while payment of the July rent was extended to the 16th of that month; that an extension to September 6, 1929, was given for the payment of that month's rent. We are not unmindful of the application by courts of the rule of strictissimi juris with regard to contracts of guaranty, under which rule the obligations of the guarantor are strictly construed in his favor, but it is only when an alteration in the subject of an agreement amounts to a different contract that the guarantor is discharged. In the case at bar the lease remained unchanged insofar as the rent due each month was concerned. The acceptance of a lower rental for one month amounted only to a mere gift from the lessor to the tenant and does not constitute a material alteration of the written contract such as will release the guarantor. Kennedy v. Moyer, 5 Cal.App.2d 29, 31, 42 P.2d 352. The extension of such a favor by oral agreement between the lessor and the lessee never had any executory force as a contract modifying the terms of the lease. Dodge v. Chapman, 42 Cal.App. 612, 615, 183 P. 966. The temporary reduction amounted only to a sacrifice or waiver by the landlord; did not materially alter the terms of the lease so as to effect the discharge of the guarantor. Becker v. Faber, 280 N.Y. 146, 19 N.E.2d 997, 121 A.L.R. 1010; Cluver v. Sachs, 138 Misc. 352, 354, 245 N.Y.S. 699; Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am.St.Rep. 111; Callaghan v. Olsen, 58 Cal.App. 96, 207 P. 1014. For the same reasons, the guarantor has no valid basis for claiming discharge because of any extension in time for payment of the rent. Leniency extended by the lessor to the lessee in the payment of the rent, without changing the time when under the lease contract the payment of the rent due might be demanded, does not constitute an extension of the time for payment that will relieve the guarantor. Giving such leniency and such consideration under the facts here present to the tenant does not discharge the surety, for mere indulgence of this kind under the law of this state or the State of New York will not discharge a surety. Clark v. Sickler, 64 N.Y. 231, 234, 21 Am.Rep. 606; National Citizens' Bank v. Toplitz, 178 N.Y. 464, 467, 71 N.E. 1.

[21] Respondent's claim that the reletting by the lessor after dispossession of the tenant amounted "to the same thing as an assignment," cannot be upheld. When by legal proceedings the tenant was ejected and dispossessed the lease was at an end. There was nothing to assign. All that remained and survived was a liability, not for rent, but for damages. Hermitage Co. v. Levine, 248 N.Y. 333, 336, 337, 162 N.E. 97, 59 A.L.R. 1015. Furthermore, the reletting was authorized by clause "Twenty-first" of the lease which has relation to the ascertainment of damages.

[22] It is further urged by respondent that he was discharged from liability under his contract of guaranty for the reason that after the lessor had on September 17, 1929, obtained a writ of dispossession, he delayed service and execution of the same until November 4, 1929. We are not impressed with this argument, because there is no showing in the record of any agreement on the part of the lessor to stay or countermand the warrant of dispossession. Therefore, whatever delay occurred in the service of such warrant, in the state of the instant record, cannot be reasonably charged against the lessor and certainly does not amount to conduct on the part of lessor which will release the respondent guarantor.

[23-25] Finally, respondent urges all but twelve months of the installments upon the lease were barred by the Statute of Limitations. Sec. 337, Code Civ.Proc. While it is true that when a tenant repudiates a lease and abandons the premises the landlord may rest upon his contract and sue for each installment of rent as it falls due, nevertheless, when there are no covenants to the contrary, the landlord is not restricted to the course of action just stated. He has another remedy, and that is the course taken by the lessor herein, to-wit, take possession of the premises, relet the same and recover from the tenant any damages suffered thereby. In the case at bar, clause "Twenty-first" of the lease clearly empowered the landlord upon resumption by him of possession of the premises through default of the tenant, to relet such premises. The law is clear that when the last-named method is lawfully resorted to by the landlord, he cannot recover in installments, but must bring his action at the expiration of the original term, because that is the first time at which the damages can be ascertained. In fact, ordinarily, the

reletting of the premises is tantamount to an election to terminate the lease and to hold the tenant for damages, in which case, as heretofore pointed out, an action cannot be maintained successfully until the original term has ended. True, a lease may be so drawn that it contains provisions through which the rule just announced may be evaded, but in the present case, the lease specifically authorized the landlord to invoke, as he did, the last-mentioned rule. What we have just said is in harmony with the doctrine enunciated in Phillips-Hollman v. Peerless Stages, 210 Cal. 253, 259, 291 P. 178.

From the foregoing it follows that the verdict and the judgment predicated thereon are wholly unsupported by the law and the evidence. The attempted appeal from the order denying the motion for judgment notwithstanding the verdict is dismissed, and for the reasons herein stated, the judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, J., concurred in the judgment.



22 Cal.2d 787

PEOPLE v. ROGERS.

Cr. 4442.

Supreme Court of California.

Sept. 28, 1943.

1. Criminal law ⇐517(1)

A confession freely and voluntarily made without offer or promise of leniency in regard to punishment, or as the result of threats or intimidation may be used as evidence against defendant in a criminal case.

2. Criminal law ⇐736(2)

The admissibility of a confession depends upon the circumstances under which it was obtained, and presents a question in first instance addressed to trial judge.

3. Criminal law ⇐519(1)

A showing of any pressure which might reasonably have induced or required confession to be made should lead court to make a diligent inquiry concerning manner in which it was given.

4. Criminal law ⇐519(3)

A statement is neither involuntary nor inadmissible in evidence because it was made while defendant was under arrest, but that fact should be considered.

5. Criminal law ⇐519(9)

A confession obtained by means of questioning, particularly if carried on for long periods of time, should be admitted only when it appears with reasonable certainty, to have been voluntarily made.

6. Criminal law ⇐520(1), 522(1)

A confession made under influence of either threats or inducement is inadmissible.

7. Criminal law ⇐520(2)

Although promises or inducements are made by one without actual authority to give them effect if they are made in presence of one who has such authority under circumstances from which accused has a right to assume that they were authorized, confession so obtained is an "involuntary confession".

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Confession".

8. Criminal law ⇐1159(5)

It is function of jury and not of appellate court to determine credibility of witnesses in ascertaining whether confessions were voluntarily given.

9. Criminal law ⇐1172(1)

Error in an instruction may justify reversal where jury is misdirected or misled upon a vital issue to the defense and the evidence does not point unerringly to the guilt of the person accused. Const. art. 6, § 4½.

10. Criminal law ⇐1186(4)
Homicide ⇐348

In prosecution for murder and arson, instruction which stated rule of law governing admissibility of evidence and which was susceptible of construction by jurors, that proof of each crime, aside from any confession, had been held by court sufficient to meet requirements of law was prejudicially erroneous in view of inconclusive character of evidence. Const. art. 6, § 4½.

11. Criminal law ⇐1129(6)

Where accused pointed out error in second paragraph of instruction but as-

serted that instruction as a whole did not recognize duty of jurors to determine whether corpus delicti was proven, accused could rely on misleading statements in first paragraph of instruction for reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Courtney Fred Rogers was convicted of murder and arson, and he appeals.

Reversed and remanded for new trial.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Courtney Fred Rogers is the son of Courtney Commodore Rogers and Lilly Rogers. His mother died in February, 1941. Ten months later his father was asphyxiated in a fire which destroyed the house in which they were living. Following a trial upon an information which accused the son in Count I of the murder of his mother, in Count II with the murder of his father, and in Count III with arson, a jury returned verdicts finding him guilty upon each charge. The issues raised by the plea of not guilty by reason of insanity were then tried with the result that he was found to have been sane at the time of the commission of each of the offenses named in the information. As the jury determined that each homicide was murder in the first degree and included no recommendation in its verdicts, judgment was pronounced sentencing him to death upon those counts and to the state prison for the term prescribed by law upon the conviction of arson.

The appellant, 24 years of age, lived with his mother and father in a modest home on the east side of Los Angeles. An illness had prevented his graduation from high school with his class, but he took a correspondence course and, in 1938, received a diploma. His musical education commenced when he was a young child. He started studying the pipe organ at Polytechnic Evening High School, and later with a professional organist. His custom for years had been to practice on the pipe organ at one of the Los Angeles churches three afternoons each week. His mother usually went with him, and sat in the back of the church; afterward they customarily did the marketing or shopping or sought some entertainment. There is much evidence of a deep bond of affection between them.

Apparently during recent years there was little in common between the mother and father. The principal cause of this estrangement was the drinking habits of the husband, and Mrs. Rogers and the son were drawn closely together by her unhappiness.

As an unmarried young man within the draft age, for several months before the mother's death the appellant was expecting to be called for military service and his prospective leaving was evidently a matter of considerable concern to both her and the father. Because of his musical ability, young Rogers expected to serve in a band.

Except for several confessions which, the People assert, were made by the appellant following his arrest, the evidence concerning the deaths of Mr. and Mrs. Rogers shows the following facts:

Early in January, 1941, Mrs. Rogers fainted and fell. Thereafter she complained of an injury to her back and leg. She found walking was painful and avoided doing much of it. Courtney took care of her and did most of the household work. She was treated by a chiropractor, but on February 2d, Dr. Offenberg, a physician, was called. He advised that an X-ray should be taken and prescribed a sedative, directing that a 1½ grain capsule of it be taken at bedtime. Such a dose, he testified, is not a sleep producer but it makes an ordinary person feel more comfortable bodily.

Three days later, the appellant called on the physician and told him that his mother still had a good deal of pain. Dr. Offenberg again advised an X-ray and prescribed another sedative. The prescription called for 1½ grain capsules, one to be taken nightly. Dr. Offenberg testified that up to 20 grains may be taken in any 24 hours without harm.

Two days after the second sedative was obtained, Courtney and his father brought Mrs. Rogers to Dr. Offenberg's office and treatment by confinement to bed for the majority of the time during three or four weeks, with traction on the leg, was prescribed. Testifying concerning that visit,

Dr. Offenberg said, "She had been ill for a period of three to four weeks prior to this time and she didn't like the idea very much of being confined to bed * * * but she did agree to it." At this time Mrs. Rogers seems to have indulged in an hysterical outburst and to have talked of taking her own life.

The traction apparatus was apparently constructed with considerable care by the father with the help of Courtney and neighbors. It consisted of a "pulley with a weight attached to the end of a rope * * * and the other attached to the patient's leg and the rope run over a pulley into the bed." A mass of gauze and adhesive tape was made into a collar-like device to go around the ankle. To secure the tension, Mrs. Rogers would back herself up in bed so that she was pulling against the weights, and when she secured as much tension as she wanted she would lie there in bed and leave the device on as long as she felt she could stand it. When disengaged from the ankle, the rope remained under the covers of the bed, ready for instant use, and all the while attached to the weight at the base of the bed.

Although the physician instructed Mrs. Rogers to remain in bed except to go to the bathroom, she continued to be up and around the house a good deal. She was able to get in and out of bed unassisted, although she usually had some aid. Mrs. Offredo, who worked in the Rogers house at times, told the jury that Mrs. Rogers "got up from the bed and she sat by the side of me in the kitchen and helped me wash the dish and put it away. * * * She would get up sometimes, not all the time." On the day before her death, Mrs. Rogers was up and about the house and took a bath by herself.

It was about 4 o'clock in the afternoon of February 10th that the sheriff's office received a call for assistance. Undoubtedly the telephone message came from Rogers, Sr. An officer responded. He found Mrs. Rogers in bed lying on her side with a wad of cotton "right next to her nose." The cotton smelled of chloroform. An empty box which had contained the capsules enclosing the sedative last prescribed was on a bedside table. On the same table was an empty chloroform bottle. The odor of chloroform was strong in the room.

Mrs. Gesselman, a neighbor, who came in almost at once, testified that Mr. Rogers told her "he found a piece of cotton in the mother's hand." But the officer who first arrived testified that "Mrs. Rogers was lying on her right side. She was covered up to her armpits. Her left hand was extended and her right arm across her breasts, apparently dead." He said there was a little gas jet in the corner of the bedroom which he tested, ascertaining that the gas was turned off under the house. According to Dr. Offenberg, who reached the house later than the officer, the odor of chloroform was strong in the bedroom and he also detected the odor of illuminating gas. But when reminded of his own testimony at the preliminary hearing he admitted that he had then said: "The only thing I could detect was the chloroform." To further questions he stated, "The odor of the gas was apparently stronger throughout the house and not in the bedroom."

Dr. Offenberg made no examination of the body. He said it was partially covered with a blanket but that the traction apparatus was in place. "I don't recall by what means the rope was attached to the leg, but it would probably be by a piece of bandage." Two of the officers did not notice the traction device at all; another officer testified he saw the device at the foot of the bed but he did not know whether it was attached, adding, "The covers were not disturbed while I was there." And mortuary attendants who came for the body had no recollection of removing any sort of apparatus from it.

The appellant was not at home when the officers arrived but returned about midnight. Neighbors were there with his father. As related by them, young Rogers was smiling when he came in. But his face changed immediately, one of them said, when he was told that his mother was dead. Apparently there was a momentary silence. Courtney then sat down by his father on the sofa and "they started to talk." Mr. Rogers told the son that when he reached home the windows of the bed-room were closed and, as he entered it from the hall, there was a pillow against the door on the inside; that he had found the empty chloroform bottle on the stand and an open gas jet near her bed. According to Courtney, the neighbors left "and just after that my father and I were there alone in the house and he and I talked over what had happened and then my father asked me to go over to Mrs. Offredo's house and ask her and Mrs. Gesselman to come back." Mr. Rogers then asked them not to mention

to any one the fact that Mrs. Rogers had committed suicide.

The autopsy surgeon determined that the cause of death was asphyxia from inhalation of illuminating gas, but he also found an odor of chloroform on the body. According to the funeral director, it is easy to embalm the body of a person who has died from the use of chloroform. On the contrary, "a person that dies from asphyxiation * * * is a hard case to embalm." The body of Mrs. Rogers was embalmed before the autopsy in a normal time with no difficulty. And the witness explained that, although there is a definite tinge to the skin following death from some gases, there was no discoloration of Mrs. Rogers' body.

It is apparent that Mrs. Rogers was a woman who frequently spoke of taking her own life and who regarded suicide as a likely means of escape if she should be beset with certain difficulties. She said to one friend, before her illness, that "if she was ever sick and didn't see any way of getting better that she would take a little 'black bottle.'" With respect to Courtney's going into the Army, the same neighbor testified Mrs. Rogers told her that "if they took him away from her that she couldn't go on alone." She also discussed suicide with another friend, "not in those words perhaps but in substance," and concluded her remarks by saying, "'If they take Courtney I am through.'"

Two deputies sheriff on patrol duty about 4 o'clock in the morning of October 25th, smelled smoke. Investigation showed that it was coming from the eaves of the Rogers' house. After summoning fire apparatus they broke in the front door. There was an immediate explosion and flash in the front room. The force of the explosion was so great that it threw the officers across the porch and out on the lawn. They returned to the house and with firemen, endeavored to go through it in aid of anyone who might be there. The house was in darkness and the smoke so dense that only by groping their way along the floor were they able to go through it. After great danger to themselves, they found Rogers, Sr., lying on the bathroom floor unconscious. With the aid of firemen they carried him out. He died shortly afterward in a hospital. The cause of death, as ascertained by an autopsy, was asphyxiation, with disease of the liver and acute alcoholism as contributing factors.

Battalion Chief Keyes estimated that the house burned for approximately 20 minutes and he classified it "as a fire, not from a natural origin." But he did not "detect any odor of gas" nor did he discover "anything about petcocks or any gas outlets of any sort being turned on." He said that "while the investigation was going on, after the sheriffs had arrived," he noted that the pilot light was on in the big furnace. But another fireman said that, in the bedroom which was occupied by Rogers, Sr., he found the gas petcock open.

An examination of the house disclosed that fires had been set in five different locations, one being in the closet of the bedroom occupied by Rogers, Sr. This one was of no consequence. The second fire began in a closet in the hall and only scorched some of the wood work. Two fires were lighted in the dining room. One of them caused considerable damage while the other did not get beyond the charring stage. The fifth fire, which commenced in the bedroom occupied by the son, gained the most headway. Investigating officers testified that they found "three partially burned candles on the premises: one candle in the father's clothes closet where some newspapers and stuff were scattered around the bags and suitcases"; a second candle underneath the bottom shelf in the hall closet; and a third one on the lawn.

Chief Keyes was asked: "When a door or window is opened onto a condition where fire has been going on in a closure such as that house presented to you there on that day, and there has been a fire going on, is there ever any sort of an explosion occurs?" His reply was, "Yes. That is gases that are formed from the hot materials in the room which have had insufficient oxygen to support combustion. The opening of a door or a window or the admittance of air with sufficient oxygen causes a flash which would be called a back-draft."

It appears that on several occasions during the months that followed his wife's death, Rogers, Sr., had spoken of taking his own life. Two months after it occurred, a neighbor testified, he said "He had nothing to live for only the boy * * * he called Courtney 'the kid' all the time * * * and he said that if it was not for him he would have the cat chloroformed and he would end it all." At another time he told her: "'Don't be surprised, Mrs. Gesselman, if you read of old man Rogers killing himself.'" According to

her testimony, he mentioned this to her several times.

Another neighbor testified that Mr. Rogers was very despondent from the time of Mrs. Rogers' death. He often came over to her house and "cried a long time. He would cry every day when he would talk of [her]. He would get over it, but as soon as you would mention his wife's name he started to cry again."

The evening of the day Rogers died, his son appeared at the sheriff's office, saying he had just read a newspaper account of the fire in which officers were reported to be searching for the son of the victim. He was questioned for a period of approximately five hours by the officers who had the case under investigation. The officers pointed out to him the locations where the candles had been found and other facts concerning the fire. His statement, which was taken by a stenographer, included an account of a quarrel with his father shortly before the fire occurred.

Courtney said he returned home around 11:30 p. m. and listened to the radio. The father arrived about two hours later and appeared to be intoxicated. According to the statement, Courtney told the officers that his father "sat down in the sofa beside me and said he wanted to talk over some things with me. * * * He wanted to know what was going to be done with the house. * * * He wanted to know if I would sign over a joint tenancy to him * * * or give him power of attorney. I told him I wouldn't do it, and that is where the quarrel started. He was very belligerent."

Title to the house which had been the family home for nineteen years stood in the names of Mrs. Rogers and the son as joint tenants but since her death he had taken no steps to terminate that tenancy. Unquestionably the father's concern over it was occasioned by the fact that young Rogers was under orders to appear the following Monday morning for induction into the United States Army.

In response to frequent questions, the appellant told the officers that the father "was acting in a very quarrelsome manner, as if he was mad and angry at me. I told him that my mother and grandmother had both intended the property was to be entirely mine, and neither one of them would let him get his hands on the property. And I told him I wasn't going to sign over my interest in the property. * * * He said he wasn't going to spend all the money and everything to keep the place going and have me throw him out if I wanted to. * * * I told him I hadn't any idea of throwing him out at all. I told him I would leave the house there, and he could stay there if he wanted to. * * * He got mad, and then he slammed his hat on the floor and went in the bedroom and shut the door. * * *"

The appellant also told the officers, according to the stenographic record, that his father came back with a small bottle, which contained crystals, and "told me that with my cold being bad that way I had better do something for it before I went in the army * * * and that he had something there, Vitamin B-1, stuff that was good for colds * * * I could smell the stuff, [and] * * * I knew it wasn't Vitamin B-1 * * * I told him I wasn't going to take it. * * * Then he commenced getting madder than ever and acted violent. He asked me if I wasn't going to sign the property over, to get out of there. I told him the property was mine and I wouldn't get out of there. Then he told me if I wouldn't sign over a power of attorney, that he would destroy himself and the property, and I wouldn't be able to set foot in it again. He had said that several times, and I knew he was bluffing about it. * * * Then he told me to get the hell out of there before he got his hands on me and killed me * * * well, he stood up when he said that. * * * When he acted that way I was getting scared, and I grabbed my raincoat and went out the door * * * I walked down the street. * * * There wasn't any street car there at that hour of the night, so I just kept on walking all the time, and then I came downtown. I was tired and sleepy, so I went into the Baltimore Hotel and I stayed there."

The following morning, young Rogers told the officers, he went to see a lawyer who had done some legal work for his father. The lawyer said that he could either start an action against the father, or, if he let the matter rest for a few days perhaps the situation would smooth out. He decided upon the latter course.

At the conclusion of the questioning he assured the deputies he would be available any time they wished to talk with him again. He offered himself as a witness at the coroner's inquest and the jury returned a verdict of death by suicide.

On February 16th, four months after the death of the father, the appellant was arrested on a charge connected with a claim for insurance on jewelry owned by him. On the way to the police station, so officers testified, the deaths of his parents were mentioned. The next morning, with the sheriff's file of the investigation concerning the fire at his home before them, officers began questioning him about it. From that time intermittently until March 3d he was examined and re-examined by various officers. At all times he consistently denied that he had caused the death of either his father or his mother or had started the fire which damaged the Rogers' home.

But as a part of the People's case in chief, the prosecution offered in evidence the stenographic record of a conversation with officers in the late afternoon of March 3d in which he confessed to setting fire to the house after opening the gas cock in his father's bedroom. The record also included the stenographic report of a statement said to have been made by him on the following day in which he admitted that he killed his mother by the use of chloroform and illuminating gas.

Rogers, as a witness in his own behalf, told the jury that on February 10th his father agreed to return from work about 3 p. m. to be with Mrs. Rogers while he went to a meeting of the Organists Guild of America. He was then Assistant Organist of an Episcopal church and the secretary of the Guild's local chapter. According to his testimony, his father telephoned that he would come home earlier than planned. At the urging of his mother, who said she was feeling better, he left home about 1:30 p. m.

His mother was not asleep when he left, he said on the witness stand, for he had talked with her "about three seconds" before. He took the street car and bus to the cathedral and practiced until after 4 o'clock. He then went to the church in Hollywood where the Guild meeting was held, and acted as secretary of a meeting of the executive committee. A dinner followed, at which he collected the tickets and talked with many of the Guild members. After the dinner there was an organ recital, which continued until about 10 o'clock.

"Did you ever have any part whatsoever in causing the death of your mother?" the appellant was asked. "Absolutely not," he replied. He also stated that he had not seen the bottle of chloroform since he purchased it and put it away in the medicine chest, and he insisted that he did not open the gas jet before he left the house.

After the death of the mother, the father and son continued to live in the family home. Rogers, Sr., paid the bills for the public utilities. Occasionally they had their meals together. Very evidently they had little in common, although they were not enemies, the appellant testified, and he had no desire to kill his father. As young Rogers explained the situation: "We weren't exactly friendly * * * We more or less lived in different walks of life, and there wasn't the usual father and son relationship between us. I care for music and art, and he doesn't care for anything about them at all. Lots of times he wanted me to go with him, and I refused to, and that made him rather mad."

The reason for the lack of close companionship between the father and son was the excessive use of liquor by Rogers, Sr. The father's drinking habits had been a family problem for many years, the appellant testified. And as far back as he could remember, Rogers continued, there had been arguments in the home over the father's use of intoxicants.

As to the night of the fire, the appellant's testimony is substantially the same as the statement which he gave to the deputies sheriff the day of his father's death. However, he explained that the statement is incomplete in certain particulars; also, as to some details, he later found he had been inaccurate. But he did not set the fire, or have anything to do with its cause, he testified, and he did not kill his father.

Considering the appellant's confessions, the record discloses that, although his counsel objected to their introduction in evidence upon the ground that the People had not established the corpus delicti of either homicide, their admissibility was not challenged upon any ground which required a ruling as to whether they had been freely or voluntarily made, and the trial judge evidently did not determine this of his own motion. It appears without contradiction, however, that young Rogers was subjected to more or less continuous questioning for sixteen days after his arrest before he told police officers that he had murdered his mother and father.

There is voluminous evidence concerning the methods used to obtain these confessions. Officers Shoemaker and Lindley first interviewed the appellant early on February

17th. "We finished out the morning with him and into the afternoon," Lindley said. Deputy Sheriff Carmack joined in the questioning shortly after noon. Police Lieutenant Morrell and Don Sherman also took part in it. Shortly after 3 o'clock, Dean Bloy of St. Paul's Cathedral visited Rogers, staying about 20 minutes, but in the presence of Lindley and Shoemaker. Carmack immediately resumed the questioning which continued until 6:30 or 7 p. m. During all of these hours, with the exception of the few minutes Dean Bloy was present, officers were constantly interrogating the appellant respecting the circumstances of the fire and of his father's and mother's deaths. The appellant denied he had done anything, directly or indirectly, to cause the death of either of them, or in starting the fires.

The next day, said the officers, they had a session with Rogers concerning the insurance case. On the following day, Carmack questioned him, alone, and apparently on other occasions during the following week, Rogers was subjected to further interrogation. The investigation continued for four hours on the afternoon of February 27th. Carmack also told of two other lengthy afternoon questionings when the appellant was brought to the "green room" of the county jail in custody of a deputy sheriff. At the first, only Carmack and Morrell were present. It lasted "an hour or more." The other time, Carmack said, only Morrell was present, and the questioning continued an hour and a half and might have been for a shorter or a longer time. On the following day, so Carmack testified, about noon he queried the appellant for approximately 20 minutes. He then left and Morrell continued it.

Carmack also spoke of a session in a small room which "we only use * * * when the other rooms which are better ventilated" are engaged. And he admitted that at one time he took appellant out of the County Jail at dusk, or at about dark, in connection with the inquiry. But the appellant still maintained his innocence and said he was answering all the questions fully and truthfully.

Don Sherman is a significant figure in connection with the questioning of Rogers. He was an insurance adjuster who, in November, 1941, solicited Rogers for employment in connection with the preparation of fire insurance claims. He collected, for Rogers, the insurance on the furniture which had been damaged. By a strange coincidence, on the same day that the police officers took Rogers into custody, Sherman was arrested on a charge of issuing checks with insufficient funds to meet them. It may be inferred that when the investigating officers learned of Sherman's acquaintance with Rogers, they conceived the idea of using him to get information for them from the appellant and to carry suggestions and promises to him. The record shows that Sherman was released the morning after he was arrested and, according to his own testimony, when talking with Rogers later, he intentionally gave the impression that he was still in custody. Sherman took part in the questioning of Rogers and it was he who, from the testimony of Carmack, left to deal with Rogers alone, secured the confession relating to the death of Mrs. Rogers. But as related by Sherman, he obtained both of the confessions.

The record includes a photograph of Rogers and those who were with him on March 4th when the crimes were confessed. Rogers had considerable growth of beard and showed the effects of strain and exhaustion. Apparently he had not shaved since at least February 27th, for Carmack testified concerning a conversation of that day: "I noted * * * that he wasn't shaven, and I asked him why. * * * He said he was going to let his beard grow, he thought it would be good for his face, and he didn't have a razor besides."

On the day of the confession, the interrogation commenced in the morning and continued until about 5 o'clock. Rogers was given no food in the meantime. But after he had confessed, then, said Sherman, "we suggested that we would like to get him a shave and haircut, which we did, and then took him to dinner." At that time, sixteen days after his arrest, they took him to his apartment, where he was allowed to get a razor, toothpaste, and personal toilet articles.

The appellant's testimony concerning the circumstances under which he was questioned by the police officers adds much to their version of the investigation. After the Dean's visit on the afternoon of February 17th, he said, "they didn't so much question me, they were telling me * * * that due to the Dean's visit, they had got additional information which would absolutely cinch their case against me. * * * One officer would begin questioning me and then sometimes the other officer would

break in with some question or comment, and then the other officer would come in at length, and if the other officer thought of any details, he would interpose them. That is the way the questionings proceeded. * * They told me that they had a circumstantial evidence case on arson in the first degree, which would send me to the gas chamber and there was nothing that I could do to prevent it."

Rogers could not say, positively, he told the jury, the number of times he was interrogated between February 17th and the afternoon of March 3d, when he agreed to confess to the charge of arson and also to the killing of his father, but "not to put it too high," it was at least every other day. But after the questioning on February 21st, he said, "I was just getting into a state where I was mentally tired and I was getting so that I was beginning to forget things, and there were some details which entirely slipped my mind, and they said that those were things that they could use against me."

On February 27th, said the appellant, after he was taken to the house where the fire occurred, he was returned to the sheriff's office and the questioning continued. "Officer Doane said when he was sitting at the Captain's desk that he and the boys were tired of beating around the bush with me and if I didn't make up my mind to confess pretty soon they would find a way to make me talk. * * * Some officer in the room, I don't know who it was, asked me if I knew anything about the gold fish room * * * at the Central Station. * * * I told them that since being in jail I had learned what the gold fish bowl was and what goes on in that room. They told me if I didn't make up my mind to confess I would be a person to pay a visit to that room."

After this interview, the appellant testified, Sherman insisted that he must make up his mind whether to confess or not. Sherman told him, according to his testimony, that "if I didn't confess the district attorney was going to file first degree charges against me on all of these charges and I was a dead cinch to be sent to the gas chamber and that I had no hope whatever of proving myself innocent. He asked me if I had ever heard anything about the Betty Hardaker case. I told him the name was familiar but I didn't recall what it was about."

"Then" Rogers continued, "Officers Carmack and Morrell verified the fact that Betty Hardaker had been arrested on a murder charge and she had pleaded not guilty by [reason of] insanity and she was sent to some mental institution and was released after three months and Mr. Sherman told me that if I was a wise bird I would do the same thing and go to a mental institution rather than to go to the gas chamber. He said if I was willing to give this confession that the District Attorney's office would let me get by with it and that after three months I would be released and that would end the matter as far as I was concerned, and if I wouldn't do that, the charges would be filed and I would be sent to the gas chamber. * * * Mr. Sherman asked me if I had been questioned by [Mr. Shoemaker] * * * at the Wilshire station. He said, 'Well, you know, don't you, that Clyde Shoemaker is the District Attorney's Assistant.'"

At that time, said the appellant, he was getting to the point where he "felt that confessing was the only possible way of saving my life from an unjust execution. * * * I understood that the facts could be successfully converted in such a manner that I would have no defense left."

Sherman promised to negotiate with the district attorney's office, the appellant testified. "My reason [for admitting the homicides]," he said, "was that I saw only two alternatives, either to go to the gas chamber for crimes I had never committed or else fabricate a confession and be released * * * [Sherman] told me what the District Attorney's office told him they would do * * * that if I would agree to give these confessions that they would not press the matter at all, would let me get by with an insanity verdict, and they would have me released in three months at Mendocino."

To understand his reasons for giving the confession, the appellant went on, it would be necessary to take into consideration "my mental and physical condition at the time. It happened that my mother and father were both dead and I was about to be inducted into the army, and I had nothing particularly in life to look forward to. Outside of that, there was the environment I was in, being in jail—I had never been in jail before and knew nothing about it—and the whole thing was that these officers just piled more and more on me all the time, and, although I knew I was innocent, I knew I had not the slightest possibility in the world of proving [it]—that is just

the way things looked to me at the time. And so then when I could see that I was just about to be executed for something I had never done I decided to grasp at that last straw and make the best out of it that I could."

About noon on March 3d, Sherman called at the sheriff's office and saw Captain Kunou. They went to the County Jail where Carmack and Morrell were questioning Rogers. At 3 o'clock, when Rogers had agreed to confess, a stenographer was called and to questions put by Carmack, Morrell, Sherman and Chief Bright, Rogers related that he had started the fire. The stenographer's notes show that this was concluded at 4:30 p. m.

Shortly after 10 o'clock the next morning, the examination was continued at the Rogers house. At 1:45 he had completed his story of the fire.

It was at this time, the appellant testified, that Sherman took him into his mother's bedroom, and there told him that "there was a new development in the case and said if I hoped to get off on that insanity plea I would also have to say that I murdered my mother. He said I would be strengthening my case if I did that, because if anybody would commit such unnatural crimes as murdering their father and their mother and setting fire to the house, there would be no doubt in anybody's mind that I was insane. He told me if I didn't do that, that the district attorney's office would go back on that arrangement, because after making my father's suicide out to be a murder that nobody on earth would believe my mother's suicide to actually be a suicide, and he told me that I would be strengthening my case instead of weakening it. He told me if I didn't give this additional confession the bargain was off. * * * Then I started confessing again."

At the trial the appellant urged that the prosecution had not proved the corpus delicti as to Courtney C. Rogers. He does not now take issue with the ruling that the burden of proof was met, but he vigorously contends that, given every favorable interpretation, the evidence shows no more than a bare prima facie case. With such unsatisfactory and unsubstantial proof, says the appellant, even slight error in the court's instructions was prejudicial for under a correct statement of the law the jury, as triers of the fact, in passing upon the same issue, might have arrived at a different conclusion. More specifically, he contends, by deleting a portion of an instruction which he offered, the trial court took from the jury the determination of a primary issue of his defense. And he challenges an instruction given at the request of the district attorney as, in effect, stating to the jury that, under certain circumstances, a confession may be considered as part of the proof of the corpus delicti.

With respect to the other charge of homicide, the appellant asserts that the evidence offered by the prosecution which was competent to be considered in connection with the proof of the corpus delicti was insufficient to establish a prima facie case of murder. He takes the position that all evidence respecting the circumstances of the death of Mrs. Rogers is in harmony with her suicide and that the evidence applicable to the corpus delicti does not prove a death resulting from the criminal act or omission of another. In the absence of proof of this necessary element of criminal homicide, he argues, his purported confessions were inadmissible.

The attorney general insists that, as there is sufficient evidence to show the death of the father and also of the mother by criminal means, the corpus delicti as to each homicide was proved. In defense of the criticized instructions, he asserts that, read together, they correctly state the law.

Although it cannot be said, as a matter of law, that the evidence is insufficient to support the verdict as to any one of the three crimes charged against the appellant, apart from the confessions it is inconclusive as to the cause of Mrs. Rogers' death and whether he set fire to his house after a quarrel with his father. Under these circumstances, the confessions are of unusual importance.

[1-3] A confession, freely and voluntarily made and without offer or promise of leniency in regard to punishment, or as the result of threats or intimidation, may be used as evidence against the defendant in a criminal case. But its admissibility depends entirely upon the circumstances under which it was obtained, and this presents a question which is necessarily, in the first instance, addressed to the trial judge. People v. Siemsen, 153 Cal. 387, 394, 95 P. 863; People v. Chan Chaun, 41 Cal.App.2d 586, 590, 107 P.2d 455; People v. Ellis, 33 Cal.App.2d 616, 620, 92 P.2d 431; People v. Dye, 119 Cal.App. 262, 270, 6 P.2d 313; People v. Shaffer, 81 Cal.App. 752, 757, 254

P. 666. A showing of any pressure which might reasonably have induced or required the confession to be made should lead the court to make diligent inquiry concerning the manner in which it was given. People v. Siemsen, supra, 153 Cal. page 394, 95 P. 863; People v. Mellus, 134 Cal.App. 219, 225, 25 P.2d 237.

[4-7] Although a statement is neither involuntary nor inadmissible in evidence because it was made while the defendant was under arrest, that fact should be considered. People v. Chan Chaun, supra, 41 Cal.App.2d page 590, 107 P.2d 455; People v. Ellis, supra, 33 Cal.App.2d page 621, 92 P.2d 431; People v. Mellus, supra; People v. Siemsen, supra, 153 Cal. page 395, 95 P. 863. Also, a confession obtained by means of questioning, particularly if carried on for long periods of time, should be admitted only when it appears, with reasonable certainty, to have been voluntarily made. People v. Dye, supra; People v. Clark, 55 Cal.App. 42, 45, 46, 203 P. 781; cf. People v. Gingell, 211 Cal. 532, 546, 296 P. 70; People v. McEvers, 53 Cal.App.2d 448, 128 P.2d 93. And no court should countenance the use of a confession which was made under the influence of either threats or inducement. Promise of lighter punishment: People v. Johnson, 41 Cal. 452, 454; People v. Clark, supra, 55 Cal. App. page 44, 45, 203 P. 781; cf. People v. Eckman, 72 Cal. 582, 14 P. 359. Better for defendant to confess: People v. Barric, 49 Cal. 342, 345; People v. Johnson, supra; People v. Leavitt, 100 Cal.App. 93, 94, 95, 279 P. 1056; and see, People v. Gonzales, 136 Cal. 666, 69 P. 487; People v. Castello, 194 Cal. 595, 229 P. 855; People v. Thompson, 84 Cal. 598, 606, 24 P. 384. Defendant to go free: People v. Williams, 133 Cal. 165, 167, 65 P. 323. Threats: People v. Loper, 159 Cal. 6, 17-20, 112 P. 720, Ann. Cas.1912B, 1193; People v. Flores, 15 Cal. App.2d 385, 405, 59 P.2d 517; People v. Mellus, supra. Moreover, although the promises or inducements are made by one without actual authority to give them effect, if they are made in the presence of one who has such authority under circumstances from which the accused has a right to assume that they were authorized, the confession so obtained is involuntary. People v. Silvers, 6 Cal.App. 69, 72-74, 92 P. 506; People v. Williams, supra, 133 Cal. page 167, 65 P. 323; and see People v. Lewis, 158 Cal. 185, 191, 110 P. 580; People v. Rodriguez, 61 Cal.App. 69, 86, 214 P. 452; People v. Piner, 11 Cal.App. 542, 553, 105 P. 780.

In the present case, the appellant does not claim to have been physically mistreated but there is strong evidence from which it may be inferred that he was in more or less fear of the police officers. It is significant that Officer Doane, who first denied that there is such a thing as a "gold fish" room at the police station, later characterized it as the "'crying room' where prisoners cry out their confessions" and the officers allowed a man who had been arrested on a check charge and almost immediately released to assist in the questioning. Upon their own admissions of the part Sherman played in the many questionings of the appellant, it is reasonable to believe that he was used by them to make the promises and inducements related by Rogers in his testimony.

[8] Although it was the function of the jury, and is not the duty of the appellate court, to choose between the testimony of Rogers and that of the police officers in determining whether the confessions were voluntarily given, the problem of ascertaining what the jury concluded in this regard is complicated by an instruction given the jury at the request of the prosecution. It reads:

"Proof of the corpus delicti means proof of the essential elements necessary to constitute the crime charged and of the existence of criminal agency or means as the cause of them. It may be proven by circumstances shown in evidence, or by inference drawn from facts proven.

"The evidence of the corpus delicti need not be of conclusive character, and need not necessarily connect the party informed against with the commission of the crime, in order to justify the consideration of an admission or confession of such party so charged with the crime.

"It is not necessary that the corpus delicti should be proved beyond a reasonable doubt before proof may be made of an admission or confession. Prima facie evidence of the corpus delicti is sufficient; and it is for the court to say whether there is sufficient evidence of the corpus delicti to go to the jury, precisely as in the case of any other material fact."

This instruction has no place in a charge to the jury for it states a rule of law which governs the admissibility of evidence. Also, the charge was susceptible of a con-

struction by the jurors, in attempting to apply it to their own duties, that the proof of each crime, aside from any confession of the appellant, had been held by the court sufficient to meet the requirements of the law, a decision which they were bound to accept. For these reasons, in People v. Hubbell, 54 Cal.App.2d 49, 56, 57, 128 P.2d 579, an identical instruction was held seriously prejudicial in view of the unsatisfactory, although legally sufficient proof of guilt. In an earlier decision the district court of appeal determined that the last sentence of the instruction was not erroneous (People v. Stevens, 78 Cal.App. 395, 410, 248 P. 696), but the probability of any prejudicial effect from the statement of a trial judge must be determined upon a consideration of the particular facts in each case (see People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367), and in that prosecution there was ample evidence to support the verdict.

[9] Error in an instruction which ordinarily would not prejudice the rights of a defendant may justify a reversal of the judgment where the jury is misdirected or misled upon an issue vital to the defense and the evidence does not point unerringly to the guilt of the person accused. People v. Silver, 16 Cal.2d 714, 108 P.2d 4. The question for an appellate court under these circumstances is whether, considering the entire record, the challenged instruction may have prejudiced the convicted person's rights. Const., art. VI, sec. 4½. If it is probable that in the absence of a misleading instruction the jury would not have returned the verdict complained of, then there has been a miscarriage of justice within the meaning of the constitutional provision. People v. Dail, Cal.Sup., 140 P.2d 828; People v. Putnam, supra.

[10] In the present case, it may well be that the jurors believed the confessions were not voluntarily given, yet, because of the confusing nature of the instruction telling them of the duty of the court to determine the sufficiency of the evidence of the corpus delicti before admitting a confession, they may have been constrained to reach a verdict of conviction upon each of the three counts in the belief that those determinations were compelled by the court's ruling in admitting Rogers' confessions. Consequently, because of the decidedly inconclusive character of the evidence, apart from the confessions, the giving of the instruction constituted prejudicial error.

[11] The People incorrectly claim that the appellant relies only upon the asserted error in the second paragraph of the instruction and, for that reason, may not have the benefit of any misleading statement in the first paragraph. True, Rogers points to the second paragraph as erroneously stating to the jury that it could consider his admissions or confessions as part of the proof of the corpus delicti. But he also asserts that the instruction, as a whole, does not recognize the duty of the jurors to determine whether the corpus delicti was proven, but only advises them of the legal principles which guided the trial judge in ruling upon his contention, presented upon an objection to the admission of evidence, that the corpus delicti had not been established. "As a matter of fact," argues Rogers, "the wording of the instruction removes such responsibility from the jury by declaring 'it is for the court to say whether there is sufficient evidence of the corpus delicti to go to the jury.'" And in conclusion, he quotes and makes a part of his argument the discussion in People v. Hubbell, supra, concerning the misleading character of the instruction.

The judgments are, and each of them is, reversed and the cause remanded for a new trial.

GIBSON, C. J., and CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



22 Cal.2d 808

STROMERSON et al. v. AVERILL.

Sac. 5368.

Supreme Court of California.

Sept. 20, 1943.

Rehearing Denied Oct. 30, 1943.

1. Trusts ⇐110

In action between principal and agent to quiet title to realty on theory of constructive trust, where defendant's testimony established that plaintiff entered into a contract to purchase land as defendant's agent, and plaintiff delivered contract to defendant with an assignment executed in blank, action of defendant in attempting to have new contract issued to him by filling in his name as assignee in the assignment did not compel conclusion that defendant's testimony was unworthy of belief.

2. Evidence ⇐222(2)

In action between principal and agent to quiet title to realty on theory of court's constructive trust, defendant's admission that plaintiff was the owner of land purchased in plaintiff's name was not in conflict with defendant's claim in subsequent action that other land subsequently purchased in plaintiff's name was purchased by him as defendant's agent, but such admission could be considered with other evidence in determining relationship of the parties.

3. Evidence ⇐265(2)

Defendant's testimony that land purchased in plaintiff's name was purchased by plaintiff as defendant's agent was not rendered unworthy of belief because inconsistent with his statements in correspondence with vendors in which he referred to "plaintiff's contract" and to the contract between vendors and plaintiff, where plaintiff was the party named in the contract as purchaser and such statements were used to identify the instrument.

4. Witnesses ⇐316

Inconsistencies in testimony only affect the credibility of a witness or reduce the weight of his testimony, and it is the duty of the trier of the facts to weigh the evidence and determine witness' credibility.

5. Appeal and error ⇐931(1)

It is the duty of the court in support of a judgment on appeal to harmonize apparent inconsistencies wherever possible.

6. Trusts ⇐110

Evidence that defendant, who was engaged in extensive farming operations, negotiated for the purchase of a farm under contract taken in name of plaintiff who was employed by defendant as a foreman, that all money paid on contract was advanced by defendant, and that plaintiff made no claim of ownership until after his discharge by defendant, sustained finding that plaintiff was defendant's agent and justified the quieting of title in plaintiff on theory of a "constructive trust".

7. Appeal and error ⇐1010(1)

The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court, and, if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.

8. Trusts ⇐101

Where plaintiff, acting as defendant's agent, took a contract for the purchase of realty in his own name and later repudiated his fiduciary duty to hold the land for defendant, plaintiff became "constructive trustee" of the equitable title to the property, and statute of frauds was not a bar to recovery of land by defendant. Civ. Code, §§ 852, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

9. Trusts ⇐101

Where defendant alleged that a contract to purchase land and the equitable title thereto belonged to defendant, and that plaintiff executed contract at defendant's request as his agent and employee, and the court found that, in executing the agreement of purchase, plaintiff acted as defendant's agent, and that the contract was the contract of defendant who was the equitable owner of the property, a "constructive trust" was established.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

10. Pleading ⇐129(2)

In action to quiet title, where defendant alleged himself to be the owner and denied that plaintiffs were owners or had any interest in the property, defendant's failure to specifically deny allegation that the property was in truth the property of plaintiff did not constitute an admission of such allegation.

11. Appeal and error ⇐843(2)

Where defendant was decreed to be the equitable owner of land on ground that plaintiff in purchasing land was acting as defendant's agent, that pending appeal by plaintiff and to prevent running of statute of limitations defendant brought a second action seeking to recover moneys loaned and advanced to improve land involved was not material on appeal.

12. Appeal and error ⇐1177(1)

Where a judgment properly determined that defendant was the owner of land purchased by plaintiff in his own name as defendant's agent, but agent was contingently liable for balance of payments on contract, and other outstanding obligations may have been incurred in connection with joint

farming operations, cause would be remanded to relieve plaintiff of liability on the contract and to take an accounting.

TRAYNOR, J., dissenting.

Appeal from Superior Court, Madera County; Ernest Klette, Judge Assigned.

Action to quiet title by H. C. Stromerson and others against Roger Averill. From a judgment for defendant, plaintiffs appeal.

Reversed and remanded with directions.

Prior opinions, 121 P.2d 826; 126 P.2d 392; 133 P.2d 617.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Barcroft & Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

GIBSON, Chief Justice.

Plaintiffs, H. C. Stromerson and his wife, brought this action to quiet title to a 562-acre tract which was being purchased under contract from Miller & Lux, Inc. in Stromerson's name. Defendant Averill alleged in his answer that Stromerson acted as his agent in making the contract to purchase the land, denied plaintiffs had any interest therein and prayed that title be quieted in him. The court found in accordance with the allegations in defendant's answer and plaintiffs appealed from the judgment for defendant. For the purposes of clarity and brevity H. C. Stromerson will be treated here as the sole plaintiff.

The parties had been acquainted for many years, Stromerson at one time having been employed by Averill in the contracting business. In 1933 Averill, who was then farming on a large scale in Madera County, hired Stromerson as a foreman at a starting salary of $75, later increased to $150, per month. Although Stromerson then had no agricultural experience, he soon became a capable farmer and continued to work for Averill in the capacity of foreman until he was discharged shortly before this action was commenced. Before Stromerson was employed, Averill had adopted the practice of having some of the land used in his extensive operations held in the names of employees. This may have been partly for the purpose of avoiding a restriction on the amount that could be loaned to one person by the bank which financed Averill. It appears that Averill had received the limit that could be loaned to one person and the bank knew of the practice referred to. One tract of 475 acres purchased by Averill from Miller & Lux was in the name of P. A. Davis, the farm superintendent. Another tract of 640 acres, also bought from Miller & Lux, stood in the name of a foreman, J. F. Lincoln. The combined farms, including the 562-acre tract here involved, were operated as a unit. Davis managed the farms and, working under his direction, Lincoln and Stromerson supervised the planting, cultivating and harvesting of the crops. Averill determined matters of policy and took care of financing the operations, which was handled in part through advances made by the San Joaquin Cotton Oil Company on crop mortgages and the personal credit of Averill.

Bank accounts for the combined farming operations at one time stood in the names of Averill, Davis and Stromerson, at another time in a single account in the names of Averill, Davis, Stromerson and Lincoln, then in four separate accounts, and finally in the name of Roger Averill and Associates. Except in 1934, each of the four was authorized to check on any of the accounts. The larger bills were paid by Averill or Davis, while Stromerson or Lincoln usually signed checks for labor. Stromerson drew checks for his own salary on these accounts. In making payments to meet the cost of operating the several farms, checks were drawn without regard to the source of funds in a particular account and without reference to the tract for which the expenditure was made. Each year a budget was made for the operation of the several farms and filed with the Cotton Company. Crop mortgages were given by the different individuals to secure advances made, but the money received therefrom was deposited by Averill or Davis in the bank account which needed the money. All notes were indorsed by Averill.

In the early part of 1936 Averill negotiated with Miller & Lux for the purchase of the 562 acres in controversy. Nothing was said to Stromerson concerning the transaction until it was completed. The contract for this acreage was taken in the name of Stromerson, as vendee. He executed an assignment in blank on one copy of the contract and delivered it to Averill who deposited it with the Cotton Company as further security for advances. The initial payment of $1,775 was bor-

rowed from Allen, the real estate agent who handled the transaction. The note covering the loan was signed by Averill, Davis and Stromerson, and was later paid by a draft issued by the Cotton Company and charged to Averill's account. The first installment was paid by Averill from his personal bank account, the second installment, and only other payment before the commencement of this action, was paid by a check drawn by Averill on the account of Roger Averill and Associates.

Averill testified, as to the agency relationship, that Stromerson was his agent for all purposes, and that it was Stromerson's duty under the agency to carry the contract in Stromerson's name the same as Davis and Lincoln did as to other parcels. It further appears that Averill offered Davis, Lincoln and Stromerson a fifteen-year contract covering the operation of the several farms. Davis testified that in the spring of 1937 he discussed this offer with Lincoln and Stromerson and that Stromerson said he did not want to be tied up. Stromerson stated that he would like a piece of land instead and that he wanted 80 acres for his part. Davis testified that in discussing the matter the three of them agreed that Lincoln should also have 80 acres and that Davis should have 140 acres. Stromerson further stated that Averill had promised him a percentage of the net income and Stromerson said that if the three of them would "stick together" they could get some land from Averill. Although this conversation took place shortly before Stromerson was discharged, and involved the relation of the parties with reference to the combined farming operations, nothing was said which indicates Stromerson was then making any claim to the ownership of the 562 acres. In fact, the inferences are plainly to the contrary.

[1] Stromerson contends the evidence is not sufficient to support the finding that he was the agent of Averill in the purchase of the 562 acres of land. The agency is established by the testimony of Averill, but Stromerson asserts that Averill's testimony is "false, inherently improbable and unworthy of belief." In support of this assertion, certain claimed inconsistencies, contradictions and admissions in Averill's testimony are pointed out. Reference is made to the fact that after Stromerson was discharged Averill attempted to have a new contract issued to him covering the 562 acres by filling in his name as assignee in the assignment which Stromerson had executed in blank. Since Stromerson entered into the contract as Averill's agent and delivered it to him with an assignment executed in blank, there was certainly nothing in the conduct of Averill which compels a conclusion that his testimony is unworthy of belief.

[2] It is also claimed that an admission made by Averill with respect to another transaction was inconsistent with his testimony concerning the ownership of the land in question. Shortly after Stromerson went to work for Averill a tract of 160 acres was purchased on contract from Miller & Lux and the contract was taken in Stromerson's name. In 1935 Stromerson made application to a bank for a loan to make a final payment on the purchase price. The loan was obtained and the deed issued to Stromerson. Averill admitted in substance that he informed the bank that Stromerson was the owner. Although the 160-acre tract is not involved here, and that transaction occurred long before the purchase of the 562 acres, is is argued that since Averill later claimed ownership to the 160 acres upon the theory that Stromerson purchased it as his agent, such admission conflicts with his claim here. The most that can be said of this contention is that the admission could be considered with other evidence in determining the relationship of the parties in the two transactions, or it might constitute impeachment on a collateral matter. In this connection it is argued that inasmuch as it was determined in another action that Stromerson was the owner of the 160-acre tract, the judgment in this action should not be allowed to stand because inconsistent therewith. See Stromerson v. Averill, 39 Cal.App.2d 118, 102 P.2d 571. Although the transactions were similar in many respects they differed materially in some particulars, and we cannot say that wholly inconsistent results have been reached in separate judgments on the same issue.

[3] Stromerson also asserts that Averill's testimony is unworthy of belief because his claim of ownership is inconsistent with references made in correspondence with Miller & Lux to the "Stromerson contract" and the contract between "yourselves and Stromerson." Since Stromerson was the party named in the contract the identification of the in-

strument in this manner does not in any way conflict with Averill's version of the transaction.

[4-6] Other instances of asserted conflicts and contradictions are cited in support of the contention that Averill's testimony is so unworthy of belief that it should be entirely disregarded. We have carefully examined the evidence and find no merit in the contention. Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony and it was for the trier of the fact to weigh the evidence and determine his credibility. 10 Cal.Jur. p. 1146, § 364. Furthermore, it is the duty of the court in support of a judgment on appeal to harmonize apparent inconsistencies wherever possible. 2 Cal. Jur. p. 938, § 551. It might also be noted that the testimony of Averill was supported by many circumstances and corroborated in important particulars by Davis, Lincoln and others. In our opinion there was substantial evidence to sustain the finding that Stromerson was acting as Averill's agent in the purchase of the 562 acres of land.

[7] It is contended, however, that since the judgment is based upon constructive fraud the facts which are relied upon to establish the fraud must be proved by clear, satisfactory and convincing evidence. The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. Steiner v. Amsel, 18 Cal.2d 48, 53, 54, 112 P.2d 635; Steinberger v. Young, 175 Cal. 81, 84, 85, 165 P. 432; Couts v. Winston, 153 Cal. 686, 688, 689 96 P. 357.

[8] It is also contended that the statute of frauds bars recovery by Averill. A constructive trust which is created by operation of law need not be in writing. Civ.Code, § 852. When Stromerson, as agent, took the contract in his name for Averill and later repudiated his fiduciary duty to hold the same for his principal, he became constructive trustee of the equitable title to the property. Civ.Code, § 2224; Rest., Agency, § 414; Rest., Restitution, § 194; Williston on Contracts, rev. ed., vol. 4, § 1024.

[9] It is urged that the facts giving rise to the constructive trust were neither sufficiently alleged nor found. Averill alleged that the contract and the equitable title to the property belonged to him and that Stromerson executed the contract at his request as his agent and employee. The court found that in executing the agreement of purchase Stromerson acted as the agent of Averill and that the contract was in fact the contract of Averill and that Averill is the equitable owner of the property. The facts necessary to give rise to the constructive trust were properly pleaded and found.

[10] Stromerson argues that by failure to deny an allegation in the complaint Averill admitted "that the property described herein is the community property of H. C. Stromerson and Leone Stromerson, his wife." Averill did not specifically deny that particular allegation. He did, however, deny that the Stromersons were the owners of or had any interest in the property or the contract and alleged himself to be the owner, thereby answering the allegation of ownership.

Other errors are claimed with reference to the admission of evidence which do not merit discussion. We are satisfied that in most of the instances no error occurred, while in others if error was committed it was not prejudicial.

[11] Stromerson has requested leave to introduce additional evidence. It appears that after this appeal was taken Averill commenced an action against Stromerson to recover $35,572.69 allegedly due on an open book account and representing moneys loaned and advanced to improve the 562 acres. A writ of attachment was issued in that action and levied upon the property here involved. It is argued that such conduct is inconsistent with the claim of agency and the further claim of ownership by Averill. The second action was brought to prevent the running of the statute of limitations during the pendency of this appeal. The situation is somewhat analogous to the pleading of inconsistent defenses one of which cannot be used to destroy the other. See Miller v. Chandler, 59 Cal. 540; Billings v. Drew, 52 Cal. 565; Harding v. Harding, 148 Cal. 397, 83 P. 434; Buhne v. Corbett, 43 Cal. 264; Calexico Lumber Co. v. Emerson, 54 Cal.App. 239, 201 P. 612; 21 Cal. Jur. 134. The fact that Averill brought a second action containing allegations inconsistent with his position in this case is not material on this appeal.

[12] We are of the opinion, however, that the judgment does not dispose of all the conflicting claims of the parties connected with the acquisition, operation and development of the property. Stromerson assumed personal liability under the contract of purchase from which he should be relieved. It further appears that other outstanding obligations may have been incurred, or expenditures made, by one party for the benefit of the other, in relation to the joint farming operations, and that an accounting is required in order to do complete equity.

The judgment is therefore reversed and the cause remanded to the trial court to take such accounting. The court shall thereupon make a decree declaring the legal title to the contract of purchase and the equitable title to the property are in Averill subject to his payment of any sums found due Stromerson and to the discharge by Averill of any obligations incurred by Stromerson on his behalf in connection with the property. Each party shall bear his own costs on this appeal.

SHENK, CURTIS, EDMONDS, and SCHAUER, JJ., concurred.

CARTER, J., did not participate.

TRAYNOR, Justice (dissenting).

I dissent. It was incumbent upon defendant to support his contention that Stromerson was his agent and held the equitable title to the property as constructive trustee, under the rule that the evidence in such cases must be "clear, satisfactory and convincing; explicit, unequivocal and indisputable." Wehle v. Price, 202 Cal. 394, 397, 260 P. 878, 879; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898; Woods v. Jensen, 130 Cal. 200, 203, 62 P. 473; Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543; Plass v. Plass, 122 Cal. 3, 12, 54 P. 372; Taylor v. Bunnell, 211 Cal. 601, 296 P. 288; Olson v. Olson, 4 Cal.2d 434, 49 P.2d 827; see Bogert, Trusts and Trustees, vol. 1, § 49, p. 231; 23 A.L.R. 1500; 65 C.J. 325. It is my opinion that the trial court did not observe this rule in weighing the evidence in the present case. It is apparent that there was some cooperative arrangement between Stromerson, Averill, Lincoln, and Davis, and the evidence suggests a partnership. It does not in my opinion warrant the conclusion that it is highly probable that the relationship between Averill and Stromerson in the purchase of the land in question was that of principal and agent. If there was no agency there could be no trust under the authorities relied upon in the majority opinion.

While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence "the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule." Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544; see, also, Moultrie v. Wright, 154 Cal. 520, 98 P. 257. In such cases it is the duty of the appellate court in reviewing the evidence to determine, not simply whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, as in the ordinary civil case where only a preponderance of the evidence is required, but to determine whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, as in the ordinary civil case where only a preponderance of the evidence is required, but to determine whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it hold that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, the rule that the evidence must be clear and convincing becomes meaningless. It is a contradiction that while the vitality of the rule is thus destroyed its soundness is not questioned. If, as in my opinion, the rule is sound, this court has erred in its pronouncements (see 25 Cal. Jur. 248; 2 Cal.Jur. 921) declining to accept responsibility for its enforcement.

Rehearing denied.

CURTIS, SCHAUER, and TRAYNOR, JJ., dissenting. We dissent solely on the ground that we believe plaintiffs should recover their costs of appeal.

CARTER, J., not participating.

22 Cal.2d 773

HOBBS v. TRANSPORT MOTOR CO. (two cases).

HENRICS v. TRANSPORT MOTOR CO.

S. F. 16912.

Supreme Court of California.

Sept. 27, 1943.

1. Automobiles ⇐244(22)

In actions for injuries to occupants of automobile colliding with corporate defendant's automobile driven by individual defendant, evidence *held* sufficient to support jury's implied finding that individual defendant honestly intended to buy corporate defendant's automobile, not to replace battery therein with battery in his own automobile, and hence was not guilty of fraud vitiating permission given him by corporate defendant's salesman to use automobile. Vehicle Code, §§ 402, 504, St. 1937, pp. 2353, 617.

2. Automobiles ⇐192(1)

The historical background and plain unambiguous language of statutory provision that motor vehicle owner is liable for death of or injury to person as result of negligence of person operating vehicle with owner's express or implied permission indicate Legislature's intent to hold automobile owner liable for damages or injury caused by negligence of any one having owner's permission, whether express or implied, to use or operate automobile. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles ⇐192(6)

An automobile owner's imputed liability under statute for negligence in operation of automobile by borrower thereof should not be extended to include liability for borrower's willful misconduct, in absence of express declaration to that effect in statute. Vehicle Code, § 402, St.1937, p. 2353.

4. Automobiles ⇐245(26)

Whether automobile owner's permission to another to operate automobile was given and present at time of accident due to such operator's negligence, so as to render owner liable to person injured as result thereof, is usually fact question for jury. Vehicle Code, § 402, St.1937, p. 2353.

5. Automobiles ⇐244(22)

In actions for injuries to occupants of automobile colliding with corporate defendant's automobile driven by individual defendant, evidence *held* sufficient to support jury's implied finding that corporate defendant's automobile was being used by driver with owner's permission at time of accident, so as to render corporate defendant liable to plaintiffs. Vehicle Code, § 402, St.1937, p. 2353.

6. Appeal and error ⇐1048(7)

Where defendant's witness, testifying on direct examination that he did not make contradictory statements shown in transcribed statement made by him before trial, was discredited by impeaching witness' testimony as to such statements, defendant was not prejudiced by trial court's subsequent refusal to receive entire transcribed statement in evidence. Code Civ.Proc. § 2049.

7. Appeal and error ⇐1060(1)

In actions for injuries to occupants of automobile colliding with corporate defendant's automobile driven by individual defendant, whose negligence was obvious under evidence, intemperate remarks, made by individual defendant's counsel in resisting charge of such defendant's fraud in borrowing automobile and insisting that corporate defendant also be held liable, while conceding his client's negligence and making no effort to minimize damages, *held* not prejudicial to corporate defendant. Vehicle Code, § 402, St.1937, p. 2353.

8. Automobiles ⇐246(15)

In actions for injuries to occupants of automobile colliding with corporate defendant's automobile driven by individual defendant, trial court did not abuse its discretion in refusing corporate defendant's proffered instruction that it owed no legal duty to inquire concerning individual defendant's age before assenting to his use of automobile. Vehicle Code, § 402, St. 1937, p. 2353.

9. Trial ⇐260(8)

In action for injuries to occupants of automobile colliding with corporate defendant's automobile driven by individual defendant, refusal of corporate defendant's proffered instrtuctions on questions of individual defendant's fraud in borrowing automobile and conversion thereof was not error affecting corporate defendant's rights, in view of trial court's full instructions on question of corporate defendant's liability if its assent to individual defendant's use of automobile was obtained by

fraudulent representations, trick, or device. Vehicle Code § 402, St.1937, p. 2353.

In Bank.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Consolidated actions by Frank W. Hobbs, Helen Lee Hobbs, and Clara Henrics, respectively, against the Transport Motor Company and another for personal injuries sustained in a collision between an automobile in which plaintiffs were riding and named defendant's automobile. Judgments for plaintiffs, and named defendant appeals.

Affirmed.

Prior opinion 134 P.2d 489.

Applebaum & Mitchell and John Jewett Earle, all of Oakland, for appellant.

Arthur Joel and Robert L. Dreyfus, both of San Francisco, for respondents.

SHENK, Justice.

The plaintiffs brought separate actions against the owner and driver of a borrowed car for damages resulting from injuries sustained when the borrowed car collided with the car in which the plaintiffs were riding. The actions were consolidated for trial before a jury. In the action by Frank W. Hobbs, the jury returned a verdict against the driver in the sum of $10,000 and against the owner in the statutory amount of $5,000. In each of the other actions the verdict was for $1,000 against both defendants. The owner, Transport Motor Company, appealed from the judgments on the several verdicts.

The negligence of the defendant driver was conceded at the trial, and there is no contention that the damages awarded by the jury are excessive. The principal question is whether the record sustains the implied finding of the jury that the car was being used or operated with the permission, express or implied, of the owner. Section 402 of the California Vehicle Code, St.1937 p. 2353, provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner * * *."

The evidence was conflicting. The facts which tend to support the verdicts are the following:

The defendant, Transport Motor Company, was engaged in the business of selling automobiles in the city of Oakland. About 5:30 o'clock on the evening of January 2, 1941, the defendant Rodrigues, a youth of twenty years, entered the company's salesrooms and expressed interest in the purchase of a Ford car. He selected a 1940 used Ford, settled on a price of $700, and inquired as to its performance. The salesman invited him to take it out and try it. Rodrigues said he didn't have time before dinner and the salesman suggested he try it after dinner. He returned at 7 o'clock. The salesmen moved several other cars to permit passageway for the 1940 Ford. Rodrigues got into the car and sat next to the salesman who was at the wheel. He was acting in the belief that prospective customers were not permitted to take out a car alone and that the salesman intended to accompany him. But the salesman turned the car over to Rodrigues with the caution, "We close at 9 o'clock." Rodrigues owned a 1939 Ford which had not been performing satisfactorily because the motor was "missing" at high speed. He testified that he intended to buy the 1940 car if the motor of his car could not be adjusted. When he left the salesroom floor, he drove the company's Ford to a place where he had left his own car with two companions in it. Both cars were then driven to a service station. Rodrigues had repaired or replaced the ignition system in his car. One of his companions suggested that perhaps the fault was with the battery. Rodrigues removed the battery from the company's car and placed it on the floor of the service station a few feet from his own car, and the battery from his car was put in the company's car. The Rodrigues car was left at the station with the company's battery on the floor near it, and, with the Rodrigues battery in the company's car, Rodrigues and his companions drove the company's car away from the station. It was during that ride, and while crossing an arterial intersection at high speed without making the required stop, that the collision with the plaintiffs' car occurred.

[1] The appellant contends that Rodrigues' real purpose was to obtain the company's battery and replace it with his own; that such an intent amounted to fraud which vitiated the permission and rendered his possession of the company's car wrongful from the beginning. Reliance is placed on the case of Roehrich v. Holt Motor Co., 201

Minn. 586, 277 N.W. 274, where a youth obtained the possession of a car by falsely representing his name, his residence, his financial circumstances, and his real purpose to go with his companions on a wild pleasure jaunt. It was held that the youth was a converter of the car from the moment he entered it; that the fraud foreclosed the inception of a valid permission for the reason that there had been no meeting of the minds under the circumstances. Assuming that a similar rule would be applicable in like circumstances under our Vehicle Code, it is enough to say that there are no such circumstances in this case. The representations of the youth in the Minnesota case were concededly false. In the present case the falsity of Rodrigues' representations was not necessarily proved. The question of the honesty of Rodrigues' motive and intent was hotly contested on the trial. The question was left with the jury to decide. The jury had the right to believe in accord with its implied finding that Rodrigues' intent was honest.

The same answer applies to the contention that Rodrigues was guilty of a violation of section 504 of the Vehicle Code, St. 1937, p. 617, and that such violation rendered ineffective the owner's consent as a matter of law. That section makes it a criminal offense wilfully to injure or tamper with any vehicle or break or remove any part therefrom without the consent of the owner. Whether Rodrigues was guilty of a violation of that section was not an issue nor a question for determination in this case. Assuming that a fraudulent intent would have had the effect claimed by the appellant of invalidating the owner's permission, the removal of the battery had no significance under the issues in this case in the absence, as here, of a finding of such a fraudulent intent. The evidence was sufficient to support the implied finding of the absence of fraud or dishonesty and that the permission was therefore given which would impose liability on the owner under the imputed negligence rule of section 402.

[2] The history leading to the enactment of section 402 is well stated in Bayless v. Mull, 50 Cal.App.2d 66, at page 69 et seq., 122 P.2d 608. That background and the plain, unambiguous language of the section indicate that the Legislature intended to hold an owner of a car liable for the damages or injury caused by the negligence of anyone who had permission to use or operate the car, whether that permission was "express or implied." Beyond the use of that phrase, and as pointed out in the Bayless case, the Legislature did not formulate a specific test for ascertaining what constitutes permission; at least it made no exceptions. If permission be granted—whether express or implied—for the use of operation of the car, the liability attaches. In some instances, such as in Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, the courts have held that a car in the hands of a borrower was not being used or operated with the owner's permission when the borrower took it to a place outside the territory to which the permission expressly related, or kept it longer than the time for which its use was expressly granted. But the appellant presents no case in which it has been declared that a violation of any restrictions on the manner of the use of the car will destroy the effect of the permission, and the expressions in the decisions of this court have been to the contrary. See Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645; Henrietta v. Evans, supra, 10 Cal.2d at page 529, 75 P.2d 1051.

[3-5] The appellant invokes a rule of strict construction with reliance on Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407. There the question was whether the owner should be held liable for the wilful misconduct of the borrower. It was determined that when the Legislature used the word "negligence" in the statute it did not intend to impute to the owner the borrower's wilful misconduct. The observation—that an owner's imputed liability for negligence should not be extended to include the wilful misconduct of the borrower in the absence of an express declaration to that effect in the statute—obviously follows under any rule of construction. From what has been said in this and other cases (see Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10; Souza v. Corti, supra; Bayless v. Mull, supra, and cases cited therein; Gammon v. Wales, 115 Cal.App. 133, 138, 300 P. 988), the present case must be deemed to be controlled by the application of the general formula contained in said section 402, namely, that the owner is liable to the limited extent for the negligence of one to whom he has given permission, express or implied, to use or operate his car. Whether permission has been given and is present at the time of the accident is usually a question of fact. It is clear that the jury could decide from

all the evidence in this case that the permission for the use of the car was not foreclosed by any conduct of Rodrigues and that it continued up to and including the time of the collision with the plaintiffs' car. We conclude that the jury's implied finding that at the time of the accident the car was being used by Rodrigues with the permission of the defendant, Transport Motor Company, is supported both in fact and in law.

[6] The appellant contends that the trial court committed prejudicial error in excluding from evidence a transcribed statement of one of Rodrigues' companions made during an investigation prior to trial, a portion of which he signed and the balance of which he refused to sign. The companion was called as a witness by the appellant and on direct examination made statements inconsistent with a part of the transcribed statement. Counsel for appellant laid the foundation for his impeachment. He exhibited the writing to him containing the prior alleged contradictory statements, which he also read. The witness denied having made the statements. Counsel then called an impeaching witness, the investigator, who testified that Rodrigues' companion had made the prior inconsistent and contradictory statements. Counsel then offered the entire signed statement in evidence. The trial court sustained an objection to its introduction. We may assume that the introduction of the written statement, if made for the sole purpose of impeachment and not as proof of the facts therein stated, would have been proper. See Garrison v. Pearlstein, 68 Cal.App. 326, 333, 229 P. 348; Overton v. Harband, 6 Cal.App. 2d 455, 462, 44 P.2d 484 and cases cited. However, there was no prejudice to the appellant's rights by the court's refusal to receive the entire statement in evidence. The witness had already been discredited. Sec. 2049, Code Civ.Proc. On the record the ruling of the court in rejecting the entire statement may not be seriously questioned when only a portion of it was material for impeachment purposes, and the witness was otherwise discredited.

[7] Counsel for Rodrigues is charged by the appellant with having used intemperate language at the trial in resisting the charge of fraud against his client and insisting that the owner also be held liable. In the course of his efforts Rodrigues' counsel indicated to the jury that his client had no property. Counsel for the owner assigned the remark as misconduct and the court admonished the jury that the extent of the property of a litigant was not a matter for consideration. Rodrigues' counsel could not fairly defend the charge of negligence against his client. In fact he conceded it. He made no effort to minimize the damages. He expressly applied himself to conducting the defense on the theory that his client was not guilty of fraud and that in any event the owner was also liable. Without making any contention that the damages awarded were excessive, the appellant urges that the only proper concern of Rodrigues' counsel after conceding negligence was to minimize the damages, and that efforts beyond that constituted misconduct. Counsel for Rodrigues was justifiably concerned with freeing his client from the charge of fraud or conversion. The jury was properly admonished as to any remarks touching issues not in the case. The physical facts showed Rodrigues' negligence so obviously that an admission of negligence could not be deemed collusive. No question was so close that it may fairly be said it would have been resolved favorably to the appellant had counsel's remarks been tempered or omitted. This observation applies to other matters singled out by the appellant and assigned as misconduct on the part of counsel for Rodrigues. The record does not show any prejudice to the appellant's rights by reason of the alleged misconduct on the part of Rodrigues' counsel.

[8, 9] The appellant's final contention is that the court erred prejudicially in the refusal to give certain proffered instructions. We see no reason to question the exercise of the court's discretion in refusing to give an offered instruction that there was no legal duty on the part of the owner to inquire concerning Rodrigues' age before assenting to his use of the car. Rodrigues' age was not in issue. The appellant also requested certain instructions on the questions of fraud and conversion, and assigns as prejudicial error the court's refusal to read them to the jury. The appellant's argument assumes that the jury was not instructed on those questions and therefore that the court's refusal to give them affected the appellant's rights. The fact is that the trial court fully instructed the jury on the matter of the owner's liability if its assent was obtained by fraudulent representations, trick or device. The instructions given

were fully responsive to the issues and were not unfavorable to the owner's defense.

The judgments are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



61 Cal.App.2d 11

In re PEOPLES FINANCE & THRIFT CO. OF SAN DIEGO.

In re DAUGHERTY.

Civ. 3303.

District Court of Appeal, Fourth District, California.

Oct. 15, 1943.

1. Banks and banking ⇐317

Corporation Commissioner's general power of supervision of corporations organized under the Industrial Loan Act is not inconsistent with court's power of supervision over voluntary dissolution of such a corporation where corporation is solvent and has fully complied with all provisions of the Industrial Loan Act. Gen.Laws 1937, Act 3603, as amended, and Act 3603, § 11; Civ.Code, §§ 400, 403.

2. Banks and banking ⇐317

The right of Corporation Commissioner under Industrial Loan Act to liquidate a delinquent loan company depends upon impairment of company's capital or its violation of law and failure to comply with Commissioner's orders relating thereto within period allowed, and not upon the solvency or insolvency of the company. Gen.Laws 1937, Act 3603, § 11.

3. Banks and banking ⇐310

A corporation organized under the Industrial Loan Act is a special type of corporation intentionally surrounded with safeguards not provided for general corporations which were intended to protect the interests not only of creditors, but also of shareholders and all others interested in or affected by the business of such a corporation. Gen. Laws 1937, Act 3603, as amended.

4. Banks and banking ⇐317

Corporation Commissioner had jurisdiction under Industrial Loan Act to take charge of and liquidate a corporation organized under such act which failed to make good its capital impairment within 60 days pursuant to Commissioner's order, regardless of whether corporation was solvent in the sense of having sufficient assets to pay all creditors as distinguished from shareholders, and commencement of proceeding for voluntary dissolution under supervision of court did not deprive Commissioner of such jurisdiction. Gen.Laws 1937, Act 3603, as amended, and Act 3603, § 11; Civ.Code, §§ 400, 403.

5. Banks and banking ⇐317

Corporation Commissioner's order directing loan company to restore within 60 days the deficiency of its capital presently existing, stating approximate amount thereof, and directing a further audit to determine exact amount was a sufficient compliance with Industrial Loan Act to authorize liquidation of the company by Commissioner upon failure to comply with order, though further audit disclosed a larger capital deficiency than stated in order, and company had only 13 days thereafter to make good the deficiency. Gen.Laws 1937, Act 3603, § 11.

6. Banks and banking ⇐317

Loan company having made no effort to comply with Corporation Commissioner's order directing it to restore within 60 days the deficiency of its capital then existing could not complain because Commissioner amended original order by fixing deficiency at an amount in excess of approximate amount stated in original order and company under original order had only 13 days after such amendment to restore the deficiency. Gen.Laws 1937, Act 3603, § 11.

7. Banks and banking ⇐317

A corporation organized under the Industrial Loan Act was not entitled to proceed with the voluntary liquidation of its affairs under supervision of the court while refusing to comply with Corporation Commissioner's order directing it to restore the deficiency of its capital. Gen.Laws 1937, Act 3603, as amended, and Act 3603 § 11; Civ.Code, §§ 400, 403.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the voluntary winding up of the affairs of the Peoples Finance & Thrift Company of San Diego, a corporation, wherein Edwin M. Daugherty, as Commissioner of Corporations of the State of California, filed a petition to terminate such proceedings asking that commissioner be permitted to take possession of the property and business of the corporation. From a judgment vacating court order assuming supervision over liquidation proceeding and authorizing the Commissioner of Corporations to proceed with the liquidation of the affairs of the corporation and from an order denying its motion for a new trial, the Peoples Finance & Thrift Company of San Diego appeals.

Appeal from order denying a new trial dismissed, and judgment affirmed.

Wright, Thomas & Dorman, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The Peoples Finance and Thrift Company of San Diego was organized in 1923 under the Industrial Loan Act of this state, Stats.1917, Chap. 522, p. 658; Deering's Gen.Laws 1937, Act 3603, as amended. Its capitalization was $150,000 and by 1941 it had outstanding investment certificates in the amount of $365,096.43.

On August 13, 1941, after auditing its books, the commissioner of corporations issued and served an order directing the corporation to make good within sixty days from the date thereof a deficiency and impairment of its capital in the approximate amount of $125,000, directing the corporation to employ a disinterested certified public accountant to make an audit and to report after determining the exact extent of the impairment of capital, ordering the corporation to cease from certain practices in connection with the making of loans, and further ordering it to show cause, on a certain date, why said order should not be observed and made final. Such a further audit and report was made, followed by a hearing at which findings of fact were made, and on September 30, 1941, the commissioner issued an order making the order of August 13, 1941 final but amending the same by stating that the amount of the impairment of capital was $143,014.72.

During the month of October, 1941, the corporation applied for a license as a personal property broker and attempted to amend its articles of incorporation by deleting all reference therein to the Industrial Loan Act, by reducing its stated capital from $150,000 to $60,000, and by changing its corporate powers. Nothing further seems to have been done in either of these matters or with respect to eliminating the outstanding investment certificates which had been issued under the authority of the Industrial Loan Act.

On November 10, 1941, the commissioner prepared a written notice of taking possession of the property and business of the corporation pursuant to section 11 of the Industrial Loan Act, which notice stated that this was being done because the corporation had failed to make good the impairment of its capital within sixty days of the requisition and order served upon it. On the same day, the commissioner designated one of his deputies to assist him in liquidating the affairs of the corporation. When this deputy presented this notice and attempted to take possession, on the afternoon of November 12, 1941, he was informed that in the forenoon of that day the corporation had filed a petition in the superior court of San Diego County setting forth that it had elected to voluntarily wind up its affairs and dissolve pursuant to the provisions of section 400 of the Civil Code and asking for court supervision of such dissolution under the provisions of section 403 of that code. The deputy commissioner was then served with a copy of the court order assuming supervision over such liquidation.

On January 30, 1942, the commissioner of corporations filed a petition in the proceeding in the superior court alleging, in general, the facts above stated and asking the court to terminate the proceedings which had been instituted by the corporation and to permit the commissioner to take possession of the property and business of the corporation as provided in section 11 of the Industrial Loan Act. In its answer thereto the corporation alleged, among other things, that the impairment of its capital did not exceed $65,000, and that it was in a solvent condition, and denied that under the statutes the commissioner had the right or authority to take possession of its property and business or to liquidate the same.

After a hearing the court found in favor of the commissioner and entered a judgment vacating its prior order, and authorizing the commissioner of corporations to proceed with the liquidation of the affairs of the corporation as provided in the Industrial Loan Act. A motion for a new trial was denied and the corporation has appealed from that order and from the judgment.

[1] It appears without question that this corporation's capital was seriously impaired and the main question presented is whether, under these circumstances, such a corporation has the right to voluntarily dissolve and liquidate its affairs. The appellant argues that it was solvent in the sense that it had sufficient assets to pay all of its creditors, as distinguished from its shareholders, that the public is not interested so long as the corporation was discontinuing business, and that the same rule should be applied here as was applied in the case of Daugherty v. Superior Court of Imperial County, 56 Cal.App.2d 851, 133 P.2d 827. In that case this court held that there was no inconsistency between the general power of supervision given to the corporation commissioner by the Industrial Loan Act and the power of supervision over voluntary dissolution given to the court by section 403 of the Civil Code, in cases where the corporation was solvent and had fully complied with all of the provisions of the loan act. We are here concerned not with the general power of supervision given to the commissioner by the Industrial Loan Act but with the more specific power and duty given him by section 11 of that act in a case where a corporation has allowed its capital to become impaired, or is failing to comply with the statutory or other requirements applicable to such a corporation. Section 11 of the Industrial Loan Act provides, among other things, that if the commissioner has reason to conclude that the capital of such a corporation is impaired he may by an order direct the corporation to make good the deficiency within sixty days of the date of such order, that he may also order the discontinuance of any unsafe or injurious practices, that such orders shall require the corporation to show cause why such order should not be observed, and that such orders may be made final upon such a hearing and shall then immediately be complied with by the corporation. It is then provided that such a corporation shall have ten days after such order is made final in which to commence a suit to restrain enforcement of the order and that otherwise, upon failure of the corporation to comply with the order, the commissioner may take possession of the property and business of the corporation and retain such possession until the corporation resumes business or its affairs are finally liquidated. It is further provided that on taking possession the commissioner may proceed to liquidate the affairs of the corporation in the manner provided by the Bank Act.

The real question here is not as to any power of supervision in the court over the acts of the commissioner of corporations in liquidating such a corporation, but is as to whether the commissioner of corporations or the officers of such a corporation shall have charge of the process of liquidation of such a corporation when its capital is impaired and it has failed to comply with the orders of the corporation commissioner. In effect, the appellant's contention is that while section 11 of the Industrial Loan Act would apply when such a corporation desires to go on doing business, it has no application where the corporation, being solvent, elects to dissolve and wind up its affairs. The statute does not so provide.

[2-4] Under section 11 of the Industrial Loan Act the right of the commissioner to liquidate a delinquent loan company is made dependent not upon the solvency or insolvency of the corporation, but on the impairment of its capital or its violation of law and its failure to comply with the orders of the commissioner relating thereto within the period allowed. Under such circumstances, to permit such a corporation to elect to voluntarily liquidate instead of complying with the orders of the commissioner and to permit the officers of the corporation to remain in charge of the liquidation under the general provisions of the Civil Code, would be clearly inconsistent with the express terms of section 11 of the Industrial Loan Act. This is a special type of corporation, intentionally surrounded with safeguards not provided for general corporations and which were undoubtedly provided for the purpose of protecting the interests not only of creditors but of shareholders and all others interested in or affected by the business of such a corporation. Under the plain terms of the statute the commissioner is authorized, under the circumstances here

appearing, to take charge of such a corporation and to liquidate its affairs in the manner provided by the Bank Act.

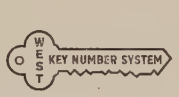
The appellant further contends that, in any event, the commissioner did not properly comply with the requirements of section 11 of the Industrial Loan Act in that the order of August 13, 1941, referred to an impairment of capital then existing in an approximate amount of $125,000 whereas the order of September 30, amended this by stating the deficiency as "the sum of $143,014.72." It is argued that had the appellant raised the $125,000 mentioned in the original notice it would have been required to raise an additional $18,000 under the order of September 30, 1941, and that with respect to this additional amount it would have had but thirteen days and not sixty days as provided for in the statute. It is also argued that an erroneous basis was used in computing the amount of the impairment of capital in that certain reserve funds were not taken into account, with the result that the impairment of capital was only $80,505.90 instead of $143,014.72.

[5, 6] The order of August 13, 1941, directed the appellant to restore "the deficiency and impairment of its capital presently existing" within sixty days from the date of that order. It also stated that the deficiency was in the approximate amount of $125,000. We think this was a sufficient compliance with the statute. The facts were known to, or available to, the officers of the appellant and the order contemplated that the exact amount of the deficiency should be determined by a further audit which was ordered made. The real effect of the order was to direct the corporation to restore such deficiency as actually existed. Regardless of whether the appellant would have been entitled to more time in which to restore the additional $18,000 it is not contended that any effort was ever made to restore any part of the deficiency or impairment of capital which admittedly existed. It may be further observed that even if the appellant was entitled to sixty days after the order of September 30, 1941, in which to restore its capital it did not do so within that time, or at all. The fact that the appellant started dissolution proceedings and applied for the supervision of the superior court under section 403 of the Civil Code before the commissioner took possession is not controlling. This was not a matter to be settled by a "race for the court house", and no offer or attempt was at any time made to replace or restore any part of the capital deficiency.

[7] Under any view of the matter the appellant was not entitled to proceed with the voluntary liquidation of its affairs while refusing to comply with the orders made pursuant to section 11 of the Industrial Loan Act. It follows that the trial court acted correctly in setting aside its previous order whereby it had authorized and directed the appellant to proceed with the liquidation of its affairs under the direction of that court.

The attempted appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



61 Cal.App.2d 1

CALDWELL v. MILLER et al.
Civ. 3222.

District Court of Appeal, Fourth District, California.

Oct. 15, 1943.

1. Automobiles ⇐242(1)

An automobile guest suing for injury sustained in accident had burden of proving intoxication or willful misconduct on part of driver. Vehicle Code, § 403, St. 1935, p. 154.

2. Automobiles ⇐192(12)

In determining host's liability for injuries to guest, driver's alleged intoxication would not be imputed to host as owner of automobile wherein he was riding. Vehicle Code, § 403, St.1935, p. 154.

3. Appeal and error ⇐1011(1)

The court's finding on conflicting evidence that driver of automobile was not intoxicated could not be disturbed on appeal.

4. Automobiles ⇐193(3)

Where owner and driver of automobile accompanied by girls traveled in search

of amusement, driver was not acting as owner's "agent" so as to render owner liable for girl's injuries resulting from accident caused by driver. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Helen Jean Caldwell, a minor, by and through her guardian ad litem, A. Dean Caldwell, against Athel Miller and Lee M. Langford for injuries sustained in an automobile accident, wherein the first-named defendant was never served and never appeared at the trial. From an adverse judgment, plaintiff appeals.

Affirmed.

Duckworth, Mussell & King, of San Bernardino, for appellant.

Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile accident. About 8 o'clock P. M. on March 29, 1941, the plaintiff and another girl, both about 20 years of age, started out with the two defendants in search of amusement. They first went to a cocktail bar in San Bernardino where they remained about half an hour, during which each of the boys had a bottle of beer. They then went to a cocktail bar in Colton, traveling in an automobile owned by the defendant Langford but at Langford's request Miller did the driving. They remained at this place about three hours, during which each of the boys had two or three drinks of whiskey followed by short bottles of beer. Shortly after midnight they proceeded to a similar place of entertainment some five or six miles east of San Bernardino, Miller again doing the driving. They remained there about half an hour but no intoxicating liquor was consumed. They then started for San Bernardino with Miller driving the car. He negotiated several bends in the road successfully but a few miles farther on, while proceeding along a straight stretch of highway, the car ran off the left side of the highway and struck a tree some ten feet from the south edge of the pavement, causing the injuries of which the plaintiff complains.

In this action which followed, Miller, the driver of the car, was named as a defendant but was never served and he did not appear at the trial. After the suit was filed, but before the action was tried, the plaintiff married Miller. The action proceeded to trial against Langford alone before the court sitting without a jury. The court found in all respects in favor of this defendant and the plaintiff appeals from the judgment.

[1-3] The court found, and the appellant concedes, that she was riding as a guest in this car. It was therefore incumbent upon her to prove intoxication or willful misconduct upon the part of the driver of the car. Sec. 403 of the Vehicle Code, St.1935, p. 154. The complaint did not allege, and there was no attempt to prove willful misconduct upon the part of this driver. Not only would intoxication on the part of the driver not be imputed to the respondent as owner of the car (Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407), but the court found as a fact that Miller, at the time in question, was not under the influence of intoxicating liquor and was not intoxicated. It is not contended that the evidence is insufficient to support this finding, the only argument in this connection being that the evidence would sufficiently support a finding of intoxication on the part of the driver of the car. There was no direct evidence of such intoxication and the most that can be said is that the evidence would support a finding either way on that issue. The usual rule, therefore, applies and the court's finding may not be disturbed on appeal.

[4] The appellant further contends that since the respondent was present in the car Miller was acting as his agent in driving the same, and that the respondent is liable for the acts of Miller as his agent. Not only did the court find against the appellant on the question of intoxication on the part of Miller, but it was expressly found that Miller was not acting as the agent of the respondent at the time in question. This finding is not attacked and a review of the evidence discloses that it could not be successfully attacked.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

SECREST v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 14091.

District Court of Appeal, Second District, Division 1, California.

Oct. 4, 1943.

1. Death ⇐11

An action for wrongful death under the Code of Civil Procedure is an entirely new action in the sense that it did not previously obtain under the common law and is not a continuation or revival of cause of action subsisting in decedent before death, but is founded upon injury causing death as it affects the heirs and personal representative and is entirely distinct from that vested in injured person before death. Code Civ.Proc. §§ 376, 377.

2. Death ⇐25

That injured person recovers damages against or settles with wrongdoer before death does not preclude accrual to his heirs of a cause of action for his death resulting from the same injury. Code Civ. Proc. §§ 376, 377.

3. Judgment ⇐540, 720

A former judgment operates as a bar against a second action upon the same cause, and, in a later action upon a different claim or cause of action, it operates as an "estoppel" or conclusive adjudication as to such issues in second action as were actually litigated and determined in first action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

4. Death ⇐24

Though one heir may be barred from recovering damages for wrongful death of the deceased because of the negligence of such heir contributing to death, such negligence will not affect recovery by another heir who is not at fault. Code Civ.Proc. §§ 376, 377.

5. Judgment ⇐618

Where defendants, in action by husband and wife for personal injuries sustained when automobile driven by wife collided with defendants' bus, denied negligence and pleaded contributory negligence of wife, judgment denying recovery estopped wife from maintaining action against same defendants for wrongful death of husband caused by the same injuries, wherein the same defenses were pleaded. Code Civ.Proc. §§ 376, 377, 597.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ida L. Secrest against the Pacific Electric Railway Company and others to recover for the wrongful death of plaintiff's husband as a result of injuries suffered in a collision between automobile in which plaintiff's decedent was riding and a bus. From a judgment that plantiff was estopped from prosecuting the action by adverse judgment entered in an earlier action by plaintiff and decedent for personal injuries arising out of the same collision, plaintiff appeals.

Judgment affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, O. O. Collins, and Malcolm Archbald, all of Los Angeles, for respondents.

YORK, Presiding Justice.

By the instant action, appellant, the widow and only heir at law of Frank M. Secrest, deceased, seeks to recover damages for the death of the latter on August 1, 1941, as a result of injuries sustained by him on April 6, 1940, when an automobile driven by appellant and in which decedent was riding collided with a bus of the Los Angeles Motor Coach Company, at the intersection of Wilshire Boulevard and Parkview Street in the City of Los Angeles. The complaint alleges general negligence on the part of the corporate respondents, who owned the bus, and of respondent Fritch, who was operating the bus at the time of the collision.

Respondents by their answer deny negligence on their part and plead two affirmative defenses:

1. Contributory negligence of appellant as driver of the automobile;

2. Estoppel by judgment rendered in an action initiated by appellant and her husband for personal injuries arising out of the same collision against the same defendants and involving the same issues, to-wit, an allegation and denial of negligence by defendants, and an affirmative defense of

contributory negligence of Ida L. Secrest; that said issues were tried by a jury in May of 1941, resulting in a verdict for defendants, upon which judgment was entered May 16, 1941, which judgment is now final.

Pursuant to respondents' motion under section 597 of the Code of Civil Procedure, the issue of the affirmative defense of estoppel was segregated, and trial proceeded solely upon that defense. Thereafter, the trial court, sitting without a jury, found that the issues presented by the instant litigation were determined adversely to appellant in the prior action for personal injuries, and since the issues upon which liability here depended were identical to those in the former trial, appellant was estopped from prosecuting the instant action for wrongful death.

This appeal is prosecuted from such judgment.

Appellant urges that the judgment is contrary to the law, in that an action for wrongful death in this state is a new cause of action in favor of the heirs as beneficiaries based upon their independent pecuniary injury suffered by the loss of a relative.

[1, 2] Respondents concede that an action for wrongful death under section 377 of the Code of Civil Procedure is a new cause of action. The nature of such action is discussed in 8 Cal.Jur. 958, sec. 19, as follows: "The action given by the California statute is, in general, the same as that accorded by Lord Campbell's Act. It is a new action—that is, one that had not previously obtained under the common law—and not a continuation or revival of an old action or one that subsisted prior to the death. It is founded upon the injury causing death as it affects the heirs and personal representatives and not as it affects the decedent individually. In some states the acts are but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally. But it is settled by many decisions in California that a plaintiff suing under section 376 or section 377 of the Code of Civil Procedure does not represent the right of action which the deceased would have had if the latter had survived the injury. A new right is created entirely distinct from that which was vested in the injured person before his death. The right of action vested in a decedent abates and a new and independent cause of action for damages for his death immediately arises in favor of the heirs or personal representatives. Such right of action is wholly independent and it is no less independent because it has its origin in the same tort. * * * Under the California statute the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs."

In support of her contention appellant cites the cases of Earley v. P. E. Ry. Co., 176 Cal. 79, 167 P. 513, L.R.A.1918A, 997, and Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999. In the Earley case, defendant presented a release of all claims and causes of action on account of injuries sustained by plaintiff as a bar to the action for wrongful death. The court there held that a new cause of action with a different measure of damages had accrued, and despite the fact that the injured party, prior to death, may have received a large sum of money in consideration for the release, the action for wrongful death could still be maintained, because it was an action which belonged to the heirs.

In the Blackwell case, it was held that the mere fact that a person during his lifetime had recovered damages for personal injuries did not of itself prevent his widow from recovering as an heir the damages sustained by her on account of his death resulting from such injuries.

It will be noted that in both of the cases cited by appellant, a *recovery* was had by the plaintiffs against the defendants on account of the personal injuries sustained by them, while in the instant case such recovery was denied in the personal injury action, and a verdict rendered by the jury in favor of the defendants.

By rendering such verdict in favor of defendants in the personal injury action, the jury presumptively found, either that defendants were free from negligence, or that plaintiffs through want of ordinary care contributed to their own injuries. Appellant in the instant action for wrongful death was the driver of the automobile involved in the collision resulting in the injuries and death, and in addition to their defense of estoppel, respondents set up the affirmative defense of contributory negligence on the part of appellant.

[3] It was stated in the case of Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918, cited by respondents, as follows: "A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. * * * The final adjudication of an inferior court made within its jurisdiction is binding and conclusive upon a higher court in a subsequent action. * * * In the superior court action herein, the right of plaintiff, Todhunter, to recover for personal injuries sustained by him in the automobile collision depended upon his establishing the negligence of appellant, Smith, and his own freedom from contributory negligence. These are the identical issues which were involved in the municipal court action, wherein Todhunter sought damages for injury to his automobile truck sustained in the same collision upon allegations set forth by him 'by way of cross-complaint,' which in legal effect constituted a counterclaim. By the judgment of the municipal court he was denied recovery. Smith having advanced the plea of res judicata by his answer in the superior court action herein, Todhunter cannot relitigate these issues."

In an annotated note appearing in 99 A.L.R. 1091, under the heading "Judgment in favor of defendant in an action for personal injuries as a bar to suit for death caused by such injuries, and vice versa", the following statements are made:

"* * * by the great weight of authority, the right of action for wrongful death created under statutes modeled after Lord Campbell's Act is dependent upon the existence in the decedent, at the time of his death, of a right of action to recover damages for his injuries; and consequently a judgment in his favor recovered during his lifetime is a bar to an action for wrongful death instituted after his death by his widow or personal representative, since all right of recovery of the injured person is merged in or extinguished by such judgment, and no right of recovery exists at the time of the death to satisfy the requirements of the above stated rule.

"If a judgment in favor of the injured party would have the effect of barring the cause of action for the wrongful death, it seems obvious that a judgment adverse to him would a fortiori have the same effect. And while there is authority to the contrary (citing cases) such is the ultimate conclusion reached by the weight of authority, either upon the analogy furnished by the rule and its reasons prevailing in the case of a judgment in favor of the injured party, or upon independent grounds, such as res judicata, or estoppel by judgment, etc. (citing cases.) * * *

"The principal objection to this rule has been that since the cause of action in favor of the dependents is a new cause of action and one independent of the cause of action for the injuries (which at common law dies with the injured person), and since the action is not between the same parties, and involves different elements of damages, the doctrine of res judicata is inapplicable and therefore *a judgment adverse* to the injured person in an action commenced by him during his lifetime to recover damages for his injuries is not a bar to an entirely new action under the death statute, commenced by or in behalf of the statutory beneficiaries of the deceased, to recover damages resulting to them from the death of the decedent.

"On the other hand, the counter argument against this contention, supported by the weight of authority, is that such a judgment, if rendered on the issues raised in the death action, strikes at the very foundation of the cause of action for death, since it negatives the existence of conditions which would charge the defendant with responsibilty for the death." (Emphasis added.)

[4] In the case of Bowler v. Roos, 213 Cal. 484, 2 P.2d 817, it was held that while one heir might be barred from recovering damages for the wrongful death of the deceased because of the contributory negligence of such heir, this fact will not defeat recovery by another heir, who is not at fault.

In Patania v. Yellow-Checker Cab Co., 102 Cal.App. 600, 604, 283 P. 295, 297, it was held that: "Where a parent sues to recover damages for a child's wrongful death, recovery may not be had if the negligence of the parent proximately contributed thereto."

[5] From the foregoing, it would appear that where a recovery was had and a liability established against defendants in the personal injury action, the additional action for wrongful death accrues under

the provisions of section 377 of the Code of Civil Procedure. However, when the identical issues joined by the pleadings in the action for wrongful death were determined adversely to plaintiffs in the prior personal injury action, under facts and circumstances similar to those presented by the instant case, the defense of estoppel by judgment must be sustained; because, the decision of the court in the prior action "negatives the existence of conditions which would charge the defendant with responsibililty for the death." 99 A.L.R, supra.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



60 Cal.App.2d 751

CERANSKI et al. v. MUENSCH et al.
Civ. 14053, 14062.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1943.

As Corrected Nov. 4, 1943.

1. Automobiles ⇐242(6)

An inference of automobile driver's agency for automobile owner may be drawn from proof of driver's use of automobile with owner's permission.

2. Automobiles ⇐242(6)

The inference of automobile driver's agency for automobile owner, permitting use of automobile by driver is dispelled as matter of law when rebutted by clear, positive, and uncontradicted evidence not open to doubt, though produced by party asserting such agency.

3. Automobiles ⇐242(6)

In action for injuries to occupants of automobile colliding with defendants' automobile, uncontradicted evidence that driver of defendants' automobile was employed by another than defendants and had borrowed automobile for purpose of going to his place of employment dispelled as matter of law inference of his agency for defendants.

4. Costs ⇐194

The statutes respecting costs do not require that party claiming costs shall have personally incurred obligations enumerated in memorandum of his items of costs. Code Civ.Proc. § 1033.

5. Costs ⇐194

The prevailing party in action may file memorandum of his items of costs, though disbursements for such items have not been made. Code Civ.Proc. § 1033.

6. Costs ⇐93

Defendants in an action incur legal liability to pay costs of litigation if plaintiff prevails, though some other party may have agreed to reimburse defendants for or to pay all expenses of litigation.

7. Costs ⇐93

The fact that automobile owners' liability insurance carrier agreed to pay costs of defense of action against owners for damages arising from operation of automobile did not absolve unsuccessful plaintiffs in such action from obligation to pay costs. Code Civ.Proc. § 1032.

8. Appeal and error ⇐936(1)

On appeal from order denying unsuccessful plaintiffs' motion to tax costs, it must be assumed that trial court accepted as true statements in defendants' affidavit, supporting their items of costs for expenses incurred in serving subpœnas on plaintiffs to appear for taking of depositions, that defendants failed in their effort to take depositions by stipulation and that plaintiffs did not appear as commanded by such subpœnas. Code Civ.Proc. §§ 1032, 1032a, 1033.

9. Costs ⇐154

A prevailing party is entitled to reasonable cost of taking other party's depositions, unless it appears that taking thereof was unnecessary. Code Civ.Proc. § 1032a.

10. Costs ⇐176, 189

Where defendants failed in their efforts to take plaintiffs' depositions by stipulation and plaintiffs did not appear for such purpose, as commanded by subpœnas served on them, superior court did not abuse its discretion in disallowing plaintiffs' objections, after judgment on directed verdict for defendants, to items in defendants' memorandum of costs for expenses incurred in serving subpœnas and

for reporter's fees. Code Civ.Proc. §§ 1032, 1032a, 1033.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Marya Ceranski and others against Harry Muensch and others for injuries suffered in an automobile collision. From a judgment for defendants and an order denying plaintiffs' motion to tax costs, plaintiffs appeal.

Affirmed.

John C. Miles, and Davis, Grua, Sanborn & Lindley, all of Los Angeles, for appellants.

James V. Brewer, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiffs commenced this action to recover damages for injuries which they suffered when an automobile driven by plaintiff Edmond Sobanski collided with an automobile which was owned by two of the defendants. Plaintiffs have appealed from a judgment entered after the jury had been instructed to return a verdict for defendants. There is also an appeal from an order denying plaintiffs' motion to tax costs.

The accident in question occurred on January 28, 1941. In their complaint plaintiffs alleged that defendant Harry Muensch negligently drove the car that collided with the car in which plaintiffs were riding; that Harry Muensch was a minor and that defendants Arnold G. and Bertha Muensch, parents of Harry Muensch, became responsible for the damages occasioned by the accident because they had procured the driver's license for Harry Muensch; that defendants were the owners of the automobile involved in the collision. At the trial it was definitely established that the car was driven by one David Henderson and not by Harry Muensch; that Harry Muensch was not a minor at the time of the accident; and that the car was owned by Harry Muensch and Bertha Muensch. At the close of plaintiffs' evidence the trial court granted a motion for a nonsuit as to Arnold G. Muensch and when both sides completed their evidence the court directed the jury to return a verdict in favor of the other two defendants.

[1, 2] It was established that David Henderson was available for personal service of process, but he was not made a party defendant as required by section 402(c) of the Vehicle Code, St.1937, p. 2353, in cases where liability is predicated upon imputed negligence. Plaintiffs do not now claim that they are entitled to recover under the imputed negligence section of the Vehicle Code but they do contend that an inference of agency arose from the fact that Henderson was using the car with the owners' consent and that the issue of agency should have been submitted to the jury. A number of authorities support the contention that an inference of agency may be drawn from proof of permissive use of an automobile. See Montanya v. Brown, 31 Cal.App.2d 642, 88 P.2d 745, where the authorities are listed and reviewed. But since the decision in Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, it is thoroughly established in this state that the inference of agency is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposing party. This rule has been approved in a number of later decisions, notably Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Hicks v. Reis, 21 Cal.2d 654, 661, 134 P.2d 788; Montanya v. Brown, supra.

[3] The uncontradicted evidence in the present action brings the case squarely within the rule enumerated in the Engstrom case. It was established that Henderson was not employed by defendants but was in fact employed by another party and had borrowed the car for the purpose of going to his place of employment. The court did not err in directing the verdict for defendants.

[4-7] On their appeal from the order denying the motion to tax costs appellants contend that the court erred in not striking out the entire cost bill of defendants. Their motion in the trial court was made "on the ground that said items of cost were paid by the Hartford Insurance Company and that there was a valid contract of insurance between said company and the defendants in which said defendants so insured were not obligated for said costs". To support their position they filed an affidavit by their attorney in which he states on information and belief that the costs

and expenses of the defense of the action were, according to contract, to be paid by the insurance company. Without refuting the statements contained in the affidavit, defendants point to a condition in the insurance policy in which it is provided that "in the event of any payment under this policy the Company shall be subrogated to all the insured's rights to recover therefor. * * *" It is provided in section 1032 of the Code of Civil Procedure that "costs are allowed of course: * * * To the defendant upon a judgment in his favor * * * in an action for the recovery of money or damages". In section 1033 of the Code of Civil Procedure it is provided that costs must be claimed by the filing of a memorandum "of the items of his costs and necessary disbursements in the action * * * which memorandum must be verified by the oath * * * stating * * * that the disbursements have been necessarily incurred in the action. * * *" The code sections contain no requirement that a party claiming costs must have personally incurred the obligations enumerated in the memorandum. The prevailing party may file a memorandum covering his items of costs even though disbursements for such items have not been made. Ray v. Clark, 57 Cal.App. 467, 469, 207 P. 501. Defendants incurred legal liability to pay the costs of litigation even though some other party may have agreed to reimburse them or to pay all the expenses of the litigation. It must be taken for granted that defendants expended a sum of money to procure the insurance policy by which the insurance carrier agreed to pay the costs of the defense of an action brought against them for damages. The fact that defendants thus procured the means of defending themselves in actions of this character does not furnish an avenue for plaintiffs to escape the obligation which they incurred when they unsuccessfully attempted to collect damages from defendants by an action at law.

[8-10] Plaintiffs make express objection to items in the memorandum of costs in which claims are made for expenses incurred in serving subpœnas on plaintiffs calling for their appearances to have their depositions taken, and for the per diem fees of the reporter on occasions when plaintiffs did not appear according to the commands of the subpoenas. Contradictory affidavits were filed covering the circumstances surrounding the taking of the depositions. From the affidavit filed by defendants, which it must be assumed the trial court accepted as true, it appears that defendants failed in their effort to take the depositions by stipulation; and that although subpœnas were served on plaintiffs, they did not appear as commanded. A prevailing party is entitled to the reasonable cost of taking depositions unless it appears that the taking of the depositions was unnecessary. Sec. 1032a of the Code of Civil Procedure. We find no abuse of discretion on the part of the court in disallowing the objections made by plaintiffs to the items in question.

The judgment and the order appealed from are affirmed.

MOORE, P. J., and McCOMB, J., concur.



60 Cal.App.2d 780

In re RICHARDS' ESTATE.

FLYNN v. BALL et al.

Civ. 14161.

District Court of Appeal, Second District, Division 1, California.

Oct. 8, 1943.

Hearing Denied Dec. 6, 1943.

1. Appeal and error ⇐907(3)

Upon a direct appeal on the judgment roll alone, it will be assumed in support of judgment that all objections to the evidence in support of findings were waived.

2. Executors and administrators ⇐314(12)

Where appeal from order of partial distribution of estate of a decedent was taken on judgment roll alone, reviewing court was required to presume that evidence was introduced which would support trial court's findings as made without any objection upon part of appellant, and that all parties in court below treated the facts presented as issues properly before the court in the proceeding.

3. Wills ⇐439

The prime duty of court in interpretation of a will is to determine, if possible, testator's intention.

4. Wills ⇐437(1)

Parol evidence may be admissible for purpose of aiding court in determining testator's intention.

5. Executors and administrators ⇐314(12)

Where, after a hearing, a probate court based its construction of will upon the evidence presented, appellate tribunal could not, without having evidence before it, say that a different construction should have been given, unless it was a case where no such evidence was admissible.

6. Executors and administrators ⇐314(12)

Where probate court, basing its construction of will upon evidence presented, determined that testatrix in bequeathing to friend $2,000 to be put in trust for flowers to be put on the graves of testatrix and her parents once each week used word "trust" in popular sense, so that bequest was not violative of constitutional inhibition against perpetuities, reviewing court could not disturb probate court's determination on an appeal taken on the judgment roll alone. Probate Code, § 106; Const. art. 20, § 9.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge Pro Tem.

Proceeding in the matter of the estate of Maude Elizabeth Richards, deceased. Ben H. Brown, administrator with the will annexed, petitioned the court for partial distribution, which did not attempt to distribute the bequests to W. H. Ball. A will contest was filed by Florence Van Valkenburg Flynn against W. H. Ball, which contest terminated in a dismissal. W. H. Ball then filed a petition for the partial distribution of one of cash bequests made to him, and Florence Van Valkenburg Flynn filed objections thereto. From an order for partial distribution, Florence Van Valkenburg Flynn appeals.

Affirmed.

Bailey & Poe and Rufus Bailey, all of Los Angeles, for appellant.

W. Woodson Wallace and Ernest C. Griffith, both of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal from a portion of an order which decrees partial distribution of the assets of the estate of Maude Elizabeth Richards, deceased, to W. H. Ball, being a cash legacy of $2,000 plus $60.67 interest.

The decedent, Maude Elizabeth Richards, a single woman, died on March 23, 1941, leaving an holographic will, dated May 21, 1939. This will was admitted to probate and, no executor being named, Ben H. Brown, Public Administrator, was appointed administrator with the will annexed, on April 25, 1941. The testatrix declared in her will that she had no near relatives, and she disposed of specific real and personal property to friends and acquaintances, and in that connection stated: "I declare that I have no near relatives to the best of my knowledge, but in the event of any person or persons coming forth with a claim to be my direct heirs by virtue of any relationship, I give, devise & bequeath to every person setting up such a claim the sum of $1.00 dollar." There is no residuary clause contained in the will. The testamentary document also contained the following language: "I give, devise, and bequeath to Mr. W. H. Ball of Los Angeles the sum of five thousand dollars $5000.00 (an extra two thousand $2000.00) to be put in trust for flowers to be put on the three graves in Rosedale Cemetery once each week". It is the construction and interpretation placed on this last quoted section by the trial court with which we are concerned upon this appeal.

The Public Administrator proceeded with the administration of the estate and on December 10, 1942, petitioned the court for partial distribution. The petition sought to distribute certain specific gifts, devises and a percentage of the cash bequests. It did not, however, attempt to distribute the cash bequest of $5,000 to W. H. Ball, nor the $2,000 "to be put in trust for flowers". W. H. Ball filed objections to the petition for partial distribution and asked for partial distribution of 75% of the cash bequests of $5,000 and $2,000.

Appellant herein, Florence Van Valkenburg Flynn, allegedly a cousin of the decedent, contested the validity of the will, which contest terminated in a dismissal which was filed December 4, 1942. Upon the filing of the petition of W. H. Ball for the partial distribution of the $2,000 "flower fund", appellant Flynn filed objections thereto upon the ground that said portion of the will was invalid and an ineffectual attempt to create a trust, and that said $2,000 should fall into the residuum of the

estate and be distributed to her as the sole heir at law of the decedent.

After hearing by the court, the $2,000 was ordered distributed to W. H. Ball as an absolute gift, and the court found that "said testatrix did not intend, by the use of the words 'to be put in trust for flowers to be put on the three graves in Rosedale Cemetery once each week', * * * to create, and did not create, any trust, precatory or otherwise, in reference thereto, and did not use said words or any of them in a technical sense, and no imperative, binding or enforcible trust, in a legal sense, was intended or arose by reason of the same, but said words were merely intended to express a wish or desire of the testatrix, leaving the matter entirely to the discretion of said W. H. Ball. That said bequest of $2000 was and is an absolute bequest to him. * * *"

The court made extensive and detailed findings in which it is recited that: "The account current of the administrator, settled contemporaneously herewith, shows that after distribution of the whole of all specific legacies and devises there will remain in his hands a large amount for distribution under the laws of succession." "That the testatrix, Maude Elizabeth Richards, died on March 23, 1941, leaving as her Last Will and Testament the document dated May 21st, 1939, heretofore duly admitted to probate herein. That in and by said holographic Will the testatrix declared she had no near relatives, and disposed of specific real and personal property directly to her friends and acquaintances, and bequeathed the sum only of $1.00 to every person claiming to be an heir by virtue of any relationship. That said decedent was buried in Rosedale Cemetery, at Los Angeles, California, in a grave forming part of a family plot, in which was interred the remains of her mother, who died in the month of October, 1924, and of her father, who died in the month of May, 1925. That such three graves are the only graves in Rosedale Cemetery occupied by any members of testatrix's family, or in which she was interested. That said Rosedale Cemetery is one of the oldest cemeteries in Los Angeles City, California, and that it is within the knowledge of the court, as a matter of common and general knowledge, that said cemetery has for many years last past provided perpetual care of the graves within it. That said W. H. Ball, who at all times was, and now is, a single man, was a close friend of the testatrix, and of both her parents. That such acquaintance commenced in the year 1918, and continued until their deaths. That said W. H. Ball was an intimate friend of testatrix's father, R. D. Richards; that he knew him well, personally and in a business way, during his lifetime; that he frequently visited the home of testatrix's father and mother during their lifetimes, in Los Angeles. *That said testatrix and the said W. H. Ball together had, for a period of approximately sixteen years, commencing with the death of her parents, decorated their graves with flowers at least once each week, until testatrix's death, and that said W. H. Ball generally paid for the same out of his own funds. That on many occasions when said testatrix was absent from the City of Los Angeles, the said W. H. Ball alone placed flowers on the graves of said testatrix's parents, as a friend of the family and in keeping with such custom. That testatrix knew that the said W. H. Ball had carried out such custom as a friend of the family. That following the death of testatrix the said W. H. Ball has continued the said custom of decorating with flowers the graves of testatrix's parents, and in addition her own grave.*" "That the said testatrix Maude Elizabeth Richards was a musician and singer for many years. *That her Will was an holographic will, drawn solely by her; that said testatrix had no legal training and was not familiar with or experienced in the use of legal terms, expressions or forms, and was unacquainted with technical words, and that she did not confer or consult with her attorney in reference to said Will, or ever show the same to him. That said attorney had been such from 1933 to the time of her death.*" (Emphasis added)

The only questions involved on this appeal, which is on the judgment roll alone, is whether the language used by the decedent bequeathing to W. H. Ball "an extra two thousand $2000.^{00}$ to be put in trust for flowers to be put on the three graves in Rosedale Cemetery once each week" created a valid trust, precatory or otherwise or an absolute gift, and if a trust was created, should it fail as being violative of the constitutional inhibition against perpetuities. Art. XX, section 9, Constitution of California.

[1, 2] As heretofore noted, no reporter's transcript has been filed and this appeal is prosecuted on the judgment roll alone. In

this state it is the rule that upon a direct appeal from the judgment upon the judgment roll alone it will be assumed in support of the judgment that all objections to the evidence in support of the findings were waived. Crowther v. Metalite Mfg. Co., 133 Cal.App. 452, 455, 24 P.2d 551. In Poledori v. Newman, 116 Cal. 375, 48 P. 325, 326, our Supreme Court said: "If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings." Furthermore, we must presume that evidence was introduced which would support the findings as made without any objection upon the part of contestant and appellant; and also, that all parties in the court below treated the facts presented as issues properly before the court in the proceeding. A different situation might be presented if the entire record were before this court. First Trust & Savings Bank v. Warden, 18 Cal.App.2d 131, 133, 134, 63 P.2d 329; Merron v. Title Guarantee & Trust Co., 45 Cal.App.2d 60, 63, 113 P.2d 481.

[3-6] Where, as in the case at bar, the will was drawn solely by the testatrix and she was, as the court found, unacquainted with the technical sense in which the words "in trust" are used, section 106 of the Probate Code empowered the court to determine whether the just quoted phrase was used by the testatrix in its technical and legal sense or in its popular sense. After hearing extrinsic evidence, the court found as a fact, upon what we must consider on this appeal was sufficient evidence, that under the circumstances here present the phrase was intended by the testatrix to be expressive of the trust and confidence which she reposed in her friend of so many years; that he was to take the $2,000 with absolute ownership therein; and that the questioned words were, as found by the court "merely intended to express a wish or desire of the testatrix leaving the matter entirely to the discretion of said W. H. Ball". As to the nature of the evidence taken at the hearing in the court below, we have no information. If it was addressed to the interpretation of the will, it should have been brought up on appeal through the medium of a reporter's transcript or in a bill of exceptions. To determine, if possible, the intention of the testator is the prime duty of the court in the interpretation of a will, and instances are numerous where, in connection with that duty, parol evidence is admissible. In Re Estate of Weber's Estate, 76 Cal.App. 723, at page 725, 245 P. 776, it was decisively held that where after a hearing the probate court bases its construction of the will upon the evidence presented, which is the case herein, an appellate tribunal cannot, without having the evidence before it, say that a different construction should have been given, unless it is a case where no such evidence was admissible. And we cannot say that such a situation prevailed in the instant case, but on the contrary must assume, where the appeal is upon the judgment roll alone, that the issues upon which findings were made were properly before the court, and that evidence was introduced, without objection, which would support the findings as made. First Trust & Savings Bank v. Warden, supra.

That portion of the order and judgment from which the appeal herein was taken is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CURTIS and TRAYNOR, JJ., dissenting.



60 Cal.App.2d 762

PEOPLE v. MURPHY et al.

Cr. 3728.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1943.

As Modified Nov. 3, 1943.

1. Criminal law ⇐1023(10, 13)

Where no judgment was pronounced, and proceedings were suspended and defendants placed on probation, defendants were without right of appeal except from order denying their motion for new trial.

2. Abortion ⇐11

In order to convict defendant physician of performing an illegal abortion, it was necessary to prove by evidence, other

than testimony of prosecutrix, that there was actual knowledge on part of defendant of pregnancy of prosecutrix or a belief upon his part that prosecutrix was pregnant. Pen.Code, §§ 21, 274, 1108.

3. Abortion ⇐11

Where evidence, other than prosecutrix' testimony, was insufficient as a matter of law to establish an intent on part of defendant physician to cause a miscarriage, physician's conviction of performing an illegal abortion could not be sustained. Pen.Code, §§ 21, 274, 1108.

4. Abortion ⇐11

The corroborative evidence, although not required to extend to every material fact of illegal transaction constituting crime of abortion, must nevertheless have relation to some portion of the testimony which is material to the issue. Pen.Code, §§ 21, 274, 1108.

5. Abortion ⇐11

Where viewed without recourse to prosecutrix' testimony, the corroborative circumstances standing alone, though they might be said to generate a suspicion of guilt, were as compatible with innocence as they were with guilt of performing an illegal abortion, the corpus delicti of the crime charged was not proven. Pen.Code, §§ 21, 274, 1108.

6. Criminal law ⇐427(2)

Before acts or declarations of one or more of the conspirators done or made at time prior to entering into conspiracy by particular person charged can be used in evidence against him, the fact of existence of conspiracy at time such acts were done or declarations made must have been shown by some degree of proof sufficient to justify court in admitting the evidence of such prior acts or declarations.

7. Criminal law ⇐427(5)

Proof of acts or declarations of one or more of conspirators done or made at a time prior to entering into conspiracy by particular person charged cannot consist merely in the acts and declarations of the alleged co-conspirators, but must partake of the nature of an independent showing as to existence of the conspiracy at very time when acts were done or declarations made by which person alleged to have subsequently joined the conspiracy is sought to be bound.

8. Criminal law ⇐1172(6)

In prosecution for performing an illegal abortion, where there was no evidence as to existence of a conspiracy except prosecutrix' uncorroborated testimony and an extrajudicial statement of one who was charged with being a co-conspirator, an instruction on principle of conspiracy constituted prejudicial error. Pen.Code, § 274.

9. Criminal law ⇐1170½(5)

In abortion prosecution, permitting cross-examination of defendant, who was a physician, concerning matters pending before State Board of Medical Examiners and their determination that defendant had committed two other abortions, constituted prejudicial error, where only purpose of defendant's testifying that he was a physician was for purpose of establishing his qualifications to give his expert opinion as to why he had arrived at conclusion that prosecutrix was not pregnant, and as to why he treated her in manner he did. Pen.Code, § 274.

10. Constitutional law ⇐268

"Due process of law" requires that everyone accused of a crime shall have a fair and impartial trial guaranteed by law.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

11. Criminal law ⇐427(5)

Where corpus delicti of offense of committing an illegal abortion was not established by legal, competent or sufficient evidence, incriminatory extrajudicial statements made by one of defendants were not admissible in evidence against her. Pen. Code, §§ 21, 274, 1108.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Phillip J. Murphy and Kathleen Jones were convicted of violating section 274 of the Penal Code, and they appeal from the judgment and sentence, and from orders denying their motions for a new trial.

The attempted appeals from the judgment and sentence dismissed, and orders denying defendants' motions for new trial reversed as to each defendant, and the cause remanded.

Samuel A. Rosenthal, of Los Angeles, for appellant Phillip J. Murphy.

Paul Angelillo, of Los Angeles, for appellant Kathleen Jones.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were jointly charged in two counts with the crime of abortion. Subsequent to the entry of not guilty pleas, count I of the information was dismissed and count II was amended to show the crime charged as a violation of section 274 of the Penal Code. The charging part of the information as amended alleged that the defendants did "willfully, unlawfully and feloniously provide, supply, use and employ an instrument upon the person of one * * * a woman, with the willful, unlawful and felonious intent then and there and thereby to procure the miscarriage of the said * * *", and that the use and employment of said instrument to procure said miscarriage was not then and there necessary in order to preserve the life of the woman named in the pleading.

Trial by jury resulted in the conviction of both defendants of the crime charged in the amended information. They moved for a new trial which was denied. No judgment was pronounced against either defendant but the proceedings were ordered suspended and they were placed on probation conditioned upon defendant Murphy serving a term of two years, and defendant Jones serving a term of one year, in the County Jail. The defendants filed notice of appeal from "the court's order denying each defendant's motion for a new trial and from the judgment and sentence of the court".

[1] When, as in the instant case, no judgment was pronounced, proceedings were suspended and the defendants placed on probation, they are without a right of appeal except from the order denying their motion for a new trial. People v. De Voe, 123 Cal.App. 233, 11 P.2d 26; People v. Johnson, 14 Cal.App.2d 373, 375, 58 P.2d 211; People v. Dawes, 37 Cal.App.2d 44, 46, 98 P.2d 787. The attempted appeal from the "judgment and sentence" must therefore be dismissed and consideration given only to the claimed error on the part of the trial court in denying the motions for a new trial.

The factual background surrounding this prosecution may be thus epitomized: Defendant Murphy is a physician and surgeon, licensed to practice his profession in the State of California, and specializing in gynecology, described by him as "the art and science of women's diseases". Defendant Jones was employed by her codefendant as an office receptionist and operative assistant, who, in the instant case, "prepared the instruments and the table and the anaesthetic, washed the external parts (of the patient) with lysol and placed (the patient) in position" for the surgical operation. After the rendition of these services, according to Dr. Murphy, his codefendant, Miss Jones, left the room, was not present and did not assist in the actual operation.

The prosecutrix in this case was married in August of 1941. On March 3, 1942, she gave birth to a baby boy. She menstruated once in May, after the birth of the baby, but missed her menstrual period in June, and considered herself pregnant. Because of this belief, she went to a Dr. Obando, who examined her on the occasion of her first visit and again some two weeks thereafter. Dr. Obando made another manual examination of her pelvic region. Following these two examinations, the prosecutrix went to the office of defendant Dr. Murphy, where, on the occasion of her first visit, she was met by the defendant Miss Jones. She informed Miss Jones that she had been referred to Dr. Murphy by Dr. Obando; that she asked Miss Jones, "What was the price to have something done to me?" to which, according to the testimony of the prosecutrix, defendant Miss Jones asked her "How long are you—how long was I pregnant, and I told her the date". Defendant Miss Jones then inquired of the prosecutrix as to how long the latter had gone without menstruation, after which defendant Miss Jones said, "We don't do anything to anybody after they are seven weeks". After being informed that "The price is $75.00", the prosecutrix stated she did not have that much money with her and made an appointment to return with the money on July 21st. On the last named date, the prosecutrix returned to the doctor's office in company with a friend. Defendant Jones then called her into a room, asked for the $75, which she paid but no receipt was given therefor. At the request of Miss Jones, the prose-

cutrix then signed a card consenting to an operation, and returned to the reception room to advise her friend, as suggested by defendant Miss Jones, to return at 2:30 o'clock. The prosecutrix was then returned to another room by defendant Miss Jones who placed her on a table and who, after the prosecutrix had disrobed and put on "a sort of a smock", administered the anaesthetic. At the time the anaesthetic was administered, defendant Dr. Murphy was present in the room, standing on the other side of the table. While engaged in a conversation with Dr. Murphy during the administration of the anaesthetic, the prosecutrix "went to sleep" and remembers nothing thereafter until after the operation when she revived, and after waiting about half an hour, her friend came and the prosecutrix was taken home. After the operation on July 21st, the prosecutrix again visited Dr. Obando. The latter made an examination of her, after which she again returned to appellant Murphy's office where she was examined by him. At that time Dr. Murphy gave her a prescription. A few days later she again visited Dr. Murphy's office where her temperature was taken by defendant Miss Jones, who gave her a yellow box containing large pills.

The prosecutrix testified that when she went to Dr. Murphy's office for the operation she was in good health but following the operation did not feel very well, was nauseated and felt "as though she was still pregnant". She told both defendants that she felt like she "was still pregnant and was suffering from nausea". Five visits to appellant's office were made by the prosecutrix and on the occasion of the last one she had commenced to flow heavily. On this last visit she was put on the table and defendant Dr. Murphy inserted a tube of jelly into the prosecutrix's vagina, informing her that this would give her pain, and she testified she had very severe pains and was very sick. Upon returning home she took to her bed. About a week and a half later defendant Dr. Murphy visited the prosecutrix at her home, inquired of her if she had discharged anything, to which she replied "nothing but blood". During the time Dr. Murphy was visiting the prosecutrix at her home, the latter's sister came in and in the presence of the prosecutrix asked Dr. Murphy what was wrong, informing him that her sister was very ill, had been flowing for ten days and was getting weaker and weaker. She asked defendant Dr. Murphy to send the prosecutrix to a hospital or to refund half the money paid him so that arrangements could be made for her hospitalization. Defendant Dr. Murphy refused to do either and insisted that the prosecutrix would be all right. This was the last time the prosecutrix saw either defendant.

According to the testimony, the prosecutrix continued to flow and to discharge large clots and on one occasion discharged three large pieces. She then went to a hospital where she remained almost a month under treatment of Dr. N. A. Davis. The sister of the prosecutrix testified that defendant Dr. Murphy told her that her sister's womb was dilated but that she would be all right and advised against hospitalization.

Dr. Davis testified that he was a graduate of a recognized school of medicine in the year 1933; that he made an external examination of the prosecutrix at the hospital and found evidence of pelvic inflammation which appeared to be an active infection existing over some period of time. He found the prosecutrix rigid about the pelvic region, with an elevated pulse, temperature, and a fast heart. His examination disclosed evidence of secondary anemia, a loss of blood in excess over normal with a marked shortage of red blood cells. He described the flow of blood as not having the appearance of a normal menstrual flow. In describing his diagnosis, Dr. Davis testified: "My diagnosis and my examination three weeks after the first time that I had examined Mrs. * * * externally disclosed a uterus somewhat boggy, not over-enlarged; apparently showing that there had been a recent congestion of the uterus. Now, that congestion of the uterus, from her infected condition, would indicate that she had had some infection, *but whether it was from instrumentation or from any irritation from any other source or from any infection,* from a gonorrhocal infection or any thing typical, *it may be any number of causes*". (Emphasis added.) The doctor further testified that he took a smear for gonorrhoea and found it negative. In describing the treatment administered by him, Dr. Davis testified: "The treatment of these types of conditions are subject to so much controversy, but as a general rule is more of the basic type of treatment; that might be a conservative type of treatment. When they are running an infection and running a fever, and there is evi-

dence of anything of an undisclosed cause we usually treat those conditions as if they were a septic problem; that is, an infected problem and rather give them conservative medical treatment, rest, sedatives, food, transfusions, and things of that sort. Now, that is the type of treatment Mrs. * * * has had." The same doctor further testified that in his opinion the anemic condition from which the prosecutrix suffered was "the result of some active congestion of that uterus or else some possibility of irritation from either instrumentation or pregnancy or a tubal pregnancy that had ruptured in the uterus spontaneously, possibly sex irritation, stimulation of the uterus from any number of causes that would bring on active congestion of the uterus".

The circumstances surrounding the arrest of the defendants was testified to by Officer Fremont, during which testimony there were introduced into evidence certain surgical instruments found in Dr. Murphy's office together with record cards of his cases, including the case of the prosecutrix. These case records were found in a dentist's office in a separate suite in the same building and were not discovered until the day following the arrest of the defendants when the defendant Miss Jones directed the officers to where they could be found.

S. W. Brooks, special agent for the State Board of Medical Examiners, testified he was present at the time the defendants were arrested. In relating some of his conversations with the defendants, this witness testified: "I said to Dr. Murphy, 'Dr. Murphy, you understand we are here making an investigation of various reports that you have been doing abortion,' and Dr. Murphy replied, 'Yes.' 'Now', I said, 'Doctor, in order to save time for all of us, I know that you are a busy man, will you just show us or get for us the various instruments and medicines that you use in performing these abortions,' and he said, 'Yes, I will.'" In another portion of his conversation with defendant Murphy, this witness testified: "I said, 'Doctor, I understand that you also use a paste, and that you inject this paste into the uterus.' He said, 'Yes.' I said, 'Doctor, will you get this syringe that you use for the purpose of injecting this paste into the uterus?' He said, 'Yes, I will get it for you.' And he went to a cabinet nearby and pulled a syringe from this cabinet and gave it to me."

Defendant Dr. Murphy, testifying in his own behalf, stated that the prosecutrix came to him on recommendation of Dr. Obando with the thought in her mind that she was pregnant. That upon her first visit he examined her and found a polyp protruding through the surface of the uterus. That he told the prosecutrix that such type of polyp often led to an infection which might produce a peritonitis condition and that he made arrangements to operate upon the prosecutrix for the sum of $75. It might here be noted that throughout his testimony defendant Dr. Murphy contended that the prosecutrix was not pregnant and that he did not treat her for any such condition but for the polyp condition, which he testified often ensues after the delivery of a child. He testified that he found the womb dilated; that he gradually opened up the neck of the womb and with a small curette curetted it thoroughly. The witness then testified to the post-operative directions he gave to the prosecutrix and described the medicines which he directed her to take. He admitted the conversations with the police officer and the Medical Board inspector concerning the instruments in his office which he contended are found in the office of any physician specializing in that branch of medicine to which he devoted his efforts. Defendant Dr. Murphy admitted that the prosecutrix told him that Dr. Obando had advised her she was pregnant but denied that any mention was ever made concerning an abortion and vigorously contended that no condition of pregnancy existed in the prosecutrix, and that he did not treat her for any such condition.

The defendant Kathleen Jones did not testify at the trial.

[2] We shall first give consideration to the claims advanced by defendant Dr. Murphy in support of his contention that the order denying him a new trial should be reversed. He urges that the evidence is insufficient to sustain his conviction because as a matter of law it is lacking in the required statutory corroboration. In that connection he asserts that, aside from the testimony of the prosecutrix and the extra-judicial statements of his codefendant Kathleen Jones, there was no evidence connecting him with the commission of the

offense charged against him. With commendable fairness the Attorney General concedes that the admissions and confession made by the defendant Miss Jones after the arrest of both defendants cannot be considered as evidence against Dr. Murphy, and as the Attorney General points out, such confession was admitted at the trial only as against the defendant who made it. Section 1108 of the Penal Code provides that upon a trial for violation of section 274 of the same code, the defendant cannot be convicted upon the testimony of the woman upon whom the offense was committed unless she is corroborated by other evidence. The very gist of the offense charged against these defendants is that they used an instrument with intent thereby to procure the miscarriage of the woman named in the information. Therefore, unless there was actual knowledge on the part of defendant Murphy of the pregnancy of the woman, or a belief upon his part that the woman was pregnant, there could not exist the required and necessary intent upon his part to procure the miscarriage of such woman. The question therefore arises as to whether there was present in this case evidence, other than the testimony of the prosecutrix, of sufficient substantiality to warrant a conclusion by the jury of the requisite guilty intent upon the part of defendant Dr. Murphy. People v. Richardson, 161 Cal. 552, 564, 120 P. 20, 39 L.R.A., N.S., 704; People v. Wilson, 54 Cal.App. 2d 434, 448, 129 P.2d 149. In the legitimate exercise of his profession the defendant doctor was entitled to examine the prosecutrix to ascertain if she was pregnant, and if such examination established the existence of such a condition or gave rise to a belief upon the part of the doctor that she was pregnant, and he proceeded with the use of an instrument to produce or attempt to produce a miscarriage, then he was guilty of the offense charged against him.

While the defendant doctor at all times denied the charge against him, criminal intent can rarely, if ever, be shown by statements or testimony of a defendant. We, therefore, have in this state a very common sense rule announced in section 21 of our Penal Code that "The intent or intention is manifested by the circumstances connected with the offense * * *." We must, therefore, examine the circumstances connected with the offense charged to determine whether they are of such a nature as to disclose the requisite criminal intent. In addition to the testimony of the prosecutrix, we have in this case certain instruments found in the doctor's office at the time of his arrest and which were capable of being used to bring about an abortion. In view of the fact that the procurement of a miscarriage is permissible under certain conditions, section 274, Penal Code, the court properly instructed the jury that the defendant doctor was lawfully entitled to have such instruments in his possession. Certain case history card records belonging to Dr. Murphy which were found in the office of a dentist in the same building in which defendant Murphy's office was located were introduced in evidence. The claimed concealment of these cards, it is urged by respondent, is a circumstance inconsistent with the theory of innocence. There is also present the further fact that Dr. Murphy admittedly had a conversation with the sister of the prosecutrix wherein the doctor refused to send his patient to a hospital or to refund any of the money received by him as payment for his professional services. However, nowhere in this conversation was anything said about an abortion or an attempted one. Then there is the testimony that when defendant doctor visited the prosecutrix at her home he used utragel, which he admitted was also used to induce hemorrhage and as an abortifacient.

[3-5] It is significant in this case that Dr. Obando, whom the prosecutrix testified advised her she was pregnant, was not called as a witness to corroborate her in that regard. The Attorney General also relies upon the testimony of Dr. N. A. Davis, who treated the prosecutrix after she was hospitalized following her treatment by defendant Dr. Murphy. This testimony, it is claimed, furnishes grounds upon which the jury might predicate an inference of defendant Murphy's guilt. However, recourse to the reporter's transcript shows that Dr. Davis testified that he examined the prosecutrix externally only, as to objective symptoms and found pelvic inflammation appearing to be an active infection for some period of time. With reference to the flow of the prosecutrix being of a darkish and bloody color, Dr. Davis testified "which could have been an excessive flow from many causes". The same witness testified, in epitomizing his

diagnosis: "Yes, I stated in my diagnosis that her anemic condition probably was the result of some active congestion of that uterus or else some possibility of irritation from either instrumentation or pregnancy or a tubal pregnancy that had ruptured in the uterus spontaneously, possibly sex irritation, stimulation of the uterus from any number of causes that would bring on active congestion of the uterus." As we view the testimony in this case, exclusive of that given by the prosecutrix, it is insufficient, as a matter of law, to establish the pregnancy of the prosecutrix or the fact that there existed in the mind of defendant Dr. Murphy a fully formed belief that pregnancy existed. The evidence being insufficient, as a matter of law, to establish an intent upon the doctor's part to cause a miscarriage, which is the gist of the offense, his conviction cannot be sustained. People v. Richardson, supra. It must be remembered that the corroborative evidence, although not required to extend to every material fact, must nevertheless have relation to some portion of the testimony which is material to the issue. 1 C.J. 332, § 112; 1 C.J.S. Abortion, § 35. In whatever light the corroborative evidence in this case is viewed, nevertheless, in order to give it effect, even as tending in that direction, it is necessary at every point to interpret and explain the "corroborative circumstances" in the light of the testimony of the prosecutrix. Before it can be said to connect the defendant Murphy with the commission of the crime charged against him, recourse must be had to the testimony of the prosecutrix. And, though we may concede that such corroborative evidence arouses a suspicion, even a grave suspicion, nevertheless that it is not sufficient to establish the corroboration required by law. Furthermore, when viewed without recourse to the testimony of the prosecutrix, the "corroborative circumstances" standing alone, while they may be said to generate a suspicion of guilt, are as compatible with innocence as they are with guilt of the crime denounced by section 274 of the Penal Code. Hence, the corpus delicti of the crime charged herein was not proven. People v. Gilbert, 30 Cal.App.2d 321, 323, 86 P.2d 135; People v. Braun, 31 Cal.App.2d 593, 602, 88 P.2d 728; People v. Davis, 210 Cal. 540, 555, 293 P. 32. Unless the "corroboration" furnishes inculpatory evidence, that is, evidence tending to connect the defendant with the offense, then there is no legal and sufficient corroboration. People v. Morton, 139 Cal. 719, 724, 73 P. 609.

[6-8] Appellant Dr. Murphy next finds fault with the action of the court in giving certain instructions upon the law of conspiracy. In this regard, for instance, the jury was instructed that "In this connection, you are instructed that where a criminal conspiracy has been formed, each of the persons forming the same is liable for each and all the acts and bound by the declarations, of each and all of the conspirators, done or made in pursuance and furtherance of the said conspiracy; while the said conspirator is a member of the said conspiracy; and every person who enters into and becomes a party to the said conspiracy after the formation thereof, and adopts the said conspiracy and its purposes and objects, becomes liable for each and all of the acts, and is bound by each and all of the declarations, of each and all of the other conspirators, done or made from the time of the formation of such conspiracy, in pursuance and furtherance of the said conspiracy, as long as he is a member thereof." Other similar instructions were given. While the foregoing is a correct abstract statement of the law, nevertheless that legal principle presupposes that before the acts or declarations of one or more of the conspirators done or made at a time prior to the entering into the conspiracy by the particular person charged, can be used in evidence against him, the fact of the existence of the conspiracy at the time such acts were done or declarations made must have been shown by some degree of proof sufficient to justify the court in admitting the evidence of such prior acts or declarations. It is further the law that such proof cannot consist merely in the acts and declarations of the alleged co-conspirators, but must partake of the nature of an independent showing as to the existence of the conspiracy at the very time when the acts were done or declarations made by which the persons alleged to have subsequently joined the conspiracy are sought to be bound. Needless to say, in the case at bar, there is no evidence as to the existence of a conspiracy except the uncorroborated testimony of the prosecutrix and the extra-judicial statements of defendant Kathleen Jones, the latter of whom was a co-conspirator. No admissions made or testimony given by defendant Dr. Murphy tend even in the slightest degree to establish the ex-

istence of a criminal conspiracy. It was, therefore, error for the court to give the foregoing and kindred instructions on the principle of conspiracy. That such instructions, under the circumstances here existent, were prejudicial is at once evident. Finally appellant Dr. Murphy asserts that the deputy district attorney in charge of the case for the prosecution was guilty of prejudicial misconduct during the progress of the trial. In this regard the record discloses that during the cross-examination of defendant Dr. Murphy, the following occurred: "Q. (by deputy district attorney) Do you recall being before the State Board of Medical Examiners on October 22, 1942? A. No, sir." Following timely objection and assignment of the asking of this question as prejudicial misconduct, the matter was presented to the court outside the presence of the jury, during which discussion the court inquired of the deputy district attorney, "Is your offer of proof that he has been found guilty before the Board of Medical Examiners?" to which the prosecutor replied, "Yes, your Honor"; whereupon the court stated, "Then the objection will be overruled." Thereupon, with the jury present, the following transpired:

"Q. (by the deputy district attorney) Doctor, do you recall being before the California State Board of Medical Examiners in Sacramento on October 22, 1942? A. Yes, sir.

"Mr. Rosenthal: Subject to all the objections heretofore made.

"The Court: The objection will be overruled. The answer he has given is 'Yes'.

"Q. (by the deputy district attorney) Weren't you at that time found guilty by the California State Board of Medical Examiners of committing an illegal abortion on Geneva N. Ballard and Edith M. Palmer? Mr. Rosenthal: To which we object on the ground that the decision of that body, if any were made, is the best evidence.

"The Court: The objection will be overruled.

"Mr. Rosenthal: I object to that question on the ground it is calling for the conclusion of this witness, that if there was any decision made and a finding made, or any decision reached by that board it is a matter of public record, and the record itself is the best evidence.

"The Court: The objection overruled. You may answer the question. A. Yes, sir."

When appellant Murphy's counsel on redirect examination attempted to elicit from the witness the fact that the proceedings before the State Board of Medical Examiners, about which the witness had been interrogated on cross-examination, were not completed and that a further hearing was scheduled for May 8, 1943, objections thereto by the prosecutor were sustained by the court.

At the trial the deputy district attorney sought, as does the Attorney General upon appeal, to justify the asking of the aforesaid questions upon the authority of People v. Page, 28 Cal.App.2d 642, 83 P.2d 77. In the cited case the defendant was charged with the crime of murder, and it was contended upon appeal that the district attorney was guilty of misconduct when on cross-examination he interrogated the defendant regarding the latter's Army record. In deciding this contention against the defendant in that case, it was said by the court, at page 649 of 28 Cal.App.2d, at page 80 of 83 P.2d, "The defendant had testified at length as to his military service and had taken pains to build up an enviable reputation as an army officer. He had also testified that he was still a captain in the reserve corps. The cross-examination objected to related to proceedings before an army board and his discharge for misconduct. The whole subject-matter was opened by the defendant in his direct examination, and there was neither misconduct nor error in the cross-examination which was designed to impeach that testimony". In the case at bar no such situation is present. On his direct examination defendant Dr. Murphy testified to the fact that he was a graduate of a recognized school of medicine; that he was formerly a surgeon in the United States Navy Medical Corps; that after leaving the Naval service in 1923, he practiced his profession in the city of Chicago until 1925 when he migrated to California where he has been practicing continuously since. When defendant Dr. Murphy had completed his direct testimony, counsel for his codefendant Kathleen Jones stated that he adopted for and on behalf of defendant Miss Jones, the testimony given by Dr. Murphy, and stated, "In addition to that I would like to ask him one or two questions". Thereupon

counsel for defendant Kathleen Jones propounded the following interrogatories to appellant Dr. Murphy:

"Q. Doctor, in addition to the professional entitlements which you have related, are there any others? May I put my question this way? What does F.A.C.S. mean to a doctor? A. I am a Fellow of the American College of Surgeons.

"Q. Do you cherish that degree? A. You bet I do.

"Q. And do you have one? A. I have.

"Q. And how did you become a member of a Fellow of the American College of Surgeons? A. It is highly selective.

"Q. What must one do in order to attain that entitlement? A. You must have had at least 300 operations within the preceding two years, 100 of which must be written up in detail and 200 in summary form".

[9, 10] In the case of People v. Page, supra, the testimony given by the defendant and by means of which, as the court said, he "had taken pains to build up an enviable reputation as an army officer", and that he was at the time he testified a captain in the reserve corps, had no relevancy to or connection with the crime of murder with which he was charged, while in the instant case the very nature of the offense charged and the circumstances under which Dr. Murphy, as a physician, treated the prosecutrix required him to establish his qualifications to give his expert opinion as to whether or not she was pregnant, and why he arrived at the conclusion she was not, and also why he treated her as he did if no condition of pregnancy existed. The testimony here given could in no sense be said to have been offered, as in the Page case, for the purpose of establishing good character or a good reputation for truth and veracity. Under the limitations of the rule applicable to the cross-examination of a defendant in criminal cases (People v. Gilliland, 39 Cal.App.2d 250, 260, 103 P.2d 179) it was error to permit the challenged interrogatories to be propounded to defendant Dr. Murphy on cross-examination, concerning matters pending before the State Board of Medical Examiners and the determination thereof by that board. A mere reading of the questions at once suggests the damaging effect thereof upon defendant Dr. Murphy. To conclude otherwise would be to ignore human experience. The prejudicial effect of the testimony cannot be exaggerated when we consider that the defendant doctor was charged with the crime of abortion, and by such testimony the prosecutor sought to impress upon the jury that the witness had theretofore been found guilty by an administrative board of committing two other such offenses. Appellant Dr. Murphy was entitled to have his case fairly tried according to established rules of law whether he was innocent or guilty. A contrary holding would but serve to provide ways and means for the conviction of the innocent. Due process of law requires that everyone accused of crime shall have that fair and impartial trial guaranteed by law. People v. Braun, supra, 31 Cal.App.2d at page 602, 88 P.2d 728; People v. Lynch, 60 Cal.App.2d 133, 140 P.2d 418. From what we have herein stated, it follows that the order denying defendant Dr. Murphy's motion for a new trial must be reversed.

[11] We come now to a consideration of the appeal taken by defendant Kathleen Jones from the order denying her motion for a new trial. At the trial there was introduced in evidence, solely as against her, a confession made by her to certain police officers and an inspector for the State Board of Medical Examiners. However, as we have heretofore pointed out, the corpus delicti of the offense herein charged was not established by legal, competent or sufficient evidence. Therefore, the incriminatory extra-judicial statements made by defendant Kathleen Jones were not admissible in evidence against her. Except for the uncorroborated testimony of the prosecutrix and the statements of defendant Miss Jones herself, there was no evidence of sufficient substantiality to establish the fact that the crime denounced by section 274 of the Penal Code, with which the defendants were jointly charged, was committed. Therefore, under familiar and well established rules of law, the extra-judicial statements of defendant Kathleen Jones, made after her arrest, were not admissible as evidence against her. The order denying her motion for a new trial cannot, therefore, be sustained.

The attempted appeals from "the judgment and sentence" are dismissed. The order denying the defendants' motion for a new trial is reversed as to each of them, and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

60 Cal.App.2d 795

In re JONES' ESTATE.

LYLE HILL PRESBYTERIAN CHURCH et al. v. JONES et al.

Civ. 12391.

District Court of Appeal, First District, Division 1, California.

Oct. 9, 1943.

1. Wills ⇐750

In determining whether a bequest is specific, general, or demonstrative, the fundamental factor, regardless of statutory definitions, is the intent of the testator at the time the will was drafted as expressed in the will considered as a whole and in light of the surrounding circumstances. Probate Code, § 161.

2. Wills ⇐750

In determining whether a bequest is specific, general, or demonstrative, the intention to be determined is whether testator intended to give a specific thing, and that alone, or whether he intended to give a bequest that, in any event, should be paid out of his general estate, and in determining this intent, there is a strong presumption that the bequest was intended to be general and not specific. Probate Code, § 161.

3. Wills ⇐756

Generally, a gift of a certain number of bonds, described by the corporation, but not indicating a specific lot of such securities, is a "general legacy" even if testator owned the exact number of such securities, or if such securities were in certificates of deposit of such denominations that any one would satisfy the will, and even if the bonds are described by number, the gift may be general if the language does not show that testator intended to pass bonds owned at his death. Probate Code, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "General Legacy".

4. Wills ⇐756

A legacy of stock, whether given in general terms or as so many shares of a particular stock, is "general" whenever testator does not expressly refer to it in qualifying words, and mere fact that at date of will it appeared that testator owned stock and securities of the character bequeathed equal to or greater in value than those devised will not make the legacy "specific" unless testator refers to the identical securities in his possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Legacy".

5. Wills ⇐750

In determining whether legacies of stock are general or specific, the inquiry is not whether testator may not have intended to give the specific shares then owned, but whether it clearly appears that he did so intend.

6. Wills ⇐753

Words specifically identifying the property and indicative of possession are necessary in the making of a specific bequest.

7. Wills ⇐440

Generally, where the language of the will is clear, it must control.

8. Wills ⇐756, 765

Where testator owning ten Pacific Gas & Electric five percent bonds intended by gifts of five and two bonds to give his legatees substantial bequests and the other natural objects of his bounty were adequately provided for in the disposition of his substantial estate, the bequests were "general" and not "specific" or "demonstrative", and hence where bonds were redeemed before testator's death, the legacies were not adeemed.

See Words and Phrases, Permanent Edition, for all other definitions of "Demonstrative Legacy".

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Robert Jones, deceased, by Katie Kennedy Jones and another, as executors, opposed by Lyle Hill Presbyterian Church and others for instructions. From an adverse order, defendants appeal.

Reversed.

John B. Ehlen, of San Francisco, for appellants.

Gillogley, Crofton & Foster, of San Francisco, for respondents.

PETERS, Presiding Justice.

The executor and executrix of the will of Robert Jones, being in doubt as to whether there had been an ademption of certain legacies contained in the will, petitioned for instructions under § 588 of the Probate Code. The lower court determined that the bequests in question were specific Inasmuch as there was no property of the kind described in the legacies in question in the estate at the time of death, the result of such holding is that the legatees involved will receive nothing under the will. From this order the legatees adversely affected prosecute this appeal.

The appeal has been taken on an agreed statement of facts. It appears therefrom that the decedent left a will executed in San Francisco on April 22, 1921. In the first main paragraph of the will he directed that his debts be paid and that his body be shipped to the family burying ground at Umgall, Templepatrick, County Antrim, Ireland. The next paragraphs are the ones here directly involved. So far as pertinent here, they read as follows:

"Secondly, I hereby give and bequeath, five one thousand dollar Pacific Gas & Electric five percent bonds, to my Mother Ann Jones, she to receive the income from said bonds as long as she lives, at her death the bonds to be divided one each to my brothers, David, James, William, Nevin, Samuel Jones. I appoint my brothers, David Jones, James Jones, William Jones, Trustees for my Mother without bonds.

"(third) I hereby give and bequeath two one thousand dollar Pacific Gas & Electric five percent bonds to Lyle Hill Presbyterian Church, at Lyle Hill, Templepatrick, County Antrim Ireland, the income from said bonds to be divided equally—between Ballyutoag sunday school, and Lyle Hill sunday school. When the bonds become due, the money to be reinvested by the trustees of Lyle Hill Church, the income to be divided equally between the above mentioned sunday schools."

The testator then bequeathed his jewelry to his wife to be kept by her for his son Robert Jones, and then left the balance of his estate one-third to his wife and two-thirds to his son, with certain detailed provisions as to what should happen in the event his son should predecease him. After certain other provisions not here material he provided: "I request the executors of my will to pay the Inheritance Tax if any, out of my estate, on the bonds given to the trustees for my mother, and the bonds given to Lyle Hill Church." He also purported to list the property in his estate but did not make any reference therein to the Pacific Gas & Electric Company bonds.

According to the agreed statement, when the will was executed on April 22, 1921, the deceased owned ten $1,000 General and Refunding five percent bonds of the Pacific Gas & Electric Company, having purchased seven such bonds on March 7, 1921, and three on April 5, 1921. These bonds were unregistered bearer bonds. They remained in the possession of the deceased until January 5, 1937, when they were redeemed by the issuing company for $10,000. The testator died October 19, 1941, and on that date owned no Pacific Gas & Electric Company bonds. The mother of the testator predeceased him, but whether she died before or after the bonds were redeemed does not appear.

The lower court found the facts as above indicated, and concluded therefrom that "the testator intended at the time he made his will to bequeath, by the terms of Paragraphs 'Secondly' and 'third' of his will specific Pacific Gas and Electric Company 5% bonds then in his possession."

If this conclusion is correct there was an ademption and the named legatees receive nothing under the will. On the other hand, if the bequests were general in nature they must be satisfied from the general assets of the estate.

[1-3] The problem as to whether a particular bequest is specific, general, or demonstrative has many times been considered by the courts. The cases from the various jurisdictions have not been entirely consistent in their determinations. Running through the cases, however, from this and other jurisdictions, are certain fundamental concepts which have been almost universally adopted. Thus, regardless of statutory definitions, see § 161, Probate Code, the fundamental and controlling factor is the intent of the testator at the time the will was drafted as expressed in the will considered as a whole and in light of the surrounding circumstances. In re Estate of Jepson, 181 Cal. 745, 186 P. 352; see cases collected 26 Cal.Jur. p. 1038, § 316; 69 Cor.Jur. p. 925, § 2095; 4 Page on Wills, Lifetime Edition, p. 101, § 1392. The intention to be determined is whether the testator in-

tended to give a specific thing, and that alone, or whether he intended to give a bequest that, in any event, should be paid out of his general estate. In determining this intent, the courts have held that there is a strong presumption that the bequest was intended to be general and not specific, and, in cases of doubt, the courts will presume that the testator intended to give a general bequest rather than a specific one. In re Estate of Jepson, 181 Cal. 745, 186 P. 352; see discussion and cases collected 4 Page on Wills, Lifetime Edition, p. 101, § 1392 at pages 105, 106; 69 Cor. Jur. p. 926, § 2096.

In applying these rules to bequests of stocks, bonds and other securities it is quite generally held that "A gift of a certain number of shares of stock, bonds, and the like, described by the corporation, obligator, and the like, or by value or quantity, but not indicating any specific lot of such securities, is a general legacy; even if testator owned the exact number of such securities, or if such securities were in certificates of deposit of such denominations that any one would satisfy the provisions of the will. * * * Even if the bonds are described by number, the gift may be general, if the language does not show that testator intended to pass bonds which he owned at his death." (4 Page on Wills, Lifetime Ed., p. 122, § 1397.) In the footnotes the author has collected and cited cases from many jurisdictions that support the quoted rules with only a very few cases noted as contra. (See, also, many cases collected 69 Cor.Jur. p. 930, § 2104, where the same rules are stated.) While precedents are only of doubtful value in interpreting the language of a will, unless the contents of the entire will are set forth in the opinion, the following cases are illustrative of how far the courts have gone in applying the presumption that a particular bequest is general and not specific. In Ives v. Canby, C.C., 48 F. 718, a bequest of "$2,000 of the South Ward Loan of Chester, Pennsylvania" by a testator who owned $10,000 of bonds known by that designation, was held to be a demonstrative, and not a specific legacy, and was therefore not adeemed by the payment of the bonds before the testator's death. The court held that, before a legacy would be construed to be specific, there must be some expression in the will from which an intention to confine the bequest to the particular securities can be inferred, and mere possession of such securities at the time the will was drawn will not make such a bequest specific.

In Lyons v. Lyons, D.C., 224 F. 772, 773, affirmed, 4 Cir., 233 F. 744, a testator bequeathed to his wife "all my shares, of the capital stock of the Home Bank for Savings of Clarksburg, West Virginia, amounting in all to twenty (20) shares." At the time of his death he owned but twelve such shares. In spite of the use of the word "my," which in some cases has been held to indicate an intent that the bequest be specific, the court held the bequest to be general.

[4, 5] In the case of In re Low's Estate, 103 N.J.Eq. 435, 143 A. 222, 223, the testator bequeathed "thirty (30) shares of the capital stock of the First National Bank of Toms River, New Jersey" and "ten (10) shares of the capital stock" of such bank to two named legatees. In holding this was a general legacy the court stated (page 224 of 143 A.):

"A legacy of stock, whether given in general terms or given as so many shares of the particular stock, is a general legacy wherever the testator does not expressly refer to it as 'in my possession,' 'stock owned by me,' 'my stock,' or 'in my name' at the date of the execution of the will, or does not use similar qualifying words. And the mere fact that at the date of the will it appeared that he did own stock and securities of the character bequeathed equal to or greater in value than those devised will not alone make the legacy specific unless the testator shall refer to the identical securities in his possession. [Citing cases.]

"In determining whether legacies of stock are general or specific, the inquiry is not whether the testator may not have intended to give the specific shares then owned, but whether it clearly appears that he did so intend, for a clear intention upon the part of the testator must appear in order to make the legacy specific."

[6, 7] The same result was reached in the case of In re Blomdahl's Will, 216 Wis. 590, 257 N.W. 152, 258 N.W. 168, where the testatrix at the time the will was executed owned 200 shares of Ohio Oil Company stock and by her will bequeathed 100 shares each to two named legatees. She owned no such shares at the time of her death. The trial court

held the bequests to be specific. This holding was reversed, the court holding the bequests to be general. In so holding the court stated (page 153 of 257 N.W.):

"Such a bequest is a general legacy unless the testatrix, by some qualifying words, expressly indicates a different intention and a purpose to have it a specific legacy. Under the law of this state, the circumstance of the ownership of the stock at the time of execution is not material in determining this question in the absence of the necessary qualifying words creating a specific gift. * * *

"The language used by the testatrix in framing her bequest, when read by itself, clearly carries a presumption that she intended, upon her death, to provide the named legatees each with 100 shares of the Ohio Oil Company common stock. If that language in the will is read in connection with the fact that she owned, at the time of the execution of the will, 200 shares of that stock, it might reasonably give rise to the presumption that she was giving away the stock then in her possession. But will such a presumption, if acted upon, carry out the intention of the testatrix? In order to avoid the problematical as far as possible, and as an aid to the rules of law which now apply to the interpretation and construction of wills, we hold that words specifically identifying the property and indicative of possession are necessary in the making of a specific bequest. * * *

"It is a generally accepted rule that where the language of the will is clear and unambiguous, it must control and that rule must prevail in this instance. The gift of a certain number of shares of stock without words of identification and possession is a general legacy. The absence of such words in these particular bequests brings this will within the rule accepted by this court and they must be held to be general bequests."

There are many other cases holding that a bequest of a stated number of shares of stock of a designated corporation without descriptive words of ownership showing an intent to give the specific shares, is general and not specific. A few such cases are Palmer v. Palmer's Estate, 106 Me. 25, 75 A. 130, 19 Ann.Cas. 1184; Johnson v. Goss, 128 Mass. 433; In re Snyder's Estate, 217 Pa. 71, 66 A. 157, 11 L.R.A.,N.S., 49, 118 Am.St.Rep. 900, 10 Ann.Cas. 1188; Benson v. Gerhart, 241 Ill.App. 376; Evans v. Hunter, 86 Iowa 413, 53 N.W. 277, 17 L.R.A. 308, 41 Am.St.Rep. 503; In re Malone's Estate, 143 Misc. 657, 257 N.Y.S. 837.

[8] If the rules above set forth are applied to the facts here involved there can be no reasonable doubt but that the trial court incorrectly determined that the bequests here involved were specific in nature. The will, when read as a whole, discloses a clear intent on the part of the testator to care for his mother, or, in the event of her death, his brothers, and to leave the church which he attended as a child, substantial bequests. This intent to give these named legatees substantial bequests is clearly indicated by the provision that these bequests were not to be lessened or diminished by payment of inheritance taxes thereon. This interpretation does not lead to a result which will render the rest of the family destitute if the bequests are held general, because the other natural objects of his bounty, his wife and son, are adequately provided for in the disposition of his substantial estate. When these facts are considered, together with the strong presumption in favor of an interpretation in favor of a general bequest, there can be no reasonable doubt but that the bequests are general. As already pointed out, the fact that the testatrix owned ten of the designated bonds when he bequeathed seven of them to the named legatees is not sufficient to overcome the presumption.

The order appealed from is reversed.

KNIGHT and WARD, JJ., concur.

60 Cal.App.2d 785

PEOPLE v. CASILLAS.

Cr. 3733.

District Court of Appeal, Second District, Division 1, California.

Oct. 8, 1943.

1. Criminal law ⇐1023(10)

Only where no judgment is pronounced and the proceedings are suspended and accused placed on probation is he deprived of his right to appeal except from an order denying his motion for new trial, but, where a judgment is pronounced, accused may appeal therefrom, notwithstanding that execution of such judgment is suspended and accused placed on probation.

2. Criminal law ⇐1023(10)

Where sentence was imposed upon accused, an appealable "final judgment" of conviction was rendered against him notwithstanding that sentence was suspended and accused was placed on probation.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

3. Criminal law ⇐254, 682

Neither jurors nor judges when acting as arbiters of guilt are permitted to base their decisions upon the existence or nonexistence of facts according to their personal beliefs or experiences, but they must base their decisions only upon facts established by legal and competent evidence or upon inferences deducible from such proven facts as authorized by law.

4. Criminal law ⇐935(1)

Although the trial judge has a wide discretion as the sole trier of facts in determining the credibility of witnesses and the intrinsic value of evidence, that discretion is a legal one and the proper exercise thereof presents a question of law.

5. Criminal law ⇐1159(3)

Where the evidence viewed in one light creates a hypothesis inconsistent with guilt and viewed in another light is reasonably consistent with guilt and the jury adopts the hypothesis pointing to innocence, and there is legal evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, a reviewing court is bound by the finding of the jury.

6. Criminal law ⇐1158(1)

An appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them or where the evidence relied upon by the prosecution is incredible, and, when a case presents such features, the appellate court deals with it as a matter of law.

7. Incest ⇐14
Rape ⇐51(1)

Evidence did not sustain convictions of incest and rape.

8. Criminal law ⇐959
Witnesses ⇐300

Accused's failure to explain or deny by his testimony any evidence or facts in the case against him may be considered by the trial court, but that does not impair accused's constitutional right not to be compelled to be a witness against himself. Const.art. 1, § 13.

9. Witnesses ⇐300

An accused has a legal right to remain mute and rely upon the legal insufficiency of the testimony produced by the prosecution to establish his guilt. Const.art. 1, § 13.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Joe Casillas was convicted of rape and incest, and he appeals.

Reversed and remanded.

Ben Van Tress, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was charged by information in two counts with the crime of rape and in two additional counts with the crime of incest. Counts I and II are predicated upon the same act of sexual intercourse, while counts III and IV are based upon a similar act upon another date. Following the entry of pleas of not guilty to all counts, the cause was tried before the court sitting without a jury, resulting in the conviction of defendant on all four counts. His motion for a new trial was denied. Upon each count the court pronounced a judgment sentencing the defendant to imprisonment in the state pris-

on; execution of which sentence was thereupon suspended and the defendant placed on probation for the term of ten years. This appeal is prosecuted from the judgment and the order denying defendant's motion for a new trial.

[1, 2] It is first contended by the Attorney General that because sentence was suspended and the defendant placed on probation the appeal from the judgment is ineffective. We do not so understand the law. Only in cases where no judgment is pronounced, and wherein, prior to the rendition of any judgment, the proceedings are suspended and the defendant placed on probation, is he deprived of his right to appeal except from the order denying his motion for a new trial, provided such a motion is made. People v. De Voe, 123 Cal.App. 233, 11 P.2d 26; People v. Johnson, 14 Cal.App.2d 373, 375, 58 P.2d 211; People v. Dawes, 37 Cal.App. 2d 44, 46, 98 P.2d 787. Whenever, as in the instant case, a judgment is pronounced, the defendant may prosecute an appeal therefrom notwithstanding execution of such judgment is suspended and the defendant placed on probation. People v. Guerrero, Cal.Sup., 137 P.2d 21, relied upon by respondent, is not in conflict with the foregoing holding because in the last cited case the imposition of sentence was suspended, thereby resulting in no final judgment of conviction being rendered against the defendant, while in the case at bar sentence was imposed upon the defendant, thereby resulting in the rendition of a final judgment of conviction against him. In other words, in the case with which we are here concerned, it was the judgment and not the rendition thereof which was suspended.

The factual background surrounding this prosecution may be thus summarized: Defendant is the father of the complaining witness; she was 15 years of age on November 3, 1942. The defendant's family consists of his wife, the prosecutrix and five other children, the oldest of whom is 17 years of age. The entire family resided together in a two-bedroom, one-story house in the city of Los Angeles.

Except for the defendant's wife, who testified only as to the age and relationship of the prosecutrix to the defendant, the only other witness at the trial was the prosecutrix.

In order that a clear picture may be presented of her testimony and in the interest of clarity regarding the situation that prevailed at the trial, we shall quote more or less at length from the reporter's transcript which discloses that on her direct examination the complaining witness was asked if she had an act of sexual intercourse with someone during the month of July, 1942, to which she replied in the affirmative. Thereupon the following ensued:

"Q. (by deputy district attorney) Oh, I see. All right. Now, you are pregnant at this time, are you not? A. Yes, sir.

"Q. Directing your attention to the month of July of 1942, did someone have an act of sexual intercourse with you? A. Yes, sir.

"Q. Who was it? (Answer inaudible.)

"Q. You have already stated before, you remember? A. Yes.

"Q. You tell this Court here. He is the one in charge of this trial. Tell him with whom you had intercourse. A. Well, I am not strong enough to say with who and I don't feel good to say with who I had it.

"By the Court: All right; who was it? (No answer.)

"The Court: Will you answer the question, please.

"Q. By Mr. Hopkins (deputy district attorney): With whom did you have intercourse in the month of July, 1942; tell the Court. (No answer.)

"Q. You have stated here that you told this once. Now, you will have to tell it again, because we are in the Superior Court now. Tell the Court who had intercourse with you. Speak up, now. You are strong enough to tell this.

"The Court: All right. Answer the question, please. (No answer.)

"The Court: Answer the question, please. (No answer.)

"The Court: Well, will you write it down?

"Mr. Hopkins: She can answer it, your Honor. Answer the question. (No answer.)

"The Court: Here, write it down just— (No answer.)

"The Court: I am going to have to ask you to answer the question or either to write it down, one or the other. (No answer.)

"The Court: Well, do you know what we are going to have to do? We are going to have to have you up for contempt

of court if you fail to answer his questions and refuse to answer them. Now, we don't want to have any difficulty with you. Answer the question, please. (No answer.)

"The Court: It may be necessary, if you don't answer the questions and still refuse to answer the questions that I will have to put you in jail until such time as you will. Now, I don't like to have to take those steps. Answer the question, please. Read it again, Mr. Reporter. (Question read.)

"The Court: Answer the question. A. With my dad. * * *

"Q. Where did he have the acts—where were you—strike that. When—how many —did you have more than one act of intercourse with him? A. Yes, sir.

"Q. How many? A. Two."

Thereupon the witness testified that the alleged offenses occurred in the month of July in her bedroom during the absence of her mother but while her younger sister was present. She was then asked "Did you ever have any act of intercourse with anyone else?" to which she replied "No, sir". The prosecutrix further testified that her father admonished her not to say anything about the two occurrences concerning which she testified and that she made no complaint until the occasion of a subsequent clinical examination by the juvenile authorities wherein she was found to be pregnant when she told a juvenile officer what had occurred.

On cross-examination the record reveals the following:

"Q. Mr. Sanson (deputy public defender): Did you have intercourse with any other person? A. With a boy.

"Q. With a boy? A. Yes, sir.

"Q. Now, this is the first time that you have told about having an act with a boy, isn't it? A. Yes, sir.

"Q. Now, Irma, the truth of the matter is that the boy is the one that caused you to have the baby, isn't it? A. Yes, sir.

"Q. What made you say it was your father? A. Because I wanted to protect the boy, that is why.

"Q. Who is the boy? A. I don't know. He went away. He is not here any more.

"Mr. Hopkins: What is that?

"The Witness: He went away.

"Q. By Mr. Sanson: Who is he? A. I don't know his name. His name is just Manuel.

"Q. What? A. Manuel. I don't know his last name.

"Q. Where did you have an act of intercourse with him? A. At home.

"Q. Did you tell anybody about that until now? A. No, sir.

"Q. How? A. No, sir.

"Q. Now, Irma, you came to my office with your father or your mother and all your brothers and sisters at one time, did you? A. Yes, sir.

"Q. And you said that you wanted to have your father turned loose? A. Yes, sir.

"Q. But you said that your father did that, didn't you? A. Yes, sir.

"Q. Did that act? A. Yes, sir.

"The Court: Answer out loud.

"The Witness: Yes, sir.

"Q. By Mr. Sanson: Now, Irma, is the reason that you wanted your father turned loose because you did not do it—because he did not do it? A. Yes, sir.

"Q. Now, are you being honest about that? A. Yes, sir.

"Q. Where did you hear anybody say anything about protecting the boy? A. No, sir.

"Q. You did not get anything like that from—A. No, sir.

"Q.—from what we talked about? A. No, sir. * * *

"Q. Your father did or did not have an act of intercourse with you? A. He did not.

"Q. When you went to the preliminary hearing, did you know that he did not? A. He did—I said he did.

"Q. Can you tell the officers and the court and the District Attorney how to find this boy that did? A. No, sir.

"Q. Why not? A. Because I don't know.

"By the Court: What is his last name? A. I don't know his last name. I just know him by his first name."

"Q. By Mr. Sanson: How many times did this boy have intercourse with you? A. Twice."

The witness thereupon related the fact that she had met this boy while both of them were returning from school but that he did not attend the same school that she did; that he was about 17 years of age, that she did not remember his last name and knew him only as "Manuel".

Then the transcript discloses the following interrogatories and answers thereto:

"Q. It is all a lie about your father being in bed with you? A. Yes, sir.

"Q. Your father never did get in bed with you? A. No, sir.

"Q. Did you sleep alone or with somebody else? A. With my sister.

On redirect examination by the district attorney, the witness testified that she was protecting the boy "because I did not want him to get in trouble; that is why". The witness admitted that at the preliminary examination she testified that her father did commit the acts charged against him and when asked "That is right, isn't it?" answered "Yes, sir.". However, the witness persisted in her claim that she did know the boy called "Manuel". Finally, on redirect examination the deputy district attorney asked: "As a matter of fact, you are just trying to protect your father now because you don't want to see him get into any further trouble; that is correct, isn't it?" to which the witness answered "Yes, sir". The court then inquired of the witness as to whether she was friendly with and fond of her father, to which she replied: "Well, I have to like him, because he is my father, that is why". Thereupon the court asked: "You feel that is your duty; is that right?"; to which the witness answered "Yes, sir"; and stated that she had never quarreled with her parent. On recross-examination the following occurred:

"Q. By Mr. Sanson: Did your father have an act of intercourse with you or did he not? A. He did once.

"Q. When? A. I don't remember.

"Q. Never had one twice? A. Pardon me?

"Q. Never had two acts of intercourse with you? A. No, sir.

"Q. Did he have one in July with you? A. Yes, sir.

"Q. Where was that? A. At home.

"Q. Why did you say that he had two acts with you before? A. Well, one boy did and he—

"Q. What? A. One boy did.

"Q. May I have that answer read? (Answer read.)

"Q. By Mr. Sanson: One he did? A. Yes, sir.

"Q. Which one? A. I don't remember.

"Q. Which one did the boy and which one did he do? A. Which one did he do what?

"Q. Which act—which time did your father have an act with you? A. I don't remember.

"Q. How many years ago? A. In July."

Finally, defendant's counsel asked: "Q. Irma Casillas, did your father, Joe Casillas, ever have an act of intercourse with you?" to which the witness replied "No, sir". The deputy district attorney having no further questions, the witness was excused.

Thus we are confronted with the spectacle of the complaining witness in a prosecution for rape and incest, without any corroborative evidence or incriminatory circumstances being shown, reluctantly testifying on direct examination, after being threatened with imprisonment for contempt, that her father committed two acts of sexual intercourse upon her; then on cross-examination denying that her father ever had an act of sexual intercourse with her and accusing a boy named Manuel of being responsible for her pregnant condition; that she had accused her father because she desired to protect the boy and did not believe her accusation against her father would result in any trouble for the latter. Then again on recross-examination, we have the witness testifying that her father had one act of sexual intercourse with her and the boy named Manuel also committed one such act.

In his summation of the evidence after submission of the cause for decision, the trial judge observed: "In this case the complaining witness obviously was trying not to testify in this case against her father at all and, when she did, under considerable stress and strain, that was apparent, I think, to all, she said that her father was the one. She did not know this Manuel. She did not know anything about him except that he was one that appeared on the corner and went to school, and a different school, and she knew so very little that that was clearly, in the mind of the court, a subterfuge to try to change her testimony that was so damaging against her father at the time of the preliminary hearing. She was beside herself. * * * but her testimony that he was the one on two occasions and then later said it was on one and then said that he did not at any time—the court has to

consider that the last statement was made in attempting to do everything that she could to help her father. She was in a very perplexing position, and the court must find the defendant guilty on all charges in the information."

In ruling upon the motion for a new trial, the court said: "*In this case the testimony, as you stated, was entirely uncertain.* * * * after watching the witness, listening to the manner in which she testified, the court could come to no conclusion but that she was testifying to the truth * * * and that he had committed those acts. * * * Of course, I feel this way about the matter: While I feel—the way I decided the case—*it is quite a burden upon the court upon such unreliable testimony,* * * * I hesitated on the sentence that I must pronounce on all four counts in this case." (Emphasis added)

[3, 4] It is at once apparent that in the personal opinion of the trial judge, the prosecutrix told the truth only in that part of her testimony wherein she accused her father of the horrible crimes charged against him. But causes cannot be legally decided upon personal opinions of those charged with that responsibility, and legal decisions must be made upon a judicial determination based upon legal evidence and recognized rules of law. Neither jurors nor judges, when acting as arbiters of guilt, are permitted to base their decisions upon the existence or non-existence of facts according to their personal beliefs or experiences, but only upon facts established by legal and competent evidence or upon inferences deducible from such proven facts as authorized by law. The personal opinion of the judge does not necessarily reflect the legal opinion of the court. Personal opinion may, and often times does, disregard law, but judicial determination depends for its accuracy and solidity upon prescribed principles of law and definite rules of procedure. Conceding, as urged by respondent, that the trial judge has a wide discretion as the sole trier of facts in determining the credibility of witnesses and the intrinsic value of evidence, nevertheless that discretion is a legal one, and the proper exercise thereof presents a question of law.

[5, 6] Before we could affirm the judgments of conviction under the state of the record before us in this case, we would be compelled to completely emasculate the doctrine of reasonable doubt, reference to which was at no time made by the trial court in arriving at his decision or in passing upon the motion for a new trial. In whatever light the testimony of the prosecutrix is viewed, it must be conceded that her testimony was, in one part or another, perjurious. She gave three separate, distinct and contradictory versions as to who ravished her and the circumstances surrounding the commission of the offenses. Without being unmindful of the rule that where the evidence, viewed in one light, creates a hypothesis inconsistent with guilt, and when viewed in another light such evidence is reasonably consistent with guilt, and where the jury, or in this case, the trial judge, adopts the hypothesis pointing to innocence, and there is legal evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the trial court or jury; nevertheless it is axiomatic as well that an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible. When a case presents any of these features, this court deals with it as a matter of law.

[7] That such a situation only presents itself in extreme cases we may concede, but we are convinced that the case at bar does not present the usual and ordinary situation where the evidence was in conflict as to the main or only issue, but on the contrary, tenders to us a case wherein the evidence is so lacking in substantiality as to truth or credibility that it falls far short of that quantum of verity, reasonableness and substantiality required by law in criminal cases to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty. It must, therefore, be regarded as amounting to no evidence at all, as a matter of law, sufficient to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt.

The Attorney General argues that the boy referred to by the prosecutrix as "Manuel" was a mere fiction of her imagination and was non-existent because she could not remember his last name, the school he attended or his place of resi-

dence. We are not impressed by that argument because the record reflects that at all times during her testimony the complaining witness was obviously attempting to shield and protect this boy from identification and consequent trouble with the law.

[8, 9] Respondent contends that the failure of the defendant to take the witness stand and deny the charges lodged against him is also a circumstance which the trial court was authorized to take into consideration in determining defendant's guilt or innocence. True, in criminal cases, the failure of a defendant to explain or deny by his testimony any evidence or facts in the case against him may be considered by the court, but that does not impair or deprive the defendant of his long recognized constitutional right not to be compelled to be a witness against himself. Section 13, Article I, Constitution of California. A defendant, therefore, has a legal right, which he exercised in the instant case, to remain mute and rely upon the legal insufficiency of the testimony produced by the prosecution to establish his guilt beyond a reasonable doubt.

The judgments and the order denying defendant's motion for a new trial are and each of them is reversed and the cause remanded.

DORAN, J., concurs.

YORK, P. J., concurs in the reversal and the remanding of the cause.



60 Cal.App.2d 832

In re PHILLIPS' GUARDIANSHIP

PHILLIPS v. PHILLIPS et al.

Civ. 12495.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1943.

1. Guardian and ward ⇐8

The jurisdiction to appoint a guardian must be determined from Probate Code section relating to appointment of a guardian. Probate Code, § 1440.

2. Guardian and ward ⇐8

When minor has legal residence or domicile in one county and is temporarily domiciled in another, superior court of either county has jurisdiction to appoint a guardian, and neither court has exclusive jurisdiction. Probate Code, § 1440.

3. Guardian and ward ⇐8

The superior court of San Francisco was not without jurisdiction of petition to appoint minor's mother as guardian because mother kept minor in San Francisco in violation of interlocutory divorce decree entered in superior court of Kern county. Probate Code, § 1440.

4. Guardian and ward ⇐8

The superior court in San Francisco, where minor was living at time minor's mother filed petition for appointment as guardian, had jurisdiction, and hence order transferring proceeding to county from which minor was taken by mother constituted error. Probate Code, § 1440.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the guardianship of the person and estate of Deanne Phillips, a minor, wherein Bertrice Phillips, the minor's mother, filed a petition in the superior court of the city and county of San Francisco for appointment as guardian of the minor, and notice of hearing was given to Donald E. Phillips, the minor's father, and to Mary Phillips, the minor's paternal grandmother. From an order granting a motion for change of venue, the petitioner appeals.

Reversed with directions.

Fabian D. Brown, of San Francisco, for appellant.

Dorris & Fleharty, of Bakersfield, for respondents.

SPENCE, Justice.

This is an appeal from an order granting a motion for change of venue in a guardianship proceeding.

Bertrice Phillips, the mother of Deanne Phillips, a minor of the age of four years, filed her petition in the superior court of the City and County of San Francisco for appointment as guardian of said minor.

The court directed that notice of the hearing be given to Donald E. Phillips, the father of said minor and to Mary Phillips, the paternal grandmother of said minor, who are respondents herein. At the commencement of the hearing, respondents' counsel stated that he desired to make a motion for a transfer to Kern County. Counsel for petitioner objected to the hearing of the motion upon several grounds. The court ordered the motion submitted and proceeded to hear the testimony presented by the petitioner and by respondents upon the merits of the petition. At the close of the testimony, the matter was argued and submitted. Thereafter, the court failed to pass upon the petition upon the merits but made its order granting the motion for change of venue. Petitioner appeals.

Appellant contends that the trial court erred in granting the motion and in failing to pass upon the petition upon the merits. We are of the opinion that this contention must be sustained. Respondents concede that there is no authority for the making of a motion for change of venue in a guardianship proceeding and upon the oral argument, they conceded that their motion was "ill conceived and ill considered". But they argue that regardless of any irregularities, the order should be affirmed under section 4½ of article VI of the constitution. This argument is based upon the claim that the superior court in San Francisco had no jurisdiction and that the superior court in Kern County had exclusive jurisdiction to appoint a guardian for said minor and that therefore any error in ordering the transfer to Kern County was not prejudicial to appellant.

The facts upon which this argument is based are undisputed and may be briefly stated. In 1941, appellant and Donald E. Phillips, her husband, together with their minor child, were residing in Kern County. In November 1941, appellant obtained an interlocutory decree of divorce from Donald E. Phillips in the superior court of that county. Said decree, in accordance with the agreement of the parties, provided: "That the custody of the minor child, Deanne Phillips, should be award (sic) to Bertrice Phillips, defendant and cross-complainant. That the immediate care and control of said minor child, shall be in Mrs. Mary Phillips, grandmother of said minor child. That defendant and cross-complainant, Bertrice Phillips, shall have the right to visit said minor child, and to have the right to take said minor child to her home on certain holidays, like Thanksgiving, Christmas and also the right to have the child with her for a couple of days at a time, not exceeding six days in any one month." Thereafter, the minor lived with Mary Phillips at the latter's home in Kern County until October 18, 1942. On that date, appellant went to the home of Mary Phillips and took the minor from there to stay with her at her home in San Francisco where said minor remained until this proceeding was commenced. Appellant's petition for appointment as guardian of the minor, containing the usual allegations, was filed in the superior court in San Francisco on October 26, 1942.

[1] The claim that the superior court in San Francisco had no jurisdiction and that the superior court of Kern County had exclusive jurisdiction to appoint a guardian is without merit. The superior court of Kern County had, in the divorce action, exercised the power to provide for the custody of the minor conferred upon it by section 138 of the Civil Code but that section conferred no power or jurisdiction to appoint a guardian. The special proceeding for the appointment of a guardian is provided for in section 1440 of the Probate Code and the jurisdiction to appoint a guardian must be determined from the provisions of that section. Guardianship of Burket, 58 Cal.App.2d 726, 137 P.2d 475; In re Guardianship of Kerr, 29 Cal.App. 2d 439, 85 P.2d 145; Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352.

[2-4] Section 1440 of the Probate Code provides in part: "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate." This section replaced the former section 1747 of the Code of Civil Procedure, which referred to minors who were "inhabitants or residents of the county." It therefore appears that the jurisdiction of the superior court in any particular county is not confined to the appointment of guardians of those minors whose legal residence or legal domicile is in that county but that such jurisdiction extends, under the present section 1440, to the appointment of guardians of those minors who are "tem-

porarily domiciled" there and that such jurisdiction extended, under the former section 1747, to the appointment of guardians of minors who were mere "inhabitants" there. Guardianship of Burket, 58 Cal.App. 2d 726, 137 P.2d 475; Ricci v. Superior Court, 107 Cal.App. 395, 290 P. 517; In re Green, 67 Cal.App. 504, 226 P. 76; Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352. As used in said sections, those terms appear to be of similar import. It follows that when a minor has a legal residence or domicile in one county and is "temporarily domiciled" in another, the superior court in either county has jurisdiction to appoint a guardian and that neither of such courts has exclusive jurisdiction. But respondents argue that the superior court in San Francisco could not have jurisdiction as appellant kept the minor in San Francisco in violation of the terms of the interlocutory decree entered in the superior court of Kern County. No authority supporting this argument has been called to our attention, the cases cited by respondents not being in point. In Guardianship of Vance, 92 Cal. 195, 28 P. 229, there was an appeal from an order appointing a guardian and the court was concerned solely with the question of whether the "residence" of two minors, whose mother was dead and whose father had abandoned them, was in the county where the appointment had been made. Said minors had lived for many years in Sonoma County with their maternal grandmother. The order of the superior court of Sonoma County appointing the maternal grandmother as guardian was affirmed, the court holding that the minors' "residence was in Sonoma County, and it was not changed by their surreptitious removal to San Francisco." It was not held, however, that the superior court in San Francisco would not have had jurisdiction if the petition had been filed there. The case entitled Guardianship of Danneker, 67 Cal. 643, 8 P. 514, was in reality a prohibition proceeding arising under rather peculiar circumstances. The minor was a full orphan. A petition for appointment of a guardian was filed in the superior court in San Francisco alleging that said minor was a "resident" of San Francisco but was temporarily at a school in Alameda County. After the service of citation upon one Michelson, the latter filed a petition for appointment as guardian in the superior court of Alameda County alleging that the minor was a "resident" of Alameda County. Before the hearing of the proceeding in San Francisco, Michelson obtained an order from the superior court in Alameda County appointing him as guardian without disclosing to said court the pendency of the proceeding in the superior court in San Francisco. Michelson then sought a writ of prohibition to prohibit the superior court in San Francisco from entertaining the proceeding in that court claiming that said court had no jurisdiction. The writ was denied upon the ground that when the petition was filed in the superior court in San Francisco, "that court had jurisdiction to hear and determine whether the minor was a resident of that city and county" and that the subsequent proceeding in the superior court in Alameda County did not "oust the former court of jurisdiction to proceed". It was not held, however, that the superior court in Alameda County would not have had jurisdiction to appoint a guardian if the petition, filed in the superior court in that county, had been filed prior to the time of the filing of the petition in the superior court in San Francisco. In the present case, there was but one proceeding, which proceeding was pending in the superior court in San Francisco, the place where the minor was "temporarily domiciled". We therefore conclude that under said section 1440 the superior court in San Francisco had jurisdiction; that it should have passed upon the petition upon the merits; and that the making of the order transferring the proceeding to Kern County constituted error requiring a reversal.

We do not wish to be understood as expressing any opinion as to whether the petition should be granted or denied but as the superior court in San Francisco must pass upon the petition upon the merits, we believe it appropriate to make certain observations. The petition alleged "that said minor has no estate". It therefore appears that appellant sought to invoke the jurisdiction of the superior court in the county in which the minor was "temporarily domiciled" for the purpose of obtaining an order appointing appellant as guardian of the minor's person. It also appears that, in the divorce proceeding in the superior court in Kern County, the interlocutory decree contained provisions for the custody of the minor, which provisions may be changed by that court at any time upon a proper showing. In passing upon the petition upon the merits in the present proceeding, it will

be appropriate for the superior court in San Francisco, in the exercise of its jurisdiction, to determine among other things whether under all the circumstances "it appears necessary or convenient" to appoint a guardian of the person of said minor. Probate Code, sec. 1440.

The order appealed from is reversed with directions to the trial court to pass upon the petition upon the merits.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.



WULFJEN v. DOLTON et al.
Civ. 14160.

District Court of Appeal, Second District, Division 1, California.
Oct. 8, 1943.

Rehearing Denied Nov. 1, 1943.
Hearing Granted Dec. 7, 1943.

1. Appeal and error ⇐105

An order granting nonsuit duly entered in minutes of court is in legal effect a "judgment of nonsuit" and hence is appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment of Nonsuit".

2. Corporations ⇐448(1)

The quoted phrase in letter whereby director-officers made offer to corporation organized in 1938, to advance capital up to $15,000, including advances made after December 31, 1937, "and before acquisition of the business by you", advances to be repaid out of net earnings, did not authorize repayment out of other than net earnings for moneys advanced after acquisition of business by corporation, in view of other provisions of letter.

3. Corporations ⇐326

Where judgment creditor's claim against corporation arose subsequent to date when directors' alleged liability to corporation arose, judgment creditor could not avail herself of statute prescribing creditor's remedy on claim arising prior to time of a director's violation of duty. Civ.Code § 363.

4. Corporations ⇐353

A director, who was not served with writ of execution under judgment obtained against corporation, could not become liable to judgment creditor for any sums received by director from corporation. Civ.Code, § 363.

5. Corporations ⇐325

A corporation's judgment creditor was not entitled to relief against director-officers under statute prohibiting a corporation from making any loan to, or guaranteeing obligation of, director, officer, or shareholder, where corporation and director-officers jointly signed a note as co-makers, and corporation received the money so that directors became the guarantors of corporation's obligation. Civ.Code, § 366.

6. Corporations ⇐325

A corporation's judgment creditor was not entitled to relief against director-officers under statute prohibiting a corporation from making any loan to, or guaranteeing obligation of, director, officer, or shareholder, where director paid to corporation more money than he received from it, and codirector who was at the most a guarantor of director's obligation was entitled to benefit of offset claimed by director. Civ.Code, § 366.

7. Corporations ⇐351

A corporation's judgment creditor could not maintain equity suit against directors even if directors were indebted to corporation under contract with corporation since judgment creditor had an adequate remedy at law, and no reason existed for equitable intervention. Civ.Code, §§ 363, 366; Code Civ.Proc. §§ 544, 720.

8. Corporations ⇐351

Where equity suit by corporation's judgment creditor was predicated upon Civil Code sections, creditor was not entitled to relief provided for in sections of Code of Civil Procedure. Civ.Code, §§ 363, 366; Code Civ.Proc. §§ 544, 720.

9. Trial ⇐159

An order granting nonsuit was properly entered where there was no evidence

authorizing recovery by plaintiffs in the cause of action stated.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edith S. Wulfjen against O. L. Dolton, Jr., Lindley W. Potts, Helen King, and Concrete Homes Corporation for judicial decree that defendants were holding money for use and benefit of the defendant corporation as well as for plaintiff and other creditors, and that a receivership be appointed, wherein third named defendant filed a cross-demand against the defendant corporation. From an order granting a nonsuit, plaintiff appeals.

Affirmed.

See, also, Cal.App., 141 P.2d 927.

Thomas F. McCue and Mildred L. Zingals, both of Los Angeles, for appellant.

Daily & Gallaudet and Edward Gallaudet, all of Glendale, for respondents Dolton and Potts.

Paul Angelillo, of Los Angeles, for respondent King.

WHITE, Justice.

[1] This is an appeal from an order granting a non-suit, duly entered in the minutes of the court. Such an appeal is authorized because the order granting the non-suit, in its legal effect, is the equivalent of a judgment of non-suit. Lewis v. Hammond Lumber Co., 114 Cal.App. 390, 391, 300 P. 49.

The record reveals that on January 21, 1938, the defendants Dolton, Potts and King executed and delivered to the American National Bank of Santa Monica their promissory note in the sum of $5,000. On January 27, 1938, Concrete Homes Corporation was organized. The aforesaid defendants, who signed the promissory note, were officers and directors of the newly formed corporation. On March 1, 1938, the defendants Dolton, King and Potts addressed a letter to the corporation, which included among other things, an offer to the corporation for the transfer of certain assets from them to the corporation in exchange for certain of the capital stock as in such letter provided. The portion of the letter herein applicable read as follows: "The undersigned, Lindley W. Potts and Oliver L. Dolton, Jr., have advanced, and may hereafter advance, for working capital and the general purposes of the business, such sum of money, as may be necessary for such purposes, not in excess of Fifteen Thousand Dollars ($15,000), including advances made after December 31, 1937, and before acquisition of the business by you, and it is understood that such advances will be repaid by you to the undersigned out of your first net earnings. You will, as such advances are made, evidence the obligation to repay them to said undersigned persons by your promissory note or notes bearing interest at six per cent (6%) per annum, payable out of net earnings. It is understood that you will not assume any advances made by any of the undersigned for the benefit of the business, prior to December 31, 1937. * * * Signed: O. L. Dolton, Jr., Helen King, Lindley W. Potts."

The offer contained in said letter was accepted by the corporation and thereupon application was made to the Commissioner of Corporations of the State of California for permission to issue stock in accordance with the terms of the aforesaid offer. The permit was granted and the stock issued in escrow.

On June 20, 1938, defendants Dolton, Potts and King constituted the entire board of directors of the corporation and on that date executed a consent to hold and waiver of notice of a special meeting of the board of directors, and convened such special meeting. There were other holders of stock and neither the vote nor written consent of any stockholder, other than the three above named defendants, was ever obtained to the holding of such meeting or to any of the actions taken thereat.

Pursuant to a resolution which the board of directors adopted at such meeting, the bank made a loan to the corporation in the sum of $8,500, out of which $5,025 was used to pay the aforesaid note of the three defendants above referred to and executed prior to the incorporation of Concrete Homes Corporation, plus accrued interest, and a further sum of $1,275 was utilized to repay an advance made to the corporation by defendant Dolton. At the time of the aforesaid director's meeting, the adoption of the resolution, receipt of the loan and payments of the $5,025 and $1,275 items were made, the corporation had not earned any income, either net or gross. It may fairly be stated that at no time here

material did the corporation have any net income.

Plaintiff herein is a judgment creditor of defendant Concrete Homes Corporation, Inc., having on November 14, 1940, recovered a judgment against such corporation in the principal sum of $6,950 with accrued costs in the additional sum of $515.10. Said judgment at the time of the commencement of this action had become final. Pursuant to said judgment, a writ of execution issued out of the superior court on January 16, 1941, and it is conceded that the same was served upon defendants Dolton and King on the dates alleged in the complaint and that no service thereof was made upon defendant Potts. The complaint discloses that the writ was served on defendant King on January 18, 1941, and on defendant Dolton on January 20, 1941. The writ of execution was returned by the sheriff wholly unsatisfied. On February 7, 1941, defendants Dolton and King were examined in supplementary proceedings at which time each denied any debt or obligation to Concrete Homes Corporation and each claimed an interest in the property of such corporate judgment debtor adverse to it. Following the refusal of defendants Dolton and King as officers of the corporation to commence an action on behalf of the corporation against themselves as individual debtors of said corporate judgment debtor to collect moneys claimed by plaintiff herein as judgment creditor to be due from defendants Dolton, Potts and King, this action was commenced by plaintiff wherein she seeks a judicial decree that the defendants are holding the sum of $6,300 for the use and benefit of defendant corporation as well as for plaintiff and other creditors of such corporation; that a receiver be appointed for the purpose of collecting and receiving from defendants Dolton, Potts and King the aforesaid sum. In general plaintiff's complaint may be said to be based on the hereinbefore quoted letter written by defendants Dolton, Potts and King to the corporation under date of March 1, 1938, it being plaintiff's contention that because of the provisions of such letter the named defendants were not entitled to receive for themselves the proceeds or any of the proceeds of the aforesaid loan made from the bank.

Defendants King and Potts answered by way of general denial and each urged as a separate and affirmative defense that plaintiff's complaint did not state a cause of action against them, while defendant Dolton's answer set up a general denial and by way of affirmative defense alleged a cross-demand against defendant corporation in the sum of $18,990 and further that plaintiff's complaint did not state facts sufficient to constitute a cause of action against him.

After having been duly served with summons and complaint, the defendant corporation failed to answer and at the trial its default was entered and judgment as prayed ordered against it. The cause then proceeded to trial as to the individual defendants. After plaintiff had presented her evidence and rested her case, the motion for a non-suit, from which this appeal is taken, was granted in favor of all three defendants.

Appellant first contends that the letter of March 1, 1938, written by respondents Dolton, Potts and King, constituted a valid and binding contract between them and defendant corporation, under the terms of which any moneys advanced by respondents to the corporation after December 31, 1937, not in excess of $15,000, could only be repaid to respondents out of net earnings; that therefore respondents were not entitled to be repaid any of such advancements because the corporation had no net earnings. The minutes of the first meeting of the board of directors of defendant corporation on March 2, 1938, which were introduced into evidence, show that respondents herein addressed a letter to the corporation whereby they agreed to transfer to the latter all of their rights under certain licenses relating to certain United States Letters Patent covering processes used in and relating to the construction of concrete or part-concrete buildings, in consideration of the corporation delivering to respondents all of its capital stock consisting of 2,500 shares. In the aforesaid letter of March 1, 1938, there also appears the following: "By your acceptance of this offer you will undertake to assume all of the liabilities and obligations of the business incurred after December 31, 1937 (provided that liability for advances shall be payable only out of net earnings as above set out)".

[2] It seems clear to us that any amounts advanced to the corporation by respondents after December 31, 1937, up to the amount of $15,000 were not to be repaid under the agreement except from net

earnings of the corporation. The record conclusively shows that the $5,000 obtained by respondents on their note and used in furtherance of the business was obtained by them on January 21, 1938, at which time the corporation was not yet in existence. Manifestly the advancement was one contemplated by respondents' letter of March 1, 1938, and was to be repaid only out of net earnings of the corporation. Respondents contend that the words in the letter "and before acquisition of the business by you", authorize them to be repaid, not exclusively from net earnings for any moneys advanced after the acquisition of the concrete construction business from respondents by acceptance of the same on March 2, 1938. We are not in accord with such contention because respondents' letter of March 1st definitely states that they not only advanced but "may hereafter advance, for working capital and the general purposes of the business * * *". This would seem to clearly indicate that not only the advancements made prior to March 1st, but subsequent advancements to be made by respondents were to be repaid only out of net earnings of the corporation.

Nevertheless, whatever rights the corporation might have to recover these repaid amounts, appellant's right to prevail in this lawsuit as a judgment creditor of defendant corporation is dependent upon sections 363 and 366 of the Civil Code, for, as stated by her counsel at the trial, it "grows out of the liability provided by sections 363 and 366 of the Civil Code".

[3, 4] The first mentioned section clearly states that a creditor may maintain the action therein contemplated "if the debt or claim arose prior to the time of such violation". The liability, if any, imposed upon respondents arose on June 20, 1938. The record clearly indicates that appellant's claim against the corporation arose subsequent to that date. Therefore, appellant, as a judgment creditor of the corporation cannot avail herself of the remedy prescribed by section 363 of the Civil Code against the individual directors of the corporation. Furthermore, respondent Potts, never having been served with the writ of execution, could not have become liable.

[5, 6] The provisions of section 366 of the Civil Code inhibit a corporation from making "any loan of money or property to or guarantee the obligation of" a director, officer or shareholder, save and except when such loan or guarantee is made by the "vote or written consent of the holders of two-thirds of the shares" of all stock, exclusive of the shares held by "the benefited director, officer or shareholder". The section then provides that any director, shareholder or officer benefiting through such inhibited loan or guarantee shall be liable to the corporation for the amount involved therein. While this section has not been construed or interpreted by the courts of this state, appellant relies upon the case of In re Globe Drug Co., Inc., 9 Cir., 104 F.2d 114, 116. The cited case involved a suit instituted by a trustee in bankruptcy against an officer and director of a bankrupt corporation. The case, however, is not analagous to the one at bar because in the cited case the bankrupt corporation co-signed the individual officer and director's notes but the latter received the proceeds and not the corporation. This point is emphasized by the court in the following language: "The bankrupt received nothing for the payments made by it on the Stelzner note, or for its note to the bank". In the instant case the corporation and the individual respondents jointly signed the $8,500 note as co-makers, but the corporation received the money. The individual directors therefore were in truth the guarantors of the corporation's obligation. The prohibtion contained in section 366 of the Civil Code declares that the corporation shall not "make any loan of money or property to or guarantee the obligation of" a director, officer or shareholder. Under the circumstances here present it cannot, therefore, be said that Concrete Homes Corporation, Inc., loaned any money to respondents or guaranteed the obligations of any of them. Furthermore, the record herein discloses that respondent Dolton, according to financial statements introduced in evidence, paid to the corporation more money in the aggregate than he received from it, and respondent King, being at the most a guarantor of respondent Dolton's obligation, she is entitled to the benefit of the offsets claimed by him.

[7, 8] Finally it must be held that assuming as we have heretofore pointed out that respondents may be indebted to the corporation for certain amounts of money under the terms of their contract contained in their letter to the corporation under date of March 1, 1938, appellant has an adequate

remedy at law pursuant to the provisions of sections 720 and 544 of the Code of Civil Procedure, subject possibly to the provisions of section 368 of the same code, and no reason exists for equitable intervention. In any event, her equity suit herein being predicated upon sections 363 and 366 of the Civil Code she is, as we have heretofore pointed out, not entitled to the relief provided for in the last mentioned code sections.

[9] Bearing in mind the familiar rules applicable when the court is ruling on a motion for a non-suit, and the limitations upon its powers in that regard, there is nevertheless no evidence in the record authorizing a recovery by appellant in the cause of action with which we are here concerned.

For the foregoing reasons the order granting a non-suit is affirmed.

YORK, P. J., and DORAN, J., concur.



60 Cal.App.2d 802

PEOPLE v. FRANK.

Cr. 1837.

District Court of Appeal, Third District, California.

Oct. 11, 1943.

1. Automobiles ⇐355(8)

Evidence *held* sufficient to sustain conviction for failure to stop automobile and give defendant's name and address and registration number of automobile to one injured thereby. Vehicle Code, § 480, St. 1935, p. 170.

2. Criminal law ⇐1159(2)

Where there is evidence that a crime was committed and that defendant perpetrated it, the court, on appeal from conviction thereof, will not determine weight of evidence, but will decide only whether, on face of evidence, sufficient facts could not have been found by jury to warrant inference of defendant's guilt.

3. Criminal law ⇐741(1), 1160

It is function of jury in first instance, and of trial court after verdict of conviction, to determine what facts are established by evidence.

4. Criminal law ⇐1160

A jury's verdict of conviction, approved by trial court, cannot be set aside on appeal for insufficiency of evidence to sustain it, unless it clearly appears that there is no sufficient substantial evidence to support jury's conclusion on any hypothesis whatever.

5. Criminal law ⇐562

The determination of criminal charge involves proof that offense charged was committed and that it was perpetrated by person accused thereof.

6. Criminal law ⇐1144(13)

The appellate court must assume, in favor of jury's verdict of conviction, the existence of every fact which jury could reasonably have deduced from evidence, and then determine whether such facts were sufficient to support verdict.

7. Criminal law ⇐1159(2)

Where circumstances in evidence reasonably justify jury's verdict of conviction, reviewing court's opinion that such circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

8. Criminal law ⇐444, 695(5)

In prosecution for failure to stop automobile and give required information to one injured thereby, a photograph, which constable testified was true representation of conditions on highway at place and time of accident, except for girl in photograph, was properly admitted, as illustrative of witness' testimony, over objection that he was not qualified to, and did not properly, identify photograph, though girl's presence therein was not explained. Vehicle Code, § 480, St.1935, p. 170.

9. Criminal law ⇐1169(2)

In prosecution for failure to stop automobile and give required information to person injured thereby, error, if any, in admitting in evidence one of a series of six photographs, the rest of which were admitted without complaint, to illustrate testimony of constable, was not prejudicial to defendant. Vehicle Code, § 480, St. 1935, p. 170.

Appeal from Superior Court, Mendocino County; W. D. L. Hela, Judge.

Henry Frank was convicted of failing to stop his automobile and give his name and address and registration number of automobile to one injured thereby, and he appeals.

Affirmed.

Burke & Rawles, of Ukiah, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Appellant was charged with a violation of Section 480 of the Vehicle Code, St.1935, p. 170, it being alleged in the information that on April 19, 1943, in Mendocino County he drove an automobile which was involved in an accident resulting in injury to one Chad Hansen and that appellant failed to stop his automobile and failed to give his name, address and the registration number of the automobile. Upon a trial by jury he was found guilty. His motion for a new trial was denied and judgment was pronounced. This appeal is from the judgment and from the order denying the motion for a new trial.

Appellant urges these points which he states as follows:

"1. Does the evidence support the implied finding of the jury that the car driven by defendant struck and injured a man?

"2. Does the evidence support the implied finding of the jury that the defendant had knowledge, if it be a fact, that defendant had struck and injured such person?

"3. Did the Court err in admitting a picture with a witness so placed therein as to draw attention to her presence without explanation when the jury would be thereby led to believe that she was purporting to point out the location of the victim on the highway whom she testified she had never seen?"

We will discuss the first two points together as they are interwoven, and in order to understand them better we will make a brief summary of the facts as we believe they may fairly be deduced from the record.

During the afternoon of April 18th appellant, who was thirty-five years old, picked up four young girls at the Manchester Reservation about six miles north of Point Arena and the five rode around in appellant's automobile during the afternoon and evening. They stopped at various places where they partook of intoxicating liquors, but also carried wine and beer in the car and stopped occasionally to have a drink. Later in the evening they were joined by two young men who also got into the car. Sometime after midnight appellant was driving his automobile along the Coast Highway toward Point Arena. Two of the girls were in the front seat with him and the other two girls and the two boys were in the back seat. Appellant drove his car onto the left side of the highway and crashed into a highway post which he broke off. He continued to drive along the highway and struck a Coast Guardsman who was walking along the highway. Though the appellant denied on the witness stand that he had struck anyone, a statement made by him after the accident was introduced in evidence, in which statement he admitted having struck a man at the point of the accident, and a highway patrolman testified that he took appellant to the scene of the accident and that appellant admitted that he had seen the Coast Guardsman before he hit him, but said he could not stop. There was evidence that after the Coast Guardsman had been struck appellant's car stopped for a moment but admittedly no one got out of the car. One of the girls who was riding in the front seat at first denied that a man had been struck but upon being confronted with a previous statement to the contrary testified that the car did strike a man. All of the occupants of the car were aware that the car had struck and run over some object as they felt the jar. Later, during the same night, the two young men who were in the car at the time of the accident were returning along the same route and ran over a body which they testified was at about the same place at which they felt the jar of appellant's car when they were riding with him. At about 6:30 on the morning of April 19th the constable at Point Arena found a Coast Guardsman's body lying in the center of the Coast Highway north of the city limits of Point Arena. Off the west edge of the highway across from the body was growing grass which was mashed down and there were bloodstains indicating that someone had lain upon it. Bloodmarks on the pavement indicated where the body had been first struck and footprints indicated where decedent had walked to lie down in the grass beside the highway and where he had arisen to resume walking. The body was examined by a doctor at about 10:30 A. M. and showed numerous severe cuts and

bruises on the head, body and legs and the doctor testified in his opinion the deceased had been dead about six hours, indicating that he had lived for sometime after he was struck. An expert witness from the State Division of Criminal Investigation testified that the paint on the post that was struck by appellant's car and the paint on the fender of appellant's car were identical in color and general appearance with paint found on the clothing of the deceased; and the same witness also testified that the soil found on defendant's car was identical with soil found at the point on the highway where deceased was apparently struck.

[1-7] In support of his contention that the evidence is insufficient, appellant points out what he terms contradictions and inconsistencies in the testimony of various witnesses. It is apparent that the occupants of the car that appellant was driving were extremely unwilling witnesses for the People, but it is not possible to read the record without concluding that there is ample evidence to sustain the verdict of the jury. The argument of appellant upon this point is in effect an argument as to the weight of the evidence, and would be, and no doubt was, more properly directed to the jury. As was said by our Supreme Court in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, 779: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed, and second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Perkins, 8 Cal. 2d 502, 66 P.2d 631, 635; People v. Tom Woo, 181 Cal. 315, 184 P. 389; also, People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Bresh, 33 Cal.App.2d 161, 91 P.2d 193; People v. Wilson, 33 Cal.App.2d 194, 91 P. 2d 207."

Applying the rule just stated to the case at bar, we believe that the record shows that appellant was driving the automobile that struck the deceased and that he knew he had struck a man but failed to stop.

[8, 9] Appellant's final contention is that the court erred in admitting a picture (Peo. Ex.No.4) with a witness so placed therein as to draw attention to her presence without explanation, when the jury would be thereby led to believe that she was purporting to point out the location of the victim on the highway whom she testified she had never seen. Appellant argues that the jury was misled by the photograph because it showed the witness, Vernice Ball, upon the highway and that her presence in the picture was not explained.

This contention of appellant is utterly devoid of merit. When this picture was introduced in evidence the constable was the witness upon the stand and he was asked if except for the girl in the picture it was a true representation of the conditions and surroundings on the Coast Line Highway near the northern boundary of Point Arena on the morning of April 19, 1943, and he answered that it was. Appellant's objection to its introduction was upon the ground that the witness was not qualified to identify the picture and that it was not properly identified. This objection was properly overruled by the court and the photograph was properly admitted in evidence as illustrative of the testimony of the witness. An examination of the photograph itself merely shows the highway and

a girl standing in approximately the center thereof, and even if it were improperly admitted in evidence, which we, of course, do not hold, no possible prejudice could have resulted to appellant as it was only one of a series of six photographs, concerning the admission of the rest of which no complaint is made. Furthermore, appellant could have asked the court to instruct the jury that the presence of the girl in the picture had no bearing upon the case, but failed to do so. If such a request had been made the court would undoubtedly have so instructed the jury, even though it was stated at the time the photograph was offered that it was a true representation except for the girl in the picture.

Our conclusion is that the defendant was fairly tried, that the verdict of the jury was supported by ample evidence, and that the judgment and order should be and they are hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



60 Cal.App.2d 612

McLANE et al. v. VAN EATON et al.

Civ. 14064.

District Court of Appeal, Second District, Division 2, California.

Sept. 28, 1943.

1. Vendor and purchaser ⇐231(1)

Where contract for sale of realty had been placed on record before defendant purchased the realty from vendor, "constructive notice" of the contract was given to defendant who took the realty subject to the rights of the purchaser and his assignees. Civ.Code, §§ 1213, 1215.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

2. Specific performance ⇐23

Where vendor's grantee had constructive notice of rights of purchaser and his assignees, vendor's grantee was not a "purchaser in good faith" within statute relating to specific enforcement of obligations of contracts with respect to realty and purchaser's assignees upon complying with the contract were entitled specifically to enforce the obligations thereof against vendor and her grantee. Civ.Code, § 3395.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchaser in Good Faith".

3. Specific performance ⇐97(3)

Notwithstanding statute relating to extinguishment of obligations by deposits in bank, where purchaser assigned his rights to plaintiffs and vendor conveyed the realty to defendant and refused plaintiffs' offer to pay the balance of the purchase price and plaintiffs did not claim that their obligation to pay was extinguished, specific performance in favor of plaintiffs was not precluded on ground that plaintiffs did not deposit the balance of the purchase price in bank. Civ.Code, § 1500.

4. Vendor and purchaser ⇐95(2), 101

A vendor who accepts payment while his purchaser is in arrears with respect to payments suspends his right to declare a forfeiture which can be restored only by his giving notice of an intention to require that payments be made thereafter on their due dates.

5. Vendor and purchaser ⇐101

Where vendor accepted payments after they were due without giving notice of an intention to require strict performance in the future, vendor was not entitled to declare a forfeiture of contract because of failure of purchaser's assignees to make the last two payments on the due date, notwithstanding that contract contains provision that time is of the essence.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by Walter Scott McLane and another against Clyde N. Van Eaton and another for specific performance of executory contract for the sale of realty. From a judgment denying specific performance and awarding a sum of money against named defendant, plaintiffs appeal.

Reversed.

Geo. S. Hupp, of Los Angeles, for appellants.

Ralph W. Miller, of Los Angeles, for respondent Clyde Van Eaton.

Martin Korstad, of Los Angeles, for respondent Lloyd J. Storr.

W. J. WOOD, Justice.

Plaintiffs, assignees of the purchasers under an executory contract for the sale of a parcel of realty, commenced this action to compel specific performance by defendant Storr, to whom the vendor, Van Eaton, had conveyed subsequent to the execution of the executory contract. The trial court denied specific performance and gave a money judgment against defendant Van Eaton. From this judgment plaintiffs appeal.

By the contract in question Mrs. Van Eaton agreed to sell to John W. Mattox the lot in question for the sum of $318 payable at the rate of $10 per month on the fifteenth day of each month, the last payment becoming due on April 14, 1941. The contract was dated June 15, 1938, and was recorded in the office of the county recorder on August 11, 1938. Mattox assigned all of his interest in the contract to plaintiffs on May 15, 1939, by an instrument in writing which was recorded on the same date. The purchasers were delinquent at various times in their monthly payments but all payments were made to Van Eaton and accepted by her to March 1, 1941, on which date the payment of $10 due on February 15, 1941, was made. At that time the balance due was $20.23. Plaintiffs wrote a letter to defendant Van Eaton under date of March 15, 1941, informing her that they had purchased the property in question and stating that they wished to pay the balance due on the contract upon the delivery of the deed and certificate called for in the contract. To this Mrs. Van Eaton replied by letter dated March 19, 1941, as follows: "Mr. Walter McLane 4300 Whittier Blvd. Los Angeles, Calif Dear Sir:—I would like very much to comply with your request to give Mr. Mattox a deed to the property at 451 So. Downey Rd. but that property is under attachment in a suit filed against Mattox by the California Mutual Discount Company, and I have been served with a court order prohibiting me from executing the deed and requiring that I hold title of the property for satisfaction of the claim upon which Mr. Mattox was sued. The amount of the claim is $318.00 with interest at 7% per annum from June 15, 1938, plus $75 attorney's fees. The case number is 576545 in the Municipal Court of Los Angeles. Enclosed is the card of the company which filed the attachment. Perhaps if you called them some kind of an arrangement can be worked out whereby the property could be released. Under the circumstances, there is nothing I can do until I receive a release from the court. Just for your information, I wrote Mr. Mattox many times during the past three years trying to effect a settlement with him, but was unable to get results. In fact he consistently ignored my letters and my demands. Some several months ago I sold my claim against him and now have nothing to do with the matter. Yours very truly (Mrs.) Clyde Van Eaton."

The present action was commenced on December 11, 1941. It was established at the trial of the action that the property in question had not been subjected to attachment as claimed by Mrs. Van Eaton in her letter. On November 13, 1941, Mrs. Van Eaton addressed a letter to John W. Mattox in which Mattox was notified that she had declared a forfeiture of the contract of sale in question because of the alleged failure of Mattox to comply with the terms and conditions of the agreement. No notice of forfeiture was sent to plaintiffs. On November 14, 1941, Mrs. Van Eaton conveyed the property to defendant Storr, the selling price to him being $425.

The trial court found: "That thereafter, on March 15, 1941, plaintiffs offered to pay said balance due in a communication addressed to defendant Clyde N. Van Eaton, but said defendant refused to accept said offer; and the court finds it is true that on said day and date plaintiffs failed to make said offer effective by depositing in a bank the sum equal to the balance due thereunder, thereafter giving such deposit to said defendant Clyde N. Van Eaton." The court also found that the reasonable value of the property on November 14, 1941, was the sum of $384. A money judgment in the sum of $384 was given against Mrs. Van Eaton.

[1, 2] The briefs contain discussion on the question whether the evidence conclusively shows that defendant Storr acted in bad faith and with full knowledge of the claims of plaintiff when he purchased the property. This point is of little consequence since the contract made between Mrs. Van Eaton and Mattox had been placed on record long before the purchase by Storr. This gave constructive notice to Storr, who took the property subject to the rights of the vendee named in the contract and of his assignees. Civil Code, §§

1213, 1215. Upon complying with the terms of the contract plaintiffs, as assignees of Mattox, had the right to specifically enforce the obligations of the contract against the vendor and against the grantee of the vendor. Section 3395 of the Civil Code provides: "Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligations." Since defendant Storr had constructive notice of the rights of Mattox and of plaintiffs he cannot be held to be a purchaser in good faith.

[3] The finding of the trial court that plaintiffs had not complied in all respects with the terms of the contract is not supported by the evidence. From the findings it appears that the court was of the opinion that plaintiffs could not be held to have complied with the terms of the contract for the reason that they did not deposit the sum of $20.23 in a bank. In this the court erred. The finding of the court that defendant Van Eaton refused to accept the offer of plaintiffs is supported by the evidence. Her refusal to accept the offer, without any sufficient reason therefor, and without making a specific objection to the sufficiency thereof, made it unnecessary for plaintiffs to take further action. Moreover, regardless of the refusal of Mrs. Van Eaton to accept the offer of plaintiffs, the failure of plaintiffs to make a deposit of the balance due in a bank did not nullify their right to enforce the terms of the contract. Walker v. Houston, 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937. Section 1500 of the Civil Code provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor". It will be noted that under this section the obligation to pay is extinguished by the deposit when properly made. Plaintiffs, however, do not claim that their obligation to pay is extinguished but stand ready to pay the balance that is due.

[4, 5] The contract contained the usual provision that "time is of the essence" and it is claimed that the failure of plaintiffs to make the last two payments on their due dates supports the finding of the trial court that they did not comply with the terms of the contract. A vendor who accepts payments while his vendee is in arrears with respect to payments due suspends his right to declare a forfeiture, which can be restored only by his giving notice of an intention to require that payments be made thereafter on their due dates. La Chance v. Brown, 41 Cal.App. 500, 183 P. 216; Hermosa Beach, etc., Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Stevinson v. Joy, 164 Cal. 279, 128 P. 751. The evidence establishes indisputably that Mrs. Van Eaton accepted payments on the contract after they were due, without giving notice of her intention to require strict performance in the future. She was not in position to declare a forfeiture.

The judgment is reversed.

MOORE P. J., and McCOMB, J., concur.



60 Cal.App.2d 777

O'CONNELL GOLD MINES, LIMITED, v. BAKER et al.

Civ. 6886.

District Court of Appeal, Third District, California.

Oct. 7, 1943.

I. Appeal and error ⇐773(2)

While court rule properly construed means that when transcript or brief is on file at time "notice is given" as distinguished from time when motion to dismiss is heard, it shall be sufficient answer to motion, nevertheless sound discretion remains in court to grant or deny motion, dependent upon showing of reasonable excuse for delay, even when transcript or brief is not on file until after notice to dismiss is given. Rules of Supreme Court and District Court, rule 5, § 1.

2. Appeal and error ⇐773(3)

Where district court dismissed appeal on court's own motion because opening brief was not filed in time and brief arrived and was filed same day, and was filed delayed by appellant in reliance upon previous custom of district court which custom was changed shortly before such dismissal by Supreme Court, and where appellant wired two days before hearing that brief was in transit to be filed, such facts showed reasonable excuse and authorized the setting aside of order of dismissal. Rules of Supreme Court and District Court, rule 5, § 1.

Appeal from Superior Court, Siskiyou County; H. S. Gans, Judge.

Suit by the O'Connell Gold Mines, Limited, against H. George Baker and another involving title to certain mining claim. Judgment for plaintiff, and defendants appeal. On motion to set aside order of District Court dismissing appeal for failure to file opening brief within time allowed by Rule 1, § 4 of Rules for Supreme Court and District Court of Appeals.

Order vacated and appeal restored.

J. Everett Barr, of Yreka, for appellant.

Tebbe & Correia, of Yreka, for respondent.

THOMPSON, Justice.

The defendants have moved to set aside an order of this court dismissing their appeal for failure to file the opening brief within the time allowed by Rule I, Section 4, of Rules for Supreme Court and District Courts of Appeal. The motion is presented on affidavits of the respective parties.

The transcript was duly filed June 23, 1942. The suit involves the title to certain quartz mining claims in Siskiyou County. The defendants aver that it is impracticable and unprofitable to mine the claims during the present war on account of the scarcity of labor, the imposition of priorities and several restrictive orders of the administration; that both parties realized that fact and defendants were led to believe delay in filing the briefs would not be objectionable. The respondent made no motion to dismiss the appeal for failure to file the brief within the time prescribed. On its own motion this court gave notice to the defendants to show cause why the appeal should not be dismissed on that account. That hearing was set for April 26, 1943. Defendants' attorney wired this court from Yreka April 24th that their brief had been printed and was in transit to be filed. He assumed, according to former custom, that the presence of the brief before the time of hearing would be an answer to the order to show cause. He was therefore not present at that time. The brief failed to arrive prior to the time fixed in the notice, and this court therefore dismissed the appeal. The brief however arrived and was filed that same day soon after the entry of the dismissal. This motion to vacate the order dismissing the appeal was then made upon due notice.

[1] Contrary to the language of Rule V of said Court Rules, it has been previously held that the filing of a delayed brief or transcript before the time of hearing of a motion to dismiss the appeal would justify the denial of that relief. Murphy v. Krumm, 21 Cal.2d 846, 136 P.2d 8. In filing their brief in the present case the defendants relied on that former custom. Not until the rendering of its decision in the last-cited case on April 12, 1943, did the Supreme Court correct that prevalent mistake on the part of certain District Courts of Appeal in the construction of the language of that rule, although the rule clearly states that if the transcript or briefs are on file "at the time such notice is given, that fact shall be sufficient answer to the motion." While the preceding language of the rule is properly construed in the case last cited, to mean that when the transcript or brief is on file at the time the "notice is given," as distinguished from the time when the motion to dismiss is heard, it "shall be sufficient answer to the motion," nevertheless a sound discretion remains in the court to grant or deny the motion, dependent upon the showing of a reasonable excuse for the delay, even when the transcript or brief is not on file until after the notice to dismiss is given. The policy of the court is to hear appeals on their merits when that may be done without material detriment to the litigants and reasonable excuse for the delay appears. Murphy v. Krumm, supra; Wilson v. Smith, Cal.App., 140 P.2d 144.

We are in accord with adherence to the spirit of Rule I, supra. It is the policy of the law to require an appellant to exercise diligence in perfecting and prosecuting his appeal. Prompt disposition of appeals is in the interest of justice.

[2] In the present case, reasonable cause for the delay in filing appellants' opening brief appearing to our satisfaction, it is ordered that the previous order of April 26, 1943, dismissing the appeal be and it is hereby vacated, and the appeal is hereby restored. The respondent is granted thirty days from notice of this order within which to file its reply brief.

PEEK, J., and ADAMS, P. J., concur.



60 Cal.App.2d 807

McSWEENEY et al. v. EAST BAY TRANSIT CO. et al.

Civ. 12215.

District Court of Appeal, First District. Division 2, California.

Oct. 13, 1943.

Rehearing Denied Nov. 12, 1943.

Hearing Denied Dec. 6, 1943.

1. Automobiles ⇐171(11), 201(1)

Failure of bus to stop before entering boulevard protected by stop signs was a violation of statute and constituted negligence which jury was warranted in finding was a proximate cause of collision with automobile traveling on boulevard. Vehicle Code, § 577, St. 1939, p. 1608.

2. Automobiles ⇐245(14)

Where at time bus entered boulevard without making required stop, automobile was approximately 75 feet from intersection and advancing at a speed of from 25 to 30 miles per hour, whether automobile was an "immediate hazard" so as to make failure of bus to yield right of way an act of negligence was for jury. Vehicle Code, § 552, St.1935, p. 187.

See Words and Phrases, Permanent Edition, for all other definitions of "Immediate Hazard".

3. Automobiles ⇐245(78)

Speed in excess of statutory limit is not negligence as a matter of law.

4. Automobiles ⇐208

Fact that plaintiff, at time of collision, was driving about a foot and a half to right of white strip dividing boulevard into two 27 foot lanes, in absence of evidence showing that it was practicable for him to drive closer to right side did not show violation of statute requiring motorist to drive as close as practicable to right side of highway so as to charge plaintiff with contributory negligence in resulting collision with a bus. Vehicle Code, § 525, St. 1939, p. 2197.

5. Automobiles ⇐206

Motorist operating automobile on boulevard protected by stop signs and approaching intersection where he collided with bus was entitled to assume that no one would violate law and that any vehicle approaching boulevard would stop and was not guilty of contributory negligence in acting on such assumption. Vehicle Code, § 577, St.1939, p. 1608.

6. Appeal and error ⇐909(1)

Where motorist who collided with bus which failed to stop before entering boulevard did not testify, court could not assume that motorist saw bus pass crosswalk without stopping and hence could not conclude that motorist did not have control of automobile or that he plunged forward in disregard of all possible danger of a collision. Vehicle Code, § 577, St.1939, p. 1608.

7. Automobiles ⇐224(5)

Where wife of motorist, as a passenger, was not confronted with any danger until automobile entered intersection and then a period of a split second elapsed before collision with the bus which failed to stop at stop sign, wife was not guilty of negligence in failing to remonstrate with motorist regarding his driving. Vehicle Code, § 577, St.1939, p. 1608.

8. Appeal and error ⇐999(3)

Where defendants' contentions as to contributory negligence on part of plaintiffs were fully presented to jury and were decided against defendants, District Court of Appeal cannot interfere.

9. Appeal and error ⇐1067

Any error in refusal of trial court to instruct jury that they could reject whole testimony of a witness who willfully testified falsely as to a material point unless they believed that probability of truth favored testimony in other particulars was not prejudicial.

10. Appeal and error ⇐1067

Any error in refusal of trial court to give requested instruction as to manner of determining credibility of a witness was not prejudicial.

11. Trial ⇐256(1)

Where trial court, in instructing jury, read from pleadings certain passages but did not read a certain affirmative defense, but defendants at no time requested court to read such defense, defendants could not thereafter complain of such failure.

12. Courts ⇐90(1)

Where cases cited as authority for holding award excessive do not rest on same facts as case on trial, cited cases are not controlling.

13. Appeal and error ⇐979(5)

Where defendants' contention that verdict was excessive was based on holdings in other cases based on other facts, which contention was overruled when trial court denied motion for new trial, and no new or different facts were presented to District Court of Appeal, ruling of trial court would not be disturbed.

14. Appeal and error ⇐1004(1)

Where it could not be said at first blush that verdict was so disproportionate to injuries which plaintiff suffered that it must be assumed that verdict was result of passion or prejudice on part of jury, verdict was not "excessive" as a matter of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Excessive Verdict".

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by James McSweeney, an incompetent person, by and through his guardian ad litem, Earlyn McSweeney, and Earlyn McSweeney against East Bay Transit Company and H. Staats to recover for injuries sustained by plaintiffs in a collision between their automobile and a motor coach owned by corporate defendant. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Donahue, Richards & Hamlin, of Oakland, for appellants.

Nathan Goldwater, Leo Murcell, Nichols & Richard, and Leonard Dieden, all of Oakland, for respondents.

STURTEVANT, Justice.

This is an action in which the plaintiff and his wife sued the defendants to recover damages for injuries sustained in an automobile collision. The action was tried by the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs. The defendants made a motion for a new trial. Their motion was denied and the defendants have appealed from the judgment.

The facts in the case involve a collision between an automobile and a motor coach at the intersection of Foothill Boulevard and 90th Avenue in the city of Oakland. The collision occurred around 7 o'clock on the morning of January 1, 1941. Visibility was good, the weather was clear, the streets were dry.

Foothill Boulevard runs east and west and is 54 feet from curb to curb. For the guidance of traffic the center is marked with a double white line. Each half of the highway is divided into three traffic lanes. The Boulevard is an arterial or through highway. Appropriate signs posted on the Boulevard between 75th Avenue and 99th Avenue limit the speed to 25 miles an hour.

90th Avenue runs north and south and is 60 feet wide from curb to curb. It enters Foothill Boulevard from the south at approximately right angles. A building at the southwest corner of the intersection houses a grocery store and a barber shop. The southeast corner of the intersection is occupied by a service station operated by the Standard Oil Company. There is a "stop sign" on the curb at the southeast corner of the intersection, and a bench or seat on the east side of 90th Avenue south of the service station denoting generally a terminal maintained by the defendant corporation on 90th Avenue for motor coaches operating on various routes or lines.

The automobile involved in the collision was a 1931 Ford convertible coupe. It was driven by plaintiff James McSweeney east on Foothill Boulevard. He was 27 years of age and was a mail clerk in the Oakland Postoffice. He was accompanied by his wife, plaintiff Earlyn McSweeney. She was 25 years of age and also worked

in a clerical capacity. They had been married 16 months. They lived at the home of his mother in San Leandro east of the accident scene.

On the afternoon of December 31, 1940, Mr. McSweeney went to work around 4 o'clock. He expected to be through work around 11 p. m. The McSweeneys had planned an entertainment at their home for New Year's Eve. They had invited a Mr. Mayer and his wife, and a Mr. Rucker and his friend Miss Handley. The party assembled at the McSweeney home between 9 and 10 p.m. A bottle of whiskey was available. Mr. McSweeney did not reach home until around 2:30 in the early morning of January 1, 1941. Some drinking had occurred in his absence. Some drinking occurred after his return. The party at the McSweeneys broke up around 3:30 a.m. Another party was in progress at the home of the Strohleins in Fruitvale and the McSweeneys joined it. A bottle of whiskey was also available there. The party at the Strohleins broke up around 5:45 a.m. and, having delivered the Mayers to their residence near Broadway and 41st Street in Oakland, the McSweeneys then started for their own home in San Leandro.

As the automobile approached the intersection at 90th Avenue in its eastbound course on Foothill Boulevard, its left side was close to the double white line in the center of the Boulevard. Its speed, according to Mrs. McSweeney, was between 25 and 30 miles an hour. But, as it entered the intersection, she was "under the impression" that it slowed down. The view ahead was unobstructed. The automobile collided with the left side of the motor coach then making a left turn in the intersection.

The motor coach involved in the collision was 33 feet long, 7 feet 6 inches wide, 9 feet 10 inches high, and weighed 15,400 pounds. The driver of the motor coach was defendant Staats. He had been employed by the defendant corporation or its predecessor for 21 years. On a regular schedule and regular route the motor coach arrived at the terminal on the east side of 90th Avenue shortly before 7 a.m. Two passengers boarded the coach as it was parked at the curb about 75 feet south of Foothill Boulevard. It then moved north on 90th Avenue traveling at a speed of 10 to 15 miles per hour until it reached the stop sign. It then accelerated its speed above 15 miles per hour. Its regular route necessitated a left turn into Foothill Boulevard. While this turn was being made the motor coach was hit by the automobile driven by Mr. McSweeney.

The impact between the vehicles was at a point in the intersection approximately 17 feet north of the south curb of Foothill Boulevard and 26 feet west of the east curb of 90th Avenue. The front of the automobile hit the left rear corner of the motor coach just in front of the left rear wheel. The left front of the automobile was a crumpled mass of metal. The motor coach was dented and glass was broken near the left rear wheel. The coach was pushed to the east a distance of a foot or a foot and a half. The automobile turned over on its left side.

The defendants contend that the bus was stopped, but they admit there was substantial evidence that it was not stopped, as provided in section 577, St.1939, p. 1608. (All sections herein cited refer to the Vehicle Code.) However they contend that their negligence, if any, was not a proximate cause of the accident, and that the cause of the accident was the negligence of the plaintiffs. The latter contend that they were not negligent and that the accident was caused by the acts of the defendants.

[1, 2] Taking up first a consideration of the movements of the bus, as noted above, the defendants concede there was substantial evidence produced by the plaintiffs that the bus did not stop at the south line of the intersection. Such failure was a violation of the terms of section 577. But that is not all. As it reached said line and should have stopped the Ford was approximately 75 feet from the westerly line of the intersection and advancing at a speed of from 25 to 30 miles per hour. Such evidence presented an issue of fact which the jury was at liberty to solve holding that the Ford was an "immediate hazard". Zwerin v. Riverside Cement Co., 52 Cal.App.2d 715, 719, 126 P.2d 920. If the jury so held it would follow that the bus should have yielded the right of way to the Ford. Sec. 552, St.1935, p. 187. It did not do so, and it follows that the jury was warranted in finding that the defendants were guilty of another act of negligence. Furthermore, the sequence of events was so closely interwoven that it may not be said as a matter of law that

neither of said acts was a proximate cause of the accident.

As stated above, when the Ford was on the Boulevard at a distance of not more than 100 feet to the left of the bus, the latter started to enter the intersection at an increased speed. Mr. McSweeney continued on his course. The defendants say that in doing so the plaintiffs were, under the facts, guilty of contributory negligence. That charge rests on several different contentions each of which was presented to the jury which by its verdict made implied findings against the defendants. Said implied findings, among others, included the following which we think were sustained by the evidence.

[3] The record discloses that Mr. McSweeney was driving as he approached the intersection "between 25 and 30 miles per hour". That speed, defendants contend, was in excess of the statutory limit. Sec. 511, St.1939, p. 2108. But such excess was not negligence as a matter of law. Sec. 513.

[4] Shortly before he reached the intersection Mr. McSweeney was driving along at about a foot and a half to the right of the white strip dividing Foothill Boulevard into two lanes each 27 feet wide. The defendants claim such act was contributory negligence. They do not quote any parts of the record showing that it was "practicable" for him to drive closer to his right-hand side of the Boulevard. In the absence of such evidence the driver did not violate the provisions of the statute. Sec. 525, St.1939, p. 2197.

[5] The accident occurred at about 7 a.m. Unless Mr. McSweeney was negligent he was entitled to assume at said time and place that no one would violate the law and that any vehicle approaching the Boulevard from the south would stop before "entering the nearest cross-walk". Sec. 577. As the record stands we assume the jury found he did indulge in such assumption and proceeded accordingly.

[6] As Mr. McSweeney was not a witness we may not assume that he saw the bus reach said cross-walk, fail to stop, and pass the cross-walk without stopping. Therefore we think it may not be said that he did not have control of his car or that he plunged forward in disregard of all possible danger of a collision.

[7] Under the undisputed facts Mrs. McSweeney was not confronted with any danger until after the Ford car entered the intersection. At that time a period of a split second elapsed before the collision. Bearing that fact in mind we think the jury did not err in holding that Mrs. McSweeney was not guilty of negligence in failing to remonstrate with her husband regarding his driving.

[8] Each of the foregoing contentions was by the defendants fully presented to the jury and was by it decided against them. This court has neither the desire nor the right to interfere.

[9] The defendants complain because the trial court refused to give an instruction which was as follows: "A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his or her testimony in other particulars."

In refusing to give the said instruction we think the trial court did not err; but, in any event, the ruling was not prejudicial. Medlin v. Spazier, 23 Cal.App. 242, 137 P. 1078; Wallace v. Pacific Electric R. Co., 105 Cal.App. 664, 288 P. 834.

[10] They also complain because the trial court refused to give an instruction worded as follows: "In determining the credibility of a witness, you may consider whether his or her testimony is in itself contradictory; whether it has been contradicted by other credible witnesses; whether his or her statements are reasonable or unreasonable; whether they are consistent with his or her other statements or with the facts established by other evidence or admitted facts. You may also consider the witness' manner of testifying on examination, the character of his testimony, the bias or prejudice, if any, manifested by him or her, his or her interest or absence of interest in the suit, his or her recollection, whether good or bad, clear or indistinct concerning the facts to which he or she testifies; his or her inclination or motive, together with his or her opportunity of knowing the facts whereof he or she speaks." For the reasons stated

in the last point the ruling must be the same.

[11] When instructing the jury the court read from the pleadings certain passages. It did not read a certain affirmative defense which the defendants set up against the claim of Mrs. McSweeney. At no time was the court requested to read said defense. The defendants now claim that the court, in effect, withdrew said defense from the consideration of the jury. We think not. If the defendants would press that point, we think, in fairness to the trial court, they should have made a formal request to the trial court and obtained a ruling. Failing to make that request they may not now complain.

[12-14] Finally the defendants contend the verdict was excessive as a matter of law. Counsel cite certain cases in which awards were held excessive. It is not claimed that said cases rested on the same facts as the instant case. Said cases are therefore not controlling. The defendants made the same contention in the trial court when they made a motion for a new trial. That court denied their motion. No new or different facts are presented to this court. Under these circumstances the ruling of the trial court should not be disturbed. Allen v. Bay Cities Transit Co., 122 Cal.App. 590, 597, 10 P.2d 520. Moreover the facts show that Mr. McSweeney was most seriously maimed and that today he is but a walking automaton. Picking up the record by its four corners it may not be said at first blush that the verdict was so disproportionate to the injuries which he suffered that it must be assumed the verdict was the result of passion or prejudice on the part of the jury. Therefore we hold that the contention of the defendants may not be sustained. Allen v. Bay Cities Transit Co., supra.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

DORFER v. DELUCCHI et al.

Civ. 12476.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1943.

Rehearing Denied Nov. 19, 1943.

Hearing Denied Dec. 16, 1943.

1. Landlord and tenant ⇐162

A landlord must use ordinary care to keep portion of premises reserved for common use in a safe condition.

2. Appeal and error ⇐996

Where two inferences may be equally drawn from evidence, action of trial court in drawing one rather than the other is conclusive on appeal.

3. Landlord and tenant ⇐169(6)

Evidence warranted judgment for tenant for injuries sustained by fall in descending common stairway on ground that landlord's negligent maintenance of a loose carpet was proximate cause of injury.

4. Appeal and error ⇐1011(1)

The uncertainty and contradictory character of testimony was addressed to sound discretion of trial court sitting without jury.

5. Trial ⇐105(2)

Hearsay testimony admitted without objection was properly considered in determining negligence.

6. Landlord and tenant ⇐169(6)

Evidence sustained finding that tenant was not contributorily negligent in falling on common stairway covered by loose carpet, so as to preclude recovery for injuries from landlord.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Jerry Dorfer against Richard Delucchi and others for injuries sustained in descending a common stairway in named defendant's apartment house. From a judgment for plaintiff, named defendant appeals.

Affirmed.

James C. Healey, of San Bruno, and J. W. Coleberd, of South San Francisco, for appellant.

Francis N. Foley, of San Mateo, for respondent.

DOOLING, Justice pro tem.

Plaintiff recovered judgment for personal injuries in a trial without a jury, from which judgment defendant appeals.

Defendant was the owner of an apartment house and plaintiff occupied as his tenant an apartment on the second floor. In descending the common stairway from this apartment to the ground floor plaintiff slipped and fell, suffering the injuries which were the basis of the judgment appealed from. Defendant claims on appeal that the evidence does not support the finding of defendant's negligence and also shows without contradiction that plaintiff was guilty of contributory negligence.

[1] The complaint alleged, and the answer admitted, that "defendant reserved for the use of all its tenants of said building the halls and stairway leading from the first to the second story of said building." This admission brings into play the settled exception to the general rule covering the liability of the landlord for injuries to his tenant from defects in the premises, thus stated in 7 Cal.Jur., 10 yr. Supp., p. 444: "The general rule that a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises is subject to an exception to the effect that where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon the landlord to use ordinary care to keep that particular portion of the premises in a safe condition."

Without further reference to them we may state that this fact sufficiently distinguishes many of the cases cited by appellant which were concerned solely with injuries to tenants from defective conditions in premises let to the tenants and in their exclusive possession and control.

The complaint counted on two separate acts of negligence: The absence of a handrail from the stairway, and the maintenance of a carpet on the stairs in a loose and dangerous condition.

We may disregard the absence of the handrail, which appellant contends cannot be the basis of a recovery in view of the holding in Watwood v. Fosdick, 212 Cal. 84, 297 P. 881, since that becomes immaterial if the finding of the trial court, that the negligent maintenance of a loose

carpet was a proximate cause of the injury, finds support in the evidence.

In this respect the evidence shows that plaintiff slipped and fell from the twelfth or thirteenth step and that immediately after the fall the witness Atkins examined the twelfth and thirteenth steps and found the carpet pulled loose from those steps, "just a bulge, like the tacks had been pulled out."

[2, 3] Defendant argues that this evidence does not prove that the carpet was loose before the fall but rather that plaintiff's fall was what loosened the carpet. This is an argument on the correct inference to be drawn from the evidence more properly for the consideration of the trial court. Where two inferences may be equally drawn from the evidence, the action of the trial court in drawing one rather than the other is conclusive on appeal. 2 Cal.Jur. pp. 934, 935; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660.

There are other factors in the evidence strengthening the inference drawn by the trial court. The witness Atkins further testified that she saw no tacks there that had been pulled out, "They weren't there." It seems clear that if the carpet had been pulled loose by plaintiff's fall, as claimed by defendant, the loosened tacks would have been present immediately following the accident.

[4, 5] Plaintiff herself testified that after her fall defendant told her that he knew that the carpet was loose before the accident and was sorry that he had not fixed it. It is claimed that her testimony on this subject was uncertain and contradictory but that was a matter properly addressed to the discretion of the trial court. Plaintiff also testified without objection to a conversation with the janitor after her fall in which the janitor had told her that he knew that the carpet was loose and had so informed defendant. While this testimony might have been excluded as hearsay, its admission without objection justified the trial court in considering it with the other testimony on the subject. Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859; Weiss v. Bank of America, 57 Cal.App.2d 892, 135 P.2d 584.

[6] The claim that plaintiff's contributory negligence was established depends on the argument that if the carpet was loose she must or should have known it. She testified positively that she had not observed that the carpet was loose and there was evidence showing that the stairway, which was curved, was not brightly lighted. We cannot say as a matter of law that plaintiff must or should have observed its condition.

Other arguments that her fall was caused by her wearing her husband's shoes or carrying a mattress depend on the weight to be given to conflicting evidence. Plaintiff testified that her husband's shoes fit her well and that neither the fact of her wearing them nor of her carrying the mattress contributed to her fall.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



60 Cal.App.2d 822

WILLETT v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 14134.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1943.

1. Appeal and error ⇐1010(1)

Findings of trial court cannot be disturbed on appeal if there is substantial evidence to support them.

2. Mandamus ⇐168(4)

Evidence sustained finding that civil service employee's position as field agent of the Los Angeles Department of Water and Power was abolished in good faith by reason of lack of work.

3. Appeal and error ⇐996

It is function of trial court to draw inferences from evidence and to base its findings thereon.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Mandamus by Leo Willett against the Department of Water and Power of the City of Los Angeles and others to compel

defendants to reinstate petitioner as field agent and to pay him his back salary. Judgment for defendants, and plaintiff appeals.

Affirmed.

Loren A. Butts, of Los Angeles, for appellant.

Ray L. Chesebro, S. B. Robinson, George W. Adams, and Wendell Mackay, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Petitioner seeks to have a writ of mandate issued to compel members of the Board of Water and Power Commissioners and certain other officials of the city of Los Angeles to reinstate him to the position of field agent of the Department of Water and Power and to cause to be paid to him his salary from April 7, 1942. He has appealed from a judgment of the superior court in favor of defendants.

Petitioner was employed as field agent in the Department of Water and Power from February 21, 1936, to April 7, 1942, at which time he received a notice in writing informing him that he was suspended from his position for "lack of work, in accordance with Article IX sec. 125 of the Los Angeles City Charter." The position of field agent is in the classified civil service.

[1] Petitioner concedes that respondent Board has the power to lay off an employee in the classified civil service or to abolish a position when such action is occasioned by reason of lack of work and is done in good faith, but he contends that he was not in truth suspended for lack of work and that the suspension was placed upon this ground in bad faith and for the purpose of evading the civil service provisions of the charter of Los Angeles, with which compliance was not made by any of defendants. The trial court found that the notice of suspension "was not a mere sham and pretext" and that the suspension was in the interest of economy and for lack of work. This finding is equivalent to a finding that the action of the Board was taken in good faith. Petitioner now contends that the finding is not supported by the evidence. In passing upon this contention we must be guided by the rule that the findings of the trial court cannot be disturbed on appeal if there is substantial evidence to support them. Livingstone v. Mac Gillivray, 1 Cal. 2d 546, 36 P.2d 622.

[2] From the evidence received by the trial court it appears that the principal duty of petitioner was to carry on negotiations for the rental and leasing of properties of the Department in Owens Valley. He also made investigations of properties for fire hazards. From and after 1932 the Owens Valley division was over-manned and the general manager, H. A. Van Norman, undertook to make changes in the operation of the Bureau of Water Works so that it could be conducted on a more economical basis. After the beginning of the present war there was a marked decrease in the rentals made in the Owens Valley by the Department. In 1939 there were 727 rentals and in 1942 there were 453 rentals. After the suspension of petitioner no one was appointed to take his place but his work was performed by others, mainly by T. R. Silvius, who was in charge of the Owens Valley division and had been petitioner's superior in the Department's work in the Owens Valley. The evidence is unquestionably ample to support the court's finding that there was a lack of work which gave justification for the suspension of petitioner.

[3] Petitioner points to the testimony of Mr. Van Norman, which he claims compels a finding that the suspension was made in bad faith. Mr. Van Norman testified that a controversy had arisen between petitioner and Mr. Silvius; that Silvius had complained to him of petitioner's attitude and had complained of a letter which petitioner had written; and that Silvius had stated that he would be better satisfied if he could get rid of petitioner. The witness testified that there was in fact a lack of work and that in laying him off on this ground he was clearing up the situation in a legal way. He further testified: "When Mr. Silvius came with that letter and showed it to me and complained about Mr. Willett's conduct, I decided right away that now is the time to do it, to make the change. I felt it was time to make the change and it was justified, because Silvius could do the work within his classification." From this testimony the court could draw the conclusion that petitioner had been allowed to remain in his position after the work had fallen off because of the natural reluctance of employers to discharge employees from

positions which they have long filled; and that when it appeared that petitioner was not cooperative but was insubordinate the time had come to operate the department without his services or those of anyone else. It was the function of the trial court to draw inferences from the evidence and to base its findings thereon. We cannot hold that the inferences drawn by the trial court were unreasonable. The findings are supported by the evidence.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J. concur.



61 Cal.App.2d 3

B. & B. SULPHUR CO., Limited, v. KELLEY et al.

Civ. 3227.

District Court of Appeal, Fourth District, California.

Oct. 15, 1943.

1. Appeal and error ⇐173(2)

Appellant's contention that a default was improperly entered against a codefendant, in absence of an affidavit of the nonmilitary status of codefendant, could not be raised for the first time on appeal. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 200, 201, 50 U.S.C.A. Appendix §§ 520, 521.

2. Judgment ⇐239

In ejectment suit against several defendants, that a default was entered against two defendants who did not appear without filing affidavit of the nonmilitary status of such defendants did not prevent plaintiff from proceeding against defendants served who answered as though they were the only defendants, since defendants in ejectment are jointly and severally liable. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 200, 201, 50 U.S.C.A. Appendix §§ 520, 521; Code Civ.Proc. §§ 578, 579.

3. Army and navy ⇐34

In ejectment action against several defendants jointly and severally liable, defendants served and who answered were not the proper parties to raise objection that default was improperly entered against other defendants who did not appear on ground that affidavits of nonmilitary service were not filed. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 200, 201, 50 U.S.C.A. Appendix §§ 520, 521.

4. Army and navy ⇐34

Provisions of Soldiers' and Sailors' Civil Relief Act that no default judgment shall be entered against defendant who does not appear without first filing an affidavit of nonmilitary status of such defendant are intended solely for benefit of those in the armed services, and the affidavit showing nonmilitary status should be made at time of entry of default judgment. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 200, 201, 50 U.S.C.A. Appendix §§ 520, 521.

5. Army and navy ⇐34

In ejectment suit against several defendants, defendants who were served and answered could not complain of entry of default against defendants who did not appear, on ground of failure to file affidavits of nonmilitary service, where no judgment was entered against defendants who did not appear. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 200, 201, 5 U.S.C.A. Appendix §§ 520, 521.

6. Mines and minerals ⇐38(16)

In ejectment to recover possession of mining claims, evidence established that the original location of plaintiff's senior mining claim was a valid location justifying its right to immediate possession. St. 1939, p. 1083, § 2314.

7. Mines and minerals ⇐23(2)

Where mining claims are held in common, the locators or owners have the right to do the necessary and annual assessment work on any one of the claims so held, provided the work is done in good faith for the benefit of all the claims and has the tendency to benefit or develop the claims other than the one on which the work is actually performed. St.1939, p. 1083, § 2314.

8. Mines and minerals ⇐38(27)

Whether assessment work was done in good faith for the purpose of working mining claims, and has a tendency to benefit or develop such claims, is a question of fact on which the decision of the court will

not be disturbed if there is any evidence to support it. St.1939, p. 1083, § 2314.

9. Mines and minerals ⇐38(14)

A party making annual expenditure upon one of several mining claims held in common is not required to prove the location and record title of the claim upon which the work was done if the title to such claim is not in dispute, it being sufficient to prove actual possession and improvement of such claim, from which the law presumes ownership. St.1939, p. 1083, § 2314.

10. Mines and minerals ⇐38(14)

The burden of proof is on relocator to show that original locators had not performed required assessment work on mining claims, and, where original locators have filed an affidavit as having complied with requirements as to assessment work, a prima facie showing in favor of original locators is made. St.1939, p. 1083, § 2314.

11. Mines and minerals ⇐38(2)

Where plaintiff acquired its right of possession of mining claim under a lease and was put in possession of the property, defense, set up in ejectment suit, that lease under which plaintiff claimed possession was not executed by any of original locators, was not available to defendant relocators. St.1939, p. 1083, § 2314.

12. Ejectment ⇐102

In ejectment proceeding, the matter paramount in litigation is the alleged right to the possession of the demanded premises on the part of plaintiff, and its ouster by defendants, and not the title to the land.

13. Ejectment ⇐25(2)

In ejectment where prior possession is relied upon by plaintiff, defendant cannot justify his entry by showing the true title outstanding.

14. Tenancy in common ⇐49

In ejectment suit against relocators by mining claim lessee under lease executed by original locators, refusal to receive in evidence a letter allegedly written by one of the original locators, and claimed to be a notice of default and termination of lease, was not error, where letter was not signed by other locators or anyone authorized to act in their behalf. St.1939, p. 1083, § 2314.

15. Tenancy in common ⇐49

A notice of forfeiture of a lease is ineffectual where given by a tenant in common and not joined in by his cotenants, nor ratified by them.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by B. & B. Sulphur Company, Limited, a corporation, against Robert M. Kelley and others in ejectment to recover possession of certain mining claims. From a judgment for plaintiff against the defendants Robert M. Kelley and K. C. Farrell, the defendants appeal.

Affirmed.

Glenn E. Tinder and Hugh E. Brierly, both of Bishop, for appellants.

B. W. Kemper and C. C. Caswell, both of Los Angeles, for respondent.

GRIFFIN, Justice.

In July, 1928, H. B. Sample, James Pierce, and S. E. Montgomery located and filed notices of location of certain mining claims in Inyo County known as Gulch Lode No. 1 and No. 2. Frank Rossi and the above-named locators located and filed notices of location of Gulch Lode Nos. 3 to 10 inclusive. A "Lease and Purchase Agreement" was executed on March 20, 1939, to plaintiff corporation herein as lessee. It recited that James Pierce, A. J. Seeley, H. B. Sample, T. N. Wade, and Mijo Milovich were lessors. It bore only the signatures of Wade, Milovich and Pierce. It was recorded on April 13, 1939. Plaintiff corporation commenced production of sulphur soon thereafter. In March, 1939, a fire destroyed much of the workings of the mine.

It is alleged in the complaint for ejectment that defendants, on July 1, 1940, unlawfully entered and took possession of the Gulch Lode claims Nos. 1 to 10 inclusive; that they posted notices of location of the Joiner group of claims Nos. 1 to 6 inclusive, and that such location embraced part of the Gulch Lode claims. On September 21, 1940, plaintiff corporation filed this action seeking to declare the subsequent locations void and to eject all defendants named. Defendants Kelley and Farrell appeared by answer. Thereafter, upon filing an affidavit of service of summons on the two defendants Phelps, their default was entered by the clerk. No original summons or affidavit regarding military service of those defendants was filed and they made no appearance. The court found that plaintiff

corporation was entitled, as lessee, to possession of the premises as against defendants Kelley, Farrell, Heller G. Phelps, and all persons claiming under them, and that they had no right, title or interest in the Gulch group of claims or any part thereof. Judgment was accordingly entered only against Kelley and Farrell and they have appealed from such judgment.

[1-3] Appellants first contend that the case was not in a proper condition to be tried on May 26, 1940, by reason of the claimed erroneous entry of default of the Phelps; that they were necessary parties to the action. In this connection it is argued that without an affidavit that a defendant is not in the military service, under secs. 520 and 521, 50 U.S.C.A. Appendix, secs. 200, 201, of the Soldiers and Sailors Civil Relief Act of 1940, no default could be properly entered against such defendants except by order of court; that because of the fact that the source of title of these defaulted defendants was identical with that of the other defendants, Farrell and Kelley, no proper disposition of the latter's rights could be made in this action. We see no merit to this contention.

First, appellants here cannot make this complaint for the first time on appeal. Evans v. Baxter, 86 Cal.App. 412, 260 P. 832; Alhambra B. & L. Ass'n v. DeCelle, 47 Cal.App.2d 409, 118 P.2d 19. Secondly, this action is one for ejectment based on a wrongful act or tort of defendants. Defendants in a tort action are jointly and severally liable, and a plaintiff may proceed against the defendants served and who answer the same as though they were the only defendants. Secs. 578 and 579, Code Civ.Proc.; Trans-Pacific Trading Co. v. Patsy Frock & R. Co., 189 Cal. 509, 209 P. 357. Thirdly, appellants here are not the parties who have the right to raise the objection to the alleged erroneous entry of default of the other defendants by reason of plaintiff's failure to file an affidavit of nonmilitary service. Alzugaray v. Onzurez, 25 N.M. 662, 187 P. 549; Pope v. United States F. & G. Co., 67 Ga.App. 415, 20 S.E.2d 618.

[4, 5] Sections 520 and 521 of that act are intended solely for the benefit of those in the armed services of the United States. Royster v. Lederle, 6 Cir., 128 F.2d 197. The affidavit setting forth facts showing that a defendant is not in the military service should be made at the time of the making; and entry of the default judgment. In re Cool's Estate, 18 A.2d 714, 19 N.J. Misc. 236; Mader v. Christie, 52 Cal.App. 138, 198 P. 45. No judgment by default has been entered against the Phelps.

[6] Appellants next argue that the plaintiff did not establish, by a preponderance of the evidence, its right to immediate possession of the mining claims in question in that it did not establish that the original location of the Gulch mining claims was a valid location.

At the trial the record of the original locations of the Gulch Lode claims 1 to 10 inclusive were received in evidence, giving the description thereof and the date of location. The lease and purchase agreement dated March 20, 1939, was recorded April 13, 1939, together with proof of annual labor on Gulch claims 1 to 13 inclusive, which was recorded on May 18, 1940. The record shows that Milovich individually owned some of the claims. Some time prior to July 1, 1940, the plaintiff corporation had been in possession of the ten claims. Defendant Farrell had knowledge of this fact. He sold gasoline to it in 1939 and 1940. He testified that shortly before July 1, 1940, he went with Milovich to see the claims and helped him do his assessment work on his individual claim; that he observed that no work had been done on the claims here involved; that on July 1, 1940, he and the other defendants relocated the Joiner claims over and upon the Gulch claims; that they immediately started work on them; that he knew Milovich was interested in the Gulch claims.

Defendant Kelley testified that he first saw the claims in 1936; that he later saw them in 1939 when he was trying to buy a sulphur mine; that he saw a shaft being sunk on them; that in June, 1940, he went there for a load of sulphur and later for the purpose of relocating the above claims; that he was "looking for an opening", i.e., "for any property going to be relocated"; that he "went over about seven claims * * *"; that he didn't see any assessment work "that had been done, that showed up"; that "it didn't show that any work had been done for at least seven or eight months"; that the four named defendants relocated the claims as partners about 2 o'clock in the morning on July 1, 1940; that they worked on them for the next 20 days in digging the open cut; that he "sold the machinery off from the claims for junk."

Both plaintiff and defendants offered in evidence an affidavit of annual labor per-

formed on the claims. A Mr. Beal, secretary to the plaintiff corporation, testified that the corporation was organized for the purpose of acquiring a lease on the claims here involved; that it started mining operations about March 1, 1939; that it hired as many as eight men at one time, built the refinery, and continued business until October, 1939; that tunnel work, road building and mining had been done; that about five or six hundred tons of crude ore had been extracted from the "Fraction" claim in July, August and September, 1939; that because there was no grinding plant at the mine a refinery was built several miles up the gulch in the fall of 1939; that between March and October 6, 1939, about $8,000 was spent on the property; that up until June, 1940, when he visited the claims, he would drag road, remove boulders, and work the various claims sometimes for a "day or so" and "sometimes several days"; that about 200 tons of ore were removed between July 1, 1939, and June 30, 1940. Another witness corroborated his testimony.

[7-10] It is now argued by appellants that the title and right of possession of the plaintiff corporation, if it had any, was terminated by the relocation of defendants on July 1, 1940, by reason of the failure of plaintiff corporation to perform sufficient labor to comply with section 2314 of the Public Resources Code, St.1939, p. 1083. We see no merit to this argument. Where claims are held in common, the locators or owners have the right, as a matter of law, to do the necessary annual assessment work on any one of the claims so held, provided the work is done in good faith for the benefit of all the claims and has the tendency to benefit or develop the claims other than the one on which the work is actually performed. Whether the work was done in good faith for the purpose of working the claim in controversy and has a tendency to benefit or develop such claim is a question of fact upon which the decision of the court will not be disturbed if there is any evidence to support it. De Noon v. Morrison, 83 Cal. 163, 23 P. 374. It was likewise held in that case that the party making annual expenditure upon one of such claims held in common is not required to prove the location and record title of the claim upon which the work was done, if the title to such claim is not in dispute; that it is sufficient to prove actual possession and improvement of such claim, from which the law presumes ownership. See also, 17 Cal.Jur. p. 304, sec. 18. In this case, the evidence merely creates a conflict which the trial court determined in favor of the plaintiff. Under the accepted rules, we are unable to disturb the finding. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. The burden of proof is on the relocator to show that the original locators had not performed the required assessment work. Furthermore, as in this case, where the original locators have filed an affidavit of having complied with the requirements as to assessment work, the affidavit makes a prima facie showing of such in favor of the original locators. Musser v. Fitting, 26 Cal.App. 746, 148 P. 536.

[11-13] The second contention is that there was no evidence that the lease under which plaintiff claims possession was executed by any of the original locators of the mining claim. In this action, such objection is unavailable. It is clear that the plaintiff corporation acquired its right of possession under the lease as executed and was put in possession of the property; and that it had not abandoned the lease or contract of purchase. It is not shown by the evidence that the corporation was in default under its contract of purchase. Furthermore, defendants must have had knowledge that the corporation was in possession of the claims and that the assessment work had been done when they endeavored to relocate them. Under these circumstances, defendants' claimed right of possession cannot prevail over plaintiffs. In ejectment proceedings the matter paramount in litigation is the alleged right to the possession of the demanded premises on the part of the plaintiff and its ouster by defendants, and not the title to the land. Porter v. Garrissino, 51 Cal. 559; Barcroft v. Livacich, 35 Cal.App.2d 710, 96 P.2d 951. It was held in Richardson v. McNulty, 24 Cal. 339, that where prior possession is relied on by the plaintiff, the defendant cannot justify his entry by showing the true title outstanding. See, also, Neuebaumer v. Woodman, 89 Cal. 310, 26 P. 900. The second contention here claimed by defendants is equally untenable.

[14, 15] The third question involves the claimed error on the part of the trial court in refusing to receive in evidence a certain letter claimed to be a notice of default and termination of the lease under which the plaintiff claims. From the record it appears that Milovich testified that

he owned a 20 per cent interest in the claims, which interest he bought from Rossi in 1938; that he visited the claims during the years 1939 and 1940, and that in June, 1940, Beal told him that "all assessment work is done and filed for this year"; that he went to the property and could not "find anything done"; that he had an attorney who represented him and also Mr. Wade write a letter containing some form of notice to "turn the contract to us on account of" some claimed default. The record does not contain a copy of the letter, nor does it show that the attorney was authorized to represent the other lessors in sending such a notice. Regardless of the contents of the letter and the claimed default, it admittedly was not signed by the other lessees or anyone authorized to act in their behalf. It has been repeatedly held that a notice of forfeiture of a lease is ineffectual where given by a tenant in common and not joined in by his cotenants nor ratified by them. Axis Petroleum Co. v. Taylor, 42 Cal.App.2d 389, 108 P.2d 978; Metzler & Co. v. Stevenson, 217 Cal. 236, 18 P.2d 330; Beam v. Dugan, 132 Cal.App. 546, 23 P.2d 58.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



60 Cal.App.2d 825

SWALL v. ANDERSON et al.
Civ. 12448.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1943.

Hearing Denied Dec. 6, 1943.

1. Appeal and error ⇐839(1)

Where plaintiff appealed only from that portion of judgment which disallowed treble damages, appellate court would not consider plaintiff's contention that trial court erred in failing to render judgment against one of the three defendants.

2. Trespass ⇐61

The purpose of statutory provisions relating to treble damages for wrongful injuries or cutting or carrying away trees, etc., is to protect trees and timber on private land, and such provisions must be treated as penal and punitive. Code Civ. Proc. § 733; Civ.Code, § 3346; Pen.Code, § 602.

3. Trespass ⇐43(3)

Under statutory provisions relating to treble damages for injuries or cutting or carrying away trees, etc., the trespass causing the injury must be pleaded and proved to have been willful or malicious. Code Civ.Proc. § 733; Civ.Code, § 3346.

4. Statutes ⇐225

The statutory provision relating to treble damages for cutting or carrying away trees, etc., and the statute relating to treble damages for injuries to the trees, etc., relate to same subject matter and must be construed together, and they must, in so far as any reasonable construction will permit, be construed to be consistent and not in conflict so as to give effect to the whole of each. Code Civ.Proc. § 733; Civ.Code, § 3346.

5. Trespass ⇐61

The statutory provisions relating to treble damages for wrongful injuries or cutting or carrying away trees, etc., are not mandatory, but rather they commit to discretion of trial court the circumstances under which penalty shall be invoked. Code Civ.Proc. § 733; Civ.Code, § 3346.

6. Appeal and error ⇐949

The discretion invested in trial court in awarding treble damages for injuries to trees is a judicial one, not to be exercised arbitrarily or capriciously, but every intendment from the evidence is to be drawn in support of conclusion reached. Code Civ.Proc. § 733; Civ.Code, § 3346.

7. Trespass ⇐61

Trial court did not abuse its discretion in refusing to award treble statutory damages for injuries to a portion of the trees of plaintiff's orchard caused by defendants' action while moving a house along a street which bordered plaintiff's orchard, where there was no showing of an actual malevolent purpose, and especially where a very liberal award for actual damages was made. Code Civ.Proc. § 733; Civ.Code, § 3346.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Ellen G. Swall against Albert Anderson and others, individually, and as copartners, doing business under the firm name and style of Anderson Bros., to recover actual and treble statutory damages, together with attorney's fees, for injuries to a portion of the trees of an orchard owned by plaintiff. From a judgment awarding actual damages only, the plaintiff appeals.

Affirmed.

Prior opinion, 140 P.2d 196.

Earl C. Berger, of Los Altos, for appellant.

Kenneth R. Malovos and Herman J. Mager, both of San Jose, for respondents.

NOURSE, Presiding Justice.

Plaintiff instituted this action to recover actual and treble statutory damages, together with attorney's fees, for injuries to a portion of the trees of an orchard owned by her, alleged to have been caused by the "deliberate" action of defendants while moving a house along Levin Avenue, a public thoroughfare, which borders plaintiff's orchard. The trial judge rendered judgment for actual damages only and plaintiff has appealed from "that part of the judgment which disallows treble damages, costs and disbursements." Levin Avenue is located in Santa Clara County near the town of Sunnyvale. At the place in question it is bordered on one side by plaintiff's orchard and on the other by that of a third person. The trees bordering the avenue in the orchard opposite that of plaintiff are interspersed with power poles while those of plaintiff's orchard are not.

At the point in question the official width of Levin Avenue is fifty feet but the paved portion thereof was sufficient to permit two passenger cars, each about six feet wide, to pass. The trunks of the trees that were damaged are on appellant's property but the branches thereof extended over the roadway. Photographs introduced in evidence indicate that these branches extend almost to the paved portion of the roadway. The house which defendants were moving had a width of at least twenty-four feet which would necessarily extend beyond the paved portion of the roadway.

Defendant, Lawrence Anderson, who owns the house moving business conducted under the name of Anderson Brothers, was in Alaska at the date of the injuries to plaintiff's trees and at the date of the trial. His brother Albert Anderson, another defendant, was his employee and was directing the moving of the house at the date of the injuries complained of. Before proceeding down Levin Avenue, Albert Anderson observed that to proceed it would be necessary to touch the bordering trees at least on one side. He chose to strike those of plaintiff which bordered the road rather than the trees on the other side because of the power poles interspersed among the trees bordering the road. He stated that it was his judgment that "the house would brush by the limbs without any extensive damage to the trees." After striking the limb of the first tree and breaking it at its joinder with the trunk, he continued down the road, damaging thirty-nine trees. To facilitate the house's passage along the roadway with the least amount of damage to the trees he sawed off some limbs which he feared would break farther back and thus cause permanent damage to the trees.

With respect to the intent with which the damage was done the trial court found "That although the initial damage inflicted by defendants may have been accidental, the ensuing damage was not accidental, rather, it was incurred with the knowledge of the defendants that same would result if they continued to move the load further, which they did, and also when they used saws and other tools to remove limbs and branches, and in carrying same away from plaintiff's premises."

[1] Appellant first asserts that the judgment should have been against defendant Ellis Anderson as well as the other defendants but as appellant appealed only from that portion of the judgment which disallowed treble damages it is apparent that a reversal of the portion of the judgment appealed from would not require reconsideration of the whole case in the court below. For that reason we need not consider the liability of defendant Ellis Anderson. 2 Cal.Jur. 807; Whalen v. Smith, 163 Cal. 360, 362, 125 P. 904, Ann. Cas.1913E, 1319.

[2] The principal question presented is the proper construction and application of section 733 of the Code of Civil Procedure and section 3346 of the Civil Code. The first of these reads as follows: "Trespass for cutting or carrying away trees, etc., actions for: (Treble damages). Any person who cuts down or carries off any wood or

underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction."

Section 3346 of the Civil Code reads: "Injuries to trees, etc. For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment."

At the time these sections were enacted in 1872 section 602 of the Penal Code was enacted reading: "Every person who wilfully commits any trespass, by either: 1. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon the lands of another; or, 2. Carrying away any kind of wood or timber that has been cut down and is lying on such lands; * * * is guilty of a misdemeanor." The obvious purpose of all three code sections is to protect trees and timber on private land. Hence, those provisions relating to treble damages must be treated as penal and punitive.

[3] Appellant's first contention, that under these sections it is mandatory that treble damages be awarded upon a mere showing of the wrongful injury, may, under the decided cases, be quickly dismissed. In Barnes v. Jones, 51 Cal. 303, 306, the court was concerned with the proper application of section 251 of the Practice Act (which was substantially the same as section 733 of the Code of Civil Procedure). It was there held that the trespass causing the injury must be pleaded and proved to have been wilful or malicious. This holding was followed in Stewart v. Sefton, 108 Cal. 197, 41 P. 293. To the same effect is Butler v. Zeiss, 63 Cal.App. 73, 218 P. 54. In the recent case of Mosesian & Sons v. Danielian, 52 Cal.App.2d 387, 390, 126 P.2d 363, in considering the application of section 3346 of the Civil Code it was assumed without discussion that the injury must be proved to have been wilful and malicious.

It remains for us to decide the degree of malice that is required and the discretion, if any, that is invested in the trial court in determining whether treble damages should be imposed under the particular facts.

[4, 5] As sections 733 of the Code of Civil Procedure and 3346 of the Civil Code relate to the same subject matter they must be construed together. Under settled rules of statutory construction they must, in so far as any reasonable construction will permit, be construed to be consistent and not in conflict. Moreover, they must be construed so as to give effect to the whole of each. It will be noted that section 733 uses the expression that the defendant "is liable" and section 3346 states that "the measure of damages is three times" the actual damages. It is at least doubtful that these expressions even standing alone and unqualified by the concluding language of section 733, hereinafter referred to, should be construed to be mandatory. The other four sections contained in the same article as section 3346 each use the phrase "must pay" or "must provide". In using these expressions of so obviously greater emphasis it is only reasonable to conclude that the legislature intended a different meaning to be attributed to the expression "is liable". This conclusion is strengthened by the fact that in construing these sections the cases already cited (Barnes v. Jones, 51 Cal. 303; Stewart v. Sefton, 108 Cal. 197, 41 P. 293; Butler v. Zeiss, 63 Cal.App. 73, 218 P. 54; Mosesian & Sons v. Danielian, 52 Cal.App. 2d 387, 126 P.2d 363) have impressed as a condition of liability that the acts complained of be wilful and malicious, a condition not expressly set forth in the sections. But the conclusive answer to the question of whether imposition of the penalty is mandatory is contained in the concluding portion of section 733. That portion of the section provides that the damages "may be assessed", a phrase which is obviously permissive and not mandatory. If the two sections are to be construed together, as they must be, and if full meaning is to be given to each provision of both sections, it is the only reasonable conclu-

sion that while these two sections prescribe the degree of penalty to be invoked they commit to the sound discretion of the trial court the facts and circumstances under which it shall be invoked.

In considering the question whether the trial court abused its discretion in refusing to award treble damages we must view all the circumstances under which the question arises—the penal nature of the statutes, the conditions confronting respondents leading to the injuries, and the purposes for which the statutes were enacted. It is undisputed in the testimony, and verified by the exhibits, that the branches of appellant's trees extended into the highway close to the paved portion, that the paved portion of the highway was approximately sixteen or eighteen feet wide, that the house which defendants were moving was twenty-four feet wide and about eighteen feet high, so that it was impossible for them to travel solely upon the paved portion of the highway, and that some of the branches would be hit, or "brushed" by the house as it moved along. Since the highway is dedicated to public use to its full width irrespective of the portion paved for easy motor travel, the trial court was justified in taking into consideration the fact that the respondents might have thought they had a right to cut off the branches overhanging the highway. It is not unreasonable to assume that one in such predicament might believe that he had a right to remove these overhanging branches without being charged with malice or a reckless disregard of the rights of the owner. To the contrary, it is reasonable to assume that such a person would act as the respondents did here with the purpose of compensating the owner for the actual damage caused. Now, on the issue of punitive damages, the fact that respondents thought they would not injure the trees very much is not the same as if they had thought they had the right to injure them to some extent. In one case they would think they were not going to do much harm, in the other they would think they were not going to do anything which they did not have the right to do. Here the actual injuries to the trees were greatly exaggerated and the trial court would have been justified, upon the evidence offered by the owner, in awarding damages in a much smaller sum than that found in the judgment. All these circumstances were in the mind of the trial court in rendering its judgment. Prior to the entry of judgment an opinion was filed to which we may refer for the purpose of discovering "the process by which judgment was reached." Union Suger Co. v. Hollister Estate Co., 3 Cal.2d 740, 750, 47 P.2d 273, 278. In the opinion of the learned trial judge he said:

"I am of opinion in that the facts of this case do not justify a trebling of damages. The first damage was accidental—a negligent accident, perhaps; but still unintended and without malice or expectation of wrongdoing.

"The damage next following was the result of an awkward attempt to repair part of the first damage. And finally the succeeding damage was caused by poor judgment in endeavoring to escape from the difficult situation which had then developed."

[6, 7] It has been said frequently that the discretion invested in the trial court is a judicial one, not to be exercised arbitrarily or capriciously, but none the less every intendment from the evidence is to be drawn in support of the conclusion reached. Resolving such conflicts in alternative inferences as may be drawn from the evidence in favor of the judgment rendered it is apparent that there was no showing of an actual malevolent purpose. The trial court found that "the initial damage inflicted by defendants may have been accidental." Thereafter respondents knew that they would damage appellant's orchard but there is evidence that they believed that the damage would not be extensive. They were faced with the dilemma of inflicting what they believed would be but slight damage to the orchard of appellant and blocking public thoroughfares for a substantial period of time. Under these circumstances, and in view of the very liberal award for actual damages, we cannot say that the trial court abused its discretion in refusing to impose the statutory penalty.

This conclusion renders it unnecessary to consider appellant's contention with respect to attorney's fees.

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

61 Cal.App.2d 98

PEOPLE v. CORNETT.

No. 1836.

District Court of Appeal, Third District, California.

Oct. 22, 1943.

1. Homicide ⇐253(1)

Evidence supported conviction of murder in the first degree.

2. Criminal law ⇐563

The corpus delicti of a crime may be established by circumstantial evidence.

3. Criminal law ⇐409

The burden was on prosecution of proving corpus delicti of a crime independently of extrajudicial admissions of guilt on part of defendant.

4. Homicide ⇐143

The elements of "corpus delicti", which are required to be shown in a homicide case, are identity of the body of the deceased and fact deceased was killed by an unlawful agency.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

5. Criminal law ⇐409

In homicide prosecution, if a prima facie showing of death by means of an unlawful act is first established, evidence of defendant's guilt by means of his extrajudicial admissions or otherwise may be received.

6. Criminal law ⇐409

In homicide prosecution, where deceased's body was positively identified, and it was proved that deceased died as result of violence, and it was further shown that deceased's body was secretly buried in a hollow base of a remote tree with purpose of concealing the grave, sufficient evidence of the "corpus delicti" was furnished to render competent defendant's admissions.

7. Homicide ⇐22(1)

To sustain conviction of murder in the first degree, it is not necessary to show personal enmity on part of defendant toword deceased. Pen.Code, § 187.

8. Homicide ⇐151(1), 152

Where commission of homicide by defendant is proved, burden rests upon defendant, in absence of evidence adduced by prosecution tending to show that killing was justifiable or excusable or that it amounts only to manslaughter, to prove circumstances of mitigation or excuse. Pen.Code, § 1105.

9. Homicide ⇐146

Where defendant did not take witness stand in his own behalf, and no contention was made by defendant that he was justified or excused in killing the deceased, if killing of deceased by defendant was adequately established, malice would be implied sufficient to authorize conviction of murder in the first degree. Pen.Code, §§ 187, 1105.

10. Criminal law ⇐364(4), 371(12)

In homicide prosecution, an extrajudicial admission of defendant that he had forged and cashed three checks on bank account of deceased was properly admitted in evidence in proof of "res gestæ" and to establish motive for the homicide.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

11. Criminal law ⇐371(12)

When defendant denies killing and evidence is purely circumstantial, evidence of motive is competent even though it may disclose other offense committed by accused.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Roy Cornett was convicted of murder in the first degree, and he appeals.

Affirmed.

Lewis H. DeCastle, of Santa Rosa, for appellant.

Robt. W. Kenny, Atty. Gen., T. G. Negrich, Deputy Atty. Gen., and T. C. McGettigan, D. A., of Santa Rosa, for respondent.

THOMPSON, Justice.

The defendant was convicted of the crime of murder of the first degree and sentenced to imprisonment for life. He was charged with killing Hellmuth Seefeldt on August 29, 1942. From the judgment of conviction and from the order denying a new trial this appeal was perfected. The evidence of the homicide is

purely circumstantial. No eye witness to the affair testified at the trial. The defendant failed to take the stand in his own behalf.

It is contended the judgment is not supported by the evidence for the reason that the prosecution failed to prove the corpus delicti, and because the evidence refutes the necessary element of malice to constitute first degree murder. It is also asserted the court erred in admitting evidence of another crime of forgery.

The homicide occurred in the remote, rugged, timbered region of the Sonoma coast country. Hellmuth Seefeldt was an unmarried man sixty-eight years of age. For twenty-four years he had owned and operated a sheep ranch in the vicinity of Cazadero. He lived alone in a cottage on that ranch, which contained some timber, including a grove of redwood trees situated back of the barn about one-half mile from the house. He was peaceable, honest, industrious, frugal and thrifty. He had a bank account of about $3,000. It appears that he kept some money in a crock which he buried in a shop on the premises. The defendant was aware of that fact. The deceased was well and favorably known to the people in that vicinity. He disappeared August 29, 1942, and was never thereafter seen alive. About four months later his decomposed body was found buried in a secret grave in the hollow base of a redwood tree surrounded by a thicket of brush. The grave was covered with branches and twigs with the apparent purpose of concealing it. He had six fractured ribs.

The defendant and his family, consisting of a wife and eight children, moved to the Lorey ranch, adjoining the Seefeldt property, in April, 1942. Mr. Cornett was forty-two years of age. He was employed to cut and manufacture pilings from the timber on the Lorey place. His income was small. He was unable to provide for the needs of his family. He was formerly in the Army, but was court-martialed and convicted of an offense involving dishonesty in money matters. He was later discharged from the Army, and then came to California.

Soon after moving to the Lorey property the defendant became acquainted with Mr. Seefeldt and occasionally performed chores for him, for which he was fully paid. In June and July of 1942, Mr. Seefeldt was engaged in some war work in San Francisco. During two months' absence, by arrangement previously made, the defendant and his family moved to the ranch of the deceased, occupied his house and performed the work, including the care of some sheep. When Mr. Seefeldt returned to his home about August 1st, he planned a two-week visit to his relatives in New York. After that visit he returned to his Cazadero ranch August 22nd. During his absence the defendant and his family continued to occupy and manage that property. On his way back from New York, Mr. Seefeldt stopped at San Francisco and purchased from Woolworth Company for use on his ranch several articles of hardware which he shipped to Cazadero in his own name. That package did not arrive until after his disappearance. It was delivered to the defendant and appropriated by him. He afterward falsely stated that the package contained household articles which the deceased had shipped to the defendant in his name and which he had given to him.

Immediately after the disappearance of Mr. Seefeldt the defendant began to take possession of his property and to sell and dispose of several articles. He claimed that he had a five-year lease of the place. When he was advised to record his lease, he said he intended to do so within a few days. Later he admitted that he had no written lease, but claimed that he had an oral lease of the property. He sold certain farm equipment and offered a refrigerator for sale for $140. He promptly began forging checks and drawing on the bank account of the deceased. September 3rd he forged and cashed a check for $178. September 5th, he forged a check for $78, and on September 14th he forged another check for $137. He subsequently admitted forging those checks. Soon thereafter he left the ranch and went to Sacramento where he was arrested.

The defendant made false and inconsistent statements to inquiring neighbors and friends of the deceased regarding his absence. He inferred that the deceased had gone to a nudist colony in Los Angeles. He told several persons that Mr. Seefeldt had bought a boat and that he was going to the South Sea Islands. William Parmeter and Robert Schneider were engaged in surveying property in the vicinity of the Seefeldt ranch a few days before the homicide. They knew the deceased well. They talked with him on August 26th and also on

August 27th. He was seen on the ranch on August 28th. He rode with them to Cazadero on the first-mentioned date, but did not suggest that he intended to go to the South Sea Islands or elsewhere. They visited the ranch on August 29th to arrange with the deceased for a tree on his premises from which they desired to cut stakes. Upon inquiring for him from the defendant they were told that he left a note and had gone away, and that he "was planning on buying a boat and sailing to the South Seas." The defendant told them he had a five-year lease of the ranch and that he was going to "clean it up and * * * get rid of the scrap iron lying around." The defendant offered to sell to them scrap iron, old implements, a sheep-shearing outfit for $15, a quantity of cut stakes for $5 and a refrigerator for $140. They agreed to buy certain scrap iron and equipment for $45. They returned to the ranch the following day, which was Sunday, and also on September 6th, on both of which occasions they talked with the defendant about the absence of the deceased. The defendant escorted them into the dwelling house and other buildings on the premises. In the kitchen they observed food which had been prepared for a meal, only a portion of which had been consumed. They saw two of the deceased's guns in a rack on the wall. They were also shown the clothing and personal effects of the deceased in his trunk, which had not been removed. In that trunk the defendant also showed them a revolver which he said the deceased had left with him. They went into a shed where they observed a broken crock which had been buried in the earth in that building. The defendant told them he had struck and broke the crock with a crowbar. He suggested that the deceased had buried money in that crock. It was then empty. In attempting to account for the absence of the money the defendant suggested that "Maybe he [the deceased] did it [took the money out] before he left, and covered it up again." He also said, "Do you suppose whatever was in there that Mr. Seefeldt came back and got it? You know he is not supposed to come on the place for five years." The defendant wrote two letters to the relatives of the deceased in New York with the evident purpose of deceiving them regarding the absence of Mr. Seefeldt. He stated in one of the letters that he had left instructions not to let the neighbors know where he had gone.

The evidence shows without dispute that the deceased was present on his ranch, after his return from the visit to his relatives in New York, from August 22nd to and including August 28th, for several witnesses saw and talked with him during that period of time. He was never thereafter seen by any of them. He was in normal good health. He voted at the primary election on August 25th. To none of the neighbors or friends with whom he talked during that time did he intimate that he was going away to the South Sea Islands or elsewhere. His guns and clothing and personal effects were not removed from his house. He did not in fact go away. Apparently he did not intend to do so. Those false stories of the defendant were evidently told to mislead and deceive the neighbors and friends regarding Seefeldt's absence.

The disappearance of Hellmuth Seefeldt dates from the 29th day of August. He was never seen about the premises, or elsewhere, after that day. The neighbors and friends soon became curious and suspicious regarding his absence. The defendant and his family had occupied his home. The defendant's association with the deceased and his continuous occupation of the premises furnished him the opportunity which should have charged him with knowledge of the whereabouts of the deceased. It is not probable that he could have been accidentally killed and buried on his own premises without the knowledge of the defendant. The sudden disappearance of the deceased, the fractured ribs, and the secret burial in a grave in the hollow base of a remote redwood tree, together with the apparent effort to conceal the grave with branches of trees and shoots, indicate that he was unlawfully killed by means of violence. The defendant's false and inconsistent stories regarding his absence; his prompt efforts to dispose of the property of the deceased, to secure his bank account by means of forged checks, and his general conduct warranted the jury in concluding that the defendant killed the deceased and secretly buried his body in that secluded grave.

After an absence of several days the mysterious disappearance of the deceased was called to the attention of the officers and an investigation was commenced. They visited the ranch on September 22nd, and on several subsequent dates, without discovering the body. Finally a systematic

search resulted in a discovery of the hidden grave and recovery of the body. The grave was found in the hollow base of an old redwood tree surrounded by a thicket of bushes and sprouts. It was located one-half mile from the house. The body was found in a shallow grave about twenty inches in depth, over which the earth had been carefully smoothed. It was covered with twigs and branches with the evident purpose of concealing the grave. The body, which was clothed, was badly decomposed. The knees were drawn up and rigid. A post-mortem examination disclosed the fact that he had six lower fractured ribs on the left side. The broken ends of the ribs contained evidence of the presence of dried blood. Doctor Jesse L. Carr testified that "The ribs being broken in a straight line, as they were, and having their margins stained with blood, which was still visible, it indicates that the ribs were broken by force, particularly by force applied at one time or by a single force, and that they were broken during the time that blood was circulating in the body." The Doctor further testified that he examined the contents of the stomach and found that it contained undigested food which had been received within two hours prior to death. He also said that the force or violence or blow with an instrument which fractured the six ribs in a straight line was sufficient to have caused the death of the victim, that the limbs which were drawn up to a sharp angle and remained rigid in death indicated that position was caused by great pain as a result of the broken ribs. He asserted that the decomposed condition of the body showed that death occurred from three to six months prior to its discovery. The body of the deceased was absolutely identified as that of Hellmuth Seefeldt by evidence which is entirely satisfactory.

From the foregoing facts, and other circumstances appearing in the record, the jury was warranted in concluding that the defendant murdered Hellmuth Seefeldt and secretly buried him to conceal the crime, and that his motive for the homicide was to secure the money and property of the deceased. Mr. Seefeldt died as a result of violence. He had six broken ribs. The presence of dried blood on the ends of the broken ribs, according to expert medical testimony, indicates that the bones were fractured by violence before his death, and that he died from that cause. The circumstances refute the theory of an accidental death. There was no occasion to conceal his death or to conduct a secret burial of the body if he was merely the victim of an accident. The defendant's opportunity to secure knowledge of the whereabouts of the deceased, his false and fantastic stories regarding his going to the Los Angeles nudist colony or the South Seas, his prompt effort to appropriate the money and property of the deceased, and his general conduct, furnish ample evidence that the defendant was guilty of the crime of murder. The verdict and judgment are adequately supported by the evidence.

[1-6] We are of the opinion the evidence adequately supports the verdict and the judgment finding the defendant guilty of murder of the first degree. The record contains sufficient proof of the corpus delicti, which may be established by circumstantial evidence. People v. Ives, 17 Cal.2d 459, 110 P.2d 408; 13 Cal.Jur. 678, § 68; People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767; People v. Clark, 70 Cal.App. 531, 545, 233 P. 980. The burden was on the prosecution to prove the corpus delicti independently of extrajudicial admissions of guilt on the part of the defendant. The elements of corpus delicti, which are required to be shown in a homicide case, are the identity of the body of the deceased and the fact that he was killed by an unlawful agency. People v. Spencer, 58 Cal. App. 197, 221, 208 P. 380; 13 Cal.Jur. 676, § 68. While it is true that the guilt of a defendant charged with murder must be proved beyond a reasonable doubt, it is not necessary that the corpus delicti shall be so proved before the evidence of the defendant's guilt by means of his extrajudicial admissions or otherwise may be received. If a prima facie showing of death by means of an unlawful act is first established it is sufficient. People v. Selby, 198 Cal. 426, 434, 245 P. 426; People v. Ives, supra. In the present case the body of Hellmuth Seefeldt was positively identified. It was proved that he died as a result of violence which caused the fracturing of six ribs in a straight line. It was also shown that his body was secretly buried in the hollow base of a remote redwood tree with the evident purpose of concealing the grave. These facts furnish sufficient evidence of the corpus delicti to render competent the defendant's admissions.

The subsequent evidence of the defendant's association with the deceased, his

conduct, his false stories regarding the disappearance and whereabouts of the deceased and his prompt efforts to appropriate the property of the deceased by the sale of some of his farm and household equipment and the forgery of checks on his bank account warranted the jury in determining that the defendant murdered the deceased and secretly buried his body to hide the crime.

[7, 8] The record contains sufficient evidence of implied malice to support the verdict and judgment convicting the defendant of murder of the first degree. To sustain a conviction of murder of the first degree it is not necessary to show personal enmity on the part of the defendant toward the deceased. People v. Fleming, 218 Cal. 300, 309, 23 P.2d 28; People v. Sainz, 162 Cal. 242, 121 P. 922; 13 Cal.Jur. 591, § 11. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden rests upon him, in the absence of evidence adduced by the prosecution tending to show that the killing was justifiable or excusable, or that it amounts only to manslaughter, to prove circumstances of mitigation or excuse. Sec. 1105, Penal Code; People v. Spinelli, 14 Cal.2d 137, 142, 92 P.2d 1017, 1019. In the case last cited it is said, quoting with approval from People v. Johnson, 203 Cal. 153, 263 P. 524: "'The ruthless disposition of the body of the deceased, following the killing, certainly is some evidence as to an abandoned or malignant heart upon the part of the slayer. However this may be, section 1105, Penal Code, provides that: "The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable". The defendant offered no proof to meet the burden which the law casts upon him, and, as there was no claim of justification or excuse offered for the killing of decedent or pretense that the proof tended to show that the crime committed only amounted to manslaughter, the crime was murder of the first degree.'"

[9] In the present case the defendant did not take the witness stand in his own behalf. He did not admit the killing of the deceased. No contention was made by the defendant either at the trial or on appeal that he was justified or excused in killing the deceased. It follows that if the killing of the deceased by the defendant has been adequately established, malice is implied under the circumstances of this case sufficient to comply with the provisions of Section 187 of the Penal Code. As we have previously said, the evidence of the homicide by the defendant is sufficient to support the verdict and judgment. We must therefore assume it constituted murder of the first degree.

[10, 11] The appellant contends that the court erred in receiving evidence over his objection of a former extrajudicial admission of the defendant that he forged and cashed the three checks previously mentioned for the aggregate sum of $393, on the bank account of the deceased. It is claimed that admission is incompetent and prejudicial since it tends to prove a separate crime against him which has no bearing on the homicide for which he was being tried. It is true that a prior charge of forgery was pending against the defendant at the time of this trial. But that fact was not disclosed to the jury.

We are of the opinion the court properly admitted the evidence of defendant's forgeries. That evidence was competent in proof of the res gestae and to establish the motive for the homicide. People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Northcott, 209 Cal. 639, 653, 289 P. 634, 70 A.L.R. 806; People v. Clark, 201 Cal. 474, 485, 259 P. 47; People v. Watts, 198 Cal. 776, 787, 247 P. 884; People v. Cook, 148 Cal. 334, 83 P. 43; People v. Hall, 27 Cal.App.2d 440, 81 P.2d 248; 13 Cal.Jur. 703, § 84; Underhill's Crim.Ev., 4th Ed., 1094, § 559; 1 Wharton's Crim.Ev., 10th Ed., 145, § 38. While proof of the motive for the commission of a homicide is not necessarily essential to support a conviction (13 Cal. Jur. 665, § 74), when the defendant denies the killing and the evidence is purely circumstantial, motive for the commission of the crime may become very important and such evidence is competent even though it may disclose other offenses committed by the accused. In 1 Wharton's Criminal Evidence, supra, at page 145, it is said in that regard: "In those cases in which the evidence of the crime charged is for the most part or wholly of a circumstantial character, motive frequently becomes a powerful aid in identifying the accused, and thus connecting him with the commission of the crime. And where, on the

trial of a criminal action, evidence is offered which is competent proof of the presence of a motive in the mind of the accused, such evidence is not to be rejected because it also shows, or tends to show, a distinct and different crime."

Likewise, in Underhill's Criminal Evidence, supra, at page 1095, it is said: "Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that the defendant did kill him. * * * Thus, it may be shown that the deceased was possessed of a large sum of money or of personal property, to the knowledge of the defendant * * * and it may be shown that personal property owned by the deceased was found in the defendant's possession, leading to an inference that his covetousness or necessity was tempted."

In the case of People v. Watts, supra, which is based on circumstances somewhat similar to those of the present case in many respects, the judgment of conviction of murder of the first degree, upon which the death penalty was imposed, was affirmed on appeal. In that case the body of the deceased, Wilfred Hey, was found in a lonely spot in the desert of San Bernardino County. It was identified as the body of Hey. There was no eye-witness to the homicide. The defendant was charged and convicted of the murder. He did not take the witness stand at the trial in his own behalf. It appeared in evidence that the defendant lived in an apartment with the deceased for a period of time in Detroit, Michigan. The defendant was possessed of a British war bond of the value of $1,500. The court said: "Defendant had lived with Hey in the latter's apartment for some three or four weeks previous to their departure from Detroit. Through this association it may be inferred that he had an opportunity to acquire some knowledge of Hey's financial affairs."

Before leaving Detroit the deceased instructed his bank in Detroit to sell the bonds. Later the bank received a telegram, which purported to be from Hey, directing it to transfer the proceeds of the sale of the bonds to a designated Ogden bank, which was done. Upon request from the deceased, the money was later transferred to his credit in the Bank of Italy in Los Angeles. Soon after the date of the alleged murder, the defendant went to the Los Angeles bank, representing himself to be Wilfred Hey. He was identified by his brother as Hey. The bank issued to him a check for the balance of the money belonging to the deceased. He opened an account in the name of Hey and later withdrew the funds. That evidence was adduced at the trial for the purpose of showing motive for the commission of the crime by the defendant. The court said in regard to that evidence: "His brazen effrontery in boldly representing himself as Wilfred Hey when he secured from the Bank of Italy the proceeds of the British war bonds clearly indicates an utter absence of that fear of detection which he must have felt did he not know that the body of the man he was impersonating lay rotting on the desert sands. In the light of these circumstances the determination of the jury is conclusive upon this court."

In the present case the association of the defendant with the deceased gave him the opportunity of learning of his financial affairs, including the possession of the bank account. His conduct in promptly disposing of some of the property of the deceased, and his bold attempt to procure his bank funds by forgery, together with his false stories regarding the whereabouts of the deceased, furnish satisfactory evidence that he killed Hellmuth Seefeldt, and that he thought his body was safely concealed in the hollow base of the redwood tree where it would not be discovered. We conclude that the evidence of the forgeries was competent. The court did not err in receiving that evidence over objection of the defendant.

For the reasons above stated the motion for a new trial was also properly denied.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

61 Cal.App.2d 41

SIMONET v. FRANK F. PELLISSIER & SONS, Inc., et al.

Civ. 14136.

District Court of Appeal, Second District, Division 1, California.

Oct. 18, 1943.

1. Appeal and error ⇐882(8)

Defendants having withdrawn objection to question asked plaintiff's expert witness could not complain on appeal that the question did not contain a fair statement of the evidence.

2. Appeal and error ⇐972

Argument that derogatory references to other expert witnesses made by physician testifying as an expert for plaintiff affected the weight of the evidence adduced by such physician's testimony should have been addressed to the trial court and not to District Court of Appeal.

3. Appeal and error ⇐882(9)

Appellants could not complain of the use by appellee's expert witness of such language as "crazy" and "nuts" in referring to other expert witnesses, where such references were the result of appellants' cross-examination and in reply to argumentative questions.

4. Death ⇐103(2)

Testimony of one physician that injuries suffered by 15 year old boy in collision between bicycle he was riding and truck could and did cause his death four months later from "septicemia" or blood poisoning, though opposed by opinion testimony of five eminent surgeons and physicians to the contrary, was not so lacking in substantiality as to make causal connection a question of law for court. Code Civ.Proc. § 2061.

See Words and Phrases, Permanent Edition, for all other definitions of "Septicemia".

5. Evidence ⇐574

In determining the probative value of conflicting expert testimony as to causal connection between injury and death several months later, no significance could be attached to fact that testimony of five experts was opposed by that of only one. Code Civ.Proc. § 2061.

6. Death ⇐76

Conflicting evidence sustained trial court's finding that injuries suffered by 15 year old boy when negligently operated truck collided with bicycle he was riding caused his death four months later from septicemia with septic emboli to lungs, heart, and brain and purulent periostitis of right femur so as to render truck owner and driver liable for death.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mary M. Simonet against Frank F. Pellissier & Sons, Inc., a corporation, and another, for the death of plaintiff's minor son which allegedly resulted from injuries sustained when a milk truck operated by defendant company collided with a bicycle ridden by decedent. Judgment for plaintiff, and defendants appeal.

Judgment affirmed.

Kenneth J. Murphy, of Los Angeles, for appellants.

Dee Holder and Samuel Marks, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of plaintiff for the death of a minor son alleged to have followed from injuries sustained as the result of a collision between decedent, who was riding a bicycle, and a milk truck operated by defendant company.

Appellants' statement of the question involved is as follows: "Where the plaintiff's decedent was injured when he was knocked off a bicycle on December 5, 1941, and sustained minor injuries to his person, was the evidence sufficient to establish any proximate causal connection between the aforesaid injuries sustained on December 5, 1941, and the subsequent death of the plaintiff's decedent on April 15, 1942, it being conceded that in so far as the original injuries were concerned, the defendants were guilty of negligence which proximately caused the original injuries." Technically, therefore, the question is, does the evidence support the findings. No other valid questions are raised by the appeal.

As noted in appellants' statement on appeal the accident occurred on December 5, 1941, and death did not ensue until April 15, 1942. The evidence reveals that decedent, who was 15 years of age, was taken to the hospital April 1st, at which time he

was found to be actually ill with fever and suffering from chills. The autopsy report shows the cause of death to have been "septicemia with septic emboli to lungs, heart, and brain and purulent periostitis of the right femur." In the autopsy report, which is somewhat extensive, appears the following: "An incision into the soft tissue of the right thigh and the right hip region reveals the presence of a large quantity of pus, greyish-white in color, somewhat creamy in consistency in the muscle plane on the anterior and medial surface of the leg. The right hip joint and the right knee joint as well as the right ankle appear to have very clean uninfected surfaces. In the middle ⅓ of the right thigh on the posterior aspect there is an area about 2½ inches in length and perhaps an inch in width of roughened bone cortex and the purulent material in the right extremity appears to originate at this site. The bone marrow of the femur appears quite reddened and abundant." The record discloses in substance and effect that the focus of infection was revealed for the first time by the autopsy.

The extent of decedent's injuries as described by Dr. Wical, who attended him on the day of the accident, appears to have been some minor injury to the left ankle, which was "strapped" by the doctor, soreness in the left chest, the shoulder and contusion of the left forearm and left side of the head.

Decedent's mother testified that she accompanied her son to the hospital following his injury where, she continued, "They tried to ease up his foot and put him in—I wouldn't know what to call it, a cast; but they called it, and it is some kind of tape that you can take off and on when you bathe his foot—heavy tape like plaster Paris. And they taped up his body and through his back and around in there (indicating), and before that they X-rayed.

"Q. What injuries did he suffer, so far as you could see? A. Well, at that time he was more concerned about his foot than anything, at that time; and then his elbow and throughout his body, on his hip and around down on his leg, he was brush burned considerably. At that time I didn't know they were brush burns—that's what the doctor said they were—scratches.

"Q. In other words, it is a scraping of the skin? A. Yes, like a deep cut, like he came in contact with something sharp.

"Q. He was given first-aid, was he, at the hospital? A. Yes.

"Q. Then what was done with him? A. Well, they told me to take him home and put him to bed, and he should be quiet. And so we took him home, and he was in bed for a number of days—I don't just remember how many days."

She also testified to his condition thereafter and until he was taken to the hospital on April 1st, which, in substance, was that he continued to suffer from the effects of the accident during this period, to some extent.

Four physicians, who testified for defendants, gave as their opinion that, as contained in appellants' "statement of question involved", there was no causal connection between the injuries sustained on December 5th and death which occurred on April 15th.

Dr. Hammond, witness for plaintiff, on the other hand disputed the opinion of defendants' experts and expressed the opinion that the injuries suffered on December 5th could and did cause decedents' death.

The court found as a fact that "as a direct and proximate result of the careless, reckless and negligent manner in which the said defendant, John Priem, did steer, guide, propel, operate and maintain said milk truck, causing the said milk truck to run against and upon the rear wheel of the bicycle operated by said Richard Robert Gerving, deceased, and which caused the said Richard Robert Gerving, deceased, to be violently thrown to the ground, and the said Richard Robert Gerving, deceased, suffered injuries to his person, consisting of abrasions and contusions about the head, legs and body, and suffered sprains and bruises of his legs and body which caused the said Richard Robert Gerving, now deceased, to be confined to his bed for three weeks and four months later to-wit, on April 10th, 1942, to be hospitalized and placed under the care of physicians and nurses, and as a direct and proximate result of the abrasions, contusions and bruises suffered by the said Richard Robert Gerving, now deceased, the said Richard Robert Gerving, now deceased, suffered infection about his body and suffered septicemia with septic emboli to lungs, heart and brain and purulent periostitis of the right femur, which conditions resulted in the death of said Richard Robert Gerving on or about the 15th day of April, 1942."

[1] Appellant complains on appeal that the hypothetical question asked of plaintiff's expert witness, Dr. Hammond, "fails to contain a fair statement of the evidence". In that connection it is urged, among other things, that the question propounded referred to "original injuries received by the boy on his right hip", when as a matter of fact it is argued that at no time was there any competent medical evidence of such an injury. It is not contended that objections were made at the trial and that erroneous rulings were prejudicial. Indeed the briefs contain no reference to the subject. And an examination of the transcript reveals that an objection to the question now criticized as failing to contain a fair statement of the evidence was withdrawn. In the circumstances, it is too late to raise such objections on appeal. Moreover, the record reveals that decedent's older brother testified to and described a bruise on decedent's right hip, to which his attention had been called and which he had seen on about January 6th.

But appellants' principal contention appears to be that "the testimony of Dr. Hammond is not of sufficient substantiality to justify the court in concluding that there is any conflict in the medical testimony submitted in this case". In that connection appellants argue as follows: "Both appellants and respondent must have appreciated the significance of the rules respecting the necessity for the introduction of expert testimony. The dramatis personae of the medical cast which was before the court consisted of the following:" Then follows a brief summary of what each of defendants' experts testified to with appropriate reference to one who "specializes in orthopedic surgery", another who "is a prominent orthopedic surgeon", another as one who has been "for fourteen years, chief surgeon of the Los Angeles County Receiving Hospital"; and another as "an outstanding pathologist"; and concluding in part with, "Last, but not least, we come to the concluding character, Dr. Nettie Hammond, who, in her best professional manner, says that these eminent members of the medical profession are crazy and in her own word, 'nuts' ".

Thus, it is argued by appellants in substance that appellants' experts are eminent specialists in certain branches of the medical profession, whereas, quoting again from appellants' brief, "By her own admission Dr. Hammond was only a gynecologist, i. e.: a doctor specializing in diseases of the female organs". It is conceded that the cause of death was septicemia or blood poisoning. Nowhere in the briefs is it pointed out why one specializing in gynecology should be less qualified to express an opinion in such circumstances than another who specializes in some other branch of the medical profession. Nor indeed is it even urged that septicemia is a specialty. To the contrary, it appears to be a subject of which all physicians would be expected to have a general and substantial knowledge.

[2, 3] Dr. Hammond testified at length and gave the reasons for her opinion. If reference by her to the other witnesses as "crazy" and "nuts" affected the weight of the evidence adduced by her testimony, the proper forum to present an argument to such effect was the trial court. Moreover, appellants can scarcely be heard to complain about the use of such language for it was the product of appellants' cross-examination and in reply to questions that clearly were argumentative and hence improper.

[4-6] There is no merit to appellants' contention, therefore, that the evidence is lacking in substantiality to the extent that a question of law is raised for consideration on appeal. The trial court obviously accepted the testimony of plaintiff's expert as to the cause of death instead of the testimony of defendants' experts, five of whom testified in effect that there was no causal connection between the injury and the cause of death; in other words, that the septicemia was not the result of the injuries caused by the accident. As to the probative value of such testimony, there can be no significance attached to the fact that the score was five to one. The court is not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in the mind of the court, against a less number or against a presumption or other evidence. Sec. 2061, Code Civ.Proc. The testimony of the five witnesses for appellant was substantially the same and therefore cumulative; hence, if the trial court chose to reject the testimony of any one of such witnesses, of necessity the rest would likewise be rejected.

For the foregoing reasons the judgment appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.

60 Cal.App.2d 837

HAHN et al. v. WALTER et al.
WALTER v. HAHN et al.
Civ. 14089.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1943.

Hearing Denied Dec. 6, 1943.

1. Guaranty ⇐82

Where defendant executed note to plaintiffs, and, in agreement contemporaneously executed by plaintiffs, defendant, and others, defendant guaranteed note to plaintiffs, defendant and plaintiffs were the only "necessary parties" to action on defendant's note and guaranty, notwithstanding that plaintiffs might have made signatories to the guaranty agreement defendants. Code Civ.Proc. § 379 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

2. Parties ⇐18, 29

Unless other unnamed persons are concerned with and are necessary to determine the issues joined between the parties to an action, such others are not "necessary parties".

3. Pleading ⇐332

Where defendant executed note to plaintiffs, and, in guaranty contemporaneously executed by plaintiffs, defendant, and others, defendant guaranteed note to plaintiffs, trial court was authorized in its discretion to proceed with trial of action on defendant's note and guaranty without permitting defendant to serve cross-complaint upon other signatories to the agreement, where only interest of other guarantors was in defendant's payment of his debt to plaintiffs, and only agreements between plaintiffs and defendant with respect to his obligations were contained in note and guaranty agreement.

4. Evidence ⇐448

Where rights and obligations of each signatory to guaranty agreement were declared in simple language, resort to parol evidence to prove the meaning of the instrument was unnecessary.

5. Courts ⇐486

Where defendant executed note to plaintiffs, and, in agreement contemporaneously executed by plaintiffs, defendant, and others, defendant guaranteed note to plaintiffs, superior court properly refused to order transferred to the superior court one guarantor's justice court action against defendant on another note guaranteed by plaintiffs, where presence of justice court action in superior court could not affect defendant's debt to plaintiffs and plaintiffs' obligation was credited to defendant in superior court.

6. Appeal and error ⇐1046(2)

Where defendant had ample time within which to bring his cross-defendants into court or to gain the benefit of their testimony had he deemed their presence necessary, judgment for plaintiffs was not required to be reversed on ground that defendant was rushed into trial before service could be made on his cross-complaint.

7. Parties ⇐51(1)

Under statute authorizing trial court to order other parties to be brought into an action, the trial court must order other parties brought in only when complete determination of a controversy cannot be had without the presence of other parties. Code Civ.Proc. § 389.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Herbert L. Hahn and another against Fred L. Walter and others on a note and a guaranty, wherein named defendant filed a cross-complaint against Henry D. Lyman and others. From an adverse judgment named defendant appeals.

Affirmed.

Chas. F. Hutchins, Jr., and Stanley Hahn, both of Pasadena, for plaintiffs and respondents.

Fred L. Walter and Irving E. Read, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

The question for decision is whether the court committed prejudicial error in awarding judgment to respondents upon the promissory note of appellant and, at the same time, including in the judgment a portion of the amount due on another note guaranteed by appellant in a contract of guaranty executed contemporaneously by appellant, respondents and other parties. The appeal is based upon the contentions

(1) that the court arbitrarily refused to delay the trial until service might be made of appellant's cross-complaint upon all of the eight signatories to the guaranty agreement and (2) that the court refused to order a transfer to the superior court an action pending in the justice court brought by Henry D. Lyman, one of the guarantors against appellant and his wife.

On May 1, 1938, respondents received three promissory notes in the sums indicated and from the following parties, to wit: (1) H. D. Lyman, $2,130; (2) Fred M. Walter and Pearle Walter, $3,199.77; (3) Harrison Baker (and co-makers), $3,129.08; all payable three years after date. Contemporaneously therewith the Walters and the Baker group delivered to Lyman their notes for $461.88, and $499.54 respectively; and the Bakers delivered to Walter their note for $499.54. The notes all contain the customary provisions for interest, for acceleration in event of non-payment upon failure to pay an installment of interest, and for attorneys fees. However, each note contains a clause reciting that it is subject to the provisions of a guaranty agreement of even date by the same parties.

The guaranty agreement contained two separate guaranties; (1) a primary guaranty and (2) a secondary guaranty. By the former, appellant and Lyman each guaranteed the payment of one-fourth of the Baker note. By the secondary guaranty appellant guaranteed the payment of one-third of the Lyman guaranty, that is to say, one-third of one-fourth of the Baker note. The Baker note was not paid. Neither did Lyman pay the amount of his guaranty thereof. Excepting certain set-offs the action went to trial with appellant indebted on his own note, on his one-fourth guaranty of the Baker note, and one-twelfth of the same note by reason of Lyman's failure to pay his one-fourth of the Baker note. But respondents' debt to appellant by reason of their guaranty of the Baker note was two-thirds of the $499.54, which respondents, by the secondary guaranty, agreed to pay. Although the defense introduced no evidence at the trial, respondents conceded to appellant the uncollectibility of the Baker note as well as of Lyman's guaranty, and agreed to credit appellant's debt to respondents with two-thirds of the amount due from Baker to Walter, and in addition thereto two-thirds of the Lyman guaranty on the Baker note in favor of appellant. Pursuant to the evidence introduced by respondents and to the credits conceded in favor of appellant, judgment was entered in the amount of appellant's note to respondents plus appellant's guaranty on the Baker note plus appellant's secondary guaranty of one-twelfth of the Baker note less the sums guaranteed by respondents as above recited. Appellant offered no proof, but objected to the court's proceeding with the trial of the action on the ground that he had filed a cross-complaint making all of the signatories to the guaranty agreement cross-defendants and insisted that the judgment would not be adequate relief unless all of the parties to the guaranty agreement should appear and particularly unless the court should require the transfer to itself of the justice court action brought by Lyman against appellant and his wife.

[1-4] The court exercised a reasonable discretion in proceeding with the trial. So far as this action is concerned, appellant and respondents were the only necessary parties. To the extent that the guaranty agreement affected the obligation of appellant he was the only necessary party defendant to the action. While under sections 379 et seq. of the Code of Civil Procedure respondents might have made the signatories to the guaranty agreement defendants in the action, they did not for that reason become necessary parties. Unless other unnamed persons are concerned with and are necessary to a determination of the issues as joined between the parties to the action, such others are not necessary to a correct determination of the case. Whether under the circumstances here presented the court might allow separate trials between the obligees and the several obligors was a matter of discretion. Caldwell v. Regents of University, 35 Cal.App. 639, 170 P. 666. None of the other guarantors were concerned with appellant's payment of his debt to respondents. Their only interest was in his nonpayment. The only agreements between respondents and appellant with respect to the latter's obligations are those contained in the promissory note and in the guaranty agreement. Judgment was awarded on the basis that Lyman would default on his obligations and by reason thereof respondents credited to appellant the amounts that would be required of Lyman although the latter was declared by appellant in his cross-complaint to be solvent.

The rights and obligations of each signatory to the guaranty agreement are declared in simple language and could furnish no occasion for a resort to parol evidence to prove the meaning of the terms of the instrument. Each party guaranteed the payment of a fraction of the principal and interest of any note that should be in default. Under the several notes made in favor of respondents as well as the notes made by appellant and Baker in favor of Lyman and those by Baker in favor of appellant, each party had three obligations: (1) The payment of his own note; (2) the payment of a fraction of the debt of any defaulting payor; and (3) the obligation to pay a lesser fraction of any sum not paid by his coguarantors.

[5] The action in the justice court by Lyman against the Walters was a separate action the presence of which in the superior court could not on any hypothesis affect appellant's debt to respondents. It was based upon the promissory note executed by appellant in favor of Lyman. Respondents' obligation thereon, as shown above, was duly credited to appellant in the judgment of the superior court now before us.

[6, 7] Appellant's assignment that he was rushed into a trial of the cause comes with poor grace. He filed his cross-complaint on October 2nd and the case was not tried until twenty days later. Had he deemed the presence of his cross-defendants necessary to a proper determination of the action, he had ample time within which to bring them into court by service of summons or to gain the benefit of their testimony by subpoena. They all resided in Pasadena where the case was tried. In support of his contention that the court committed prejudicial error in trying the case without service on, or the appearance of, his cross-defendants, appellant has cited a number of authorities (Zirker v. Hughes, 77 Cal. 235, 19 P. 423; Abbott v. 76 Land & Water Co., 161 Cal. 42, 43, 118 P. 425; Greenlee v. Los Angeles Trust & Savings Bank, 171 Cal. 371, 153 P. 383; Lewis v. Hayes, 177 Cal. 587, 171 P. 293; McPherson v. Parker, 30 Cal. 455, 456, 89 Am.Dec. 129; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Solomon v. Redona, 52 Cal.App. 300, 198 P. 643) involving split demands, partnerships, accounting, titles, or other causes in equity necessitating the appearance of other unnamed though interested parties. Section 389 of the Code of Civil Procedure is not apropos. It applies "when a complete determination of a controversy cannot be had without the presence of other parties." Only then must the court order such parties to be brought in.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



WULFJEN v. DOLTON et al.
Civ. 14142.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1943.

Rehearing Denied Nov. 12, 1943.

Hearing Granted Dec. 7, 1943.

1. Abatement and revival ⇐4

The pendency of a prior action based on the same cause, contested by the same parties, and considered in the same jurisdiction, is ground for the abatement of a second action.

2. Abatement and revival ⇐4

The principle upon which the plea for "abatement" is sustained is that the law will not permit a defendant to be harassed and oppressed by two or more actions for the same cause where plaintiff has a complete remedy by one action.

See Words and Phrases, Permanent Edition, for all other definitions of "Abatement".

3. Abatement and revival ⇐8(1), 9

Only when the plaintiffs are the same, when the cause of action is the same in each suit, and the same evidence would support the judgment in each case, will the plea of another suit pending be upheld.

4. Abatement and revival ⇐9

The pendency of an action against a corporation and certain individuals for rescission of a contract to purchase stock, which was pleaded and tried upon theory that corporation was the alter ego of individual defendants and in which court's finding that corporation was a separate entity precluded judgment against individuals, was not ground for abatement of

second action against individuals only to recover damages for fraudulent representations.

5. Election of remedies ⇦1

The rule of "election of remedies" will be applied by the courts only when the disadvantage caused to the other party by a change of remedies amounts to a real injury, such as would, in the contemplation of law, amount to an estoppel.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedy".

6. Election of remedies ⇦3(4)

An action against a corporation and certain individuals for rescission of a contract and for money had and received, which was tried on theory that corporation was the alter ego of the individuals and in which court's finding that corporation was a separate entity precluded recovery against individuals, did not constitute an "election of remedies" so as to bar maintenance of a second action ex delicto against individuals only to recover damages for fraud.

7. Election of remedies ⇦11

The existence of alternative remedies is required as a condition precedent for the application of the rule of "election of remedies", the rule having no application where the bringing of the first action resulted from a misconception of remedy.

8. Election of remedies ⇦15

Where a party has pursued a remedy which would have entitled him to some relief, and later discovered facts which disclose a better remedy, he may follow the better remedy if no such conditions of injury amounting to an estoppel have resulted to the other party.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edith S. Wulfjen against O. L. Dolton, Jr., and others to recover damages for an alleged conspiracy to defraud plaintiff by certain fraudulent representations. From a judgment for defendants on ground that there was another action pending which constituted an election of remedies, plaintiff appeals.

Judgment reversed.

See, also, 141 P.2d 776.

Thomas F. McCue and Mildred L. Zingals, both of Los Angeles, for appellant.

Daily & Gallaudet and Edward Gallaudet, all of Glendale, for respondents O. L. Dolton, Jr., and Lindley W. Potts.

Paul Angelillo, of Los Angeles, for respondent Helen King.

WHITE, Justice.

On February 15, 1940, plaintiff herein filed an action in the superior court of Los Angeles County numbered 449081 (hereinafter referred to as the prior action) against O. L. Dolton, Jr., Lindley W. Potts, Helen King and Concrete Homes Corporation, a corporation. By her amended complaint in the just mentioned action, plaintiff alleged that the individual defendants were organizers and promoters of the defendant corporation and that such individual defendants at all times mentioned "held the majority and absolute control of said corporation". It is then alleged that the corporate defendant was at all times the alter ego of the individual defendants Dolton and Potts. The amended complaint then recited that plaintiff having been induced, through the fraud and misrepresentations of the named individual defendants, to part with and having parted with substantial sums of money to the defendant corporation, which she later learned to be insolvent, "plaintiff has elected to and has rescinded said agreement and each and every transaction relating thereto". The amended complaint in such prior action contained five causes of action, the first four being each divided into two counts: one for fraud and rescission, the other for money had and received. The fifth cause of action set forth a claim for work, labor and services performed by one Rathbun (who was not a party to that action but who is a party to the action with which we are here concerned), and which claim was assigned to plaintiff prior to the filing of the prior action.

During the trial of the last mentioned action a non-suit was granted as to defendant Helen King on all five causes of action and upon each count thereof. As to defendants Dolton and Potts a non-suit was granted as to the first cause of action of the amended complaint. The trial then proceeded on the remaining causes of action as to defendants Bolton and Potts, at the conclusion of which the court found that the corporation was not the alter ego of the individual defendants or any of

them; that all of the money parted with by plaintiff went to the corporation. Judgment was entered in favor of plaintiff and against the defendant corporation only, in the sum of $6,950 on the second, third and fourth causes of action; and for the defendant corporation on the first and fifth causes of action; and in favor of defendants Dolton and Potts on the second, third, fourth and fifth causes of action. From such judgment rendered in the prior action, plaintiff appealed and such appeal was pending at the time she instituted the case at bar, and is still pending.

The instant action was filed March 19, 1941. The complaint therein charges that defendants Dolton, Potts and King formed and entered into a conspiracy with one William Rathbun, allegedly the "trusted friend and adviser of plaintiff"; that the object of such conspiracy was to defraud plaintiff. Said complaint recites that following the formation of the alleged conspiracy, defendant Rathbun "known to said defendants, and all of them, to hold himself out as a trusted friend and business advisor of plaintiff, acting for himself and in accordance with the plan and design of all of the defendants," made the representations of material and inducing facts which statements and representations were false and fraudulent and known by the defendants, and each of them, to be false and fraudulent at the time they were made; that the plaintiff believed and relied upon the statements, and paid over to the defendants certain sums of money.

Defendants Dolton and Potts answered setting up a general denial and pleaded special defenses (1) the pendency of the former action; (2) that the filing of the former action constituted an election of remedies; and (3) estoppel. The defendant Helen King filed an answer similar to that of her co-defendants and also pleaded the same special defenses. The defendant Rathbun answered by way of general denial, and while he obtained a stipulation that his amended answer might be deemed to be before the trial court, apparently no such pleading was filed, but it can be assumed from statements of counsel made at the time the case was called for trial that defendant Rathbun intended by such amended answer to set up the same special defenses as were advanced by his co-defendants.

When the instant action was called for trial the court, pursuant to the provisions of section 597 of the Code of Civil Procedure, proceeded to the trial of the special defenses interposed, following which the court found "that there is another action pending entitled Edith S. Wulfjen, Plaintiff vs. O. L. Dolton, Jr., Lindley W. Potts, Concrete Homes Corporation, a corporation, and others, defendants, being No. 449081 in the records and files of the above entitled Court and that the allegations contained in the complaint of said action No. 449081 are substantially identical with those in the above entitled action and the cause of action stated in said prior action arose out of the same facts and transactions, and was based on the same subject matter as those in the present action."

On the defendants' special defense that the filing of the prior action constituted an election of remedies, the court found that on or about February 14, 1940, plaintiff elected to and did rescind each and all of the contracts, agreements or transactions alleged in plaintiff's complaint to have been had between plaintiff and defendants. The court found that by reason of said rescission plaintiff recovered a judgment against said Concrete Homes Corporation, a corporation, defendant therein on account of the matters and things referred to in said notice of rescission attached to and marked "Exhibit A" in the answer of the defendants, Dolton, Potts and King, in the sum of Sixty Nine Hundred and Fifty Dollars ($6,950). The court found that by reason of said rescission and the said judgment against the said Concrete Homes Corporation, plaintiff had elected a remedy inconsistent with the remedy sought in the other action, and was estopped from maintaining this action. Pursuant to such findings judgment was entered in favor of the defendants. It is from such judgment that plaintiff prosecutes this appeal.

[1-4] The well settled general rule prevailing in California that the pendency of a prior action, based on the same cause, contested by the same parties, and considered in the same jurisdiction, is ground for the abatement of a second action, is stated in 1 Cal.Jur. 23. The principle upon which the plea for abatement is sustained is that the law will not permit a defendant to be harassed and oppressed by two or more actions for the same cause where the plaintiff has a complete remedy by one action. Only when the plaintiffs are the same; when the cause of action is the same in each suit; and when the same evidence would support the judgment in each case, will the plea

of another suit pending be upheld. Fresno Investment Co. v. Russell, 55 Cal.App. 496, 497, 203 P. 815. In the case at bar it is true that as to plaintiff and defendants Dolton, Potts and King, the prior action was identical insofar as the parties thereto were concerned, but the causes of action cannot be said to be the same. The prior action was one based on rescission of a contract and for money had and received. It was pleaded and tried upon the theory that the corporate defendant was the alter ego of the individual defendants, but the finding of the court therein that the corporation was in fact a separate entity precluded judgment against the individual defendants, and amounted to a finding that as to such individual defendants there was no contract; that the agreement was with the corporation. Consequently as to the individual defendants, there being no contract, there was nothing to rescind as against them. William Rathbun is a defendant in the instant proceeding but, not having been a party to the prior action, he could not, of course, have been affected by it. As we view the record herein, it discloses that plaintiff brought an action based on rescission of a contract made with the corporation, which contract it was claimed was induced by the fraudulent representations of certain individuals, resulting in plaintiff parting with certain sums of money to such corporation. After exhausting her fruitless remedies against the corporation, following rescission of her contract with it, she now brings this action, not arising ex contractu but ex delicto, to recover damages for the fraud allegedly perpetrated upon her by the individuals named as defendants in the instant action. To us it is manifest that the same evidence would not support a judgment in both cases because in the prior one she was required, in order to recover, to show that the corporate defendant was the alter ego of the individual defendants whereas in the second action such proof is not required. In other words, one is an action arising out of contract while the other sounds in tort. The plea of a former pending action that would abate the instant one ought not to have been sustained.

[5-8] We come now to a consideration of the finding by the trial court in the instant action that by the prior action, plaintiff resorted to a conclusive election of remedies and is now barred from relying upon the present cause of action. It is fundamental in the doctrine of estoppel that the rule of election of remedies will be applied by the courts only when the disadvantage caused to the other party by a change of remedies amounts to a real injury, such as would, in the contemplation of law, amount to an estoppel. We fail to perceive wherein respondents have suffered any disadvantage, to say nothing of any real injury, by reason of the prior action based upon rescission and the subsequent pursuit by plaintiff of the remedy of damages against the defendants herein. To constitute a bar the two remedies open to a party must be inconsistent on the same set of facts. Here we are confronted with a situation wherein the court in the prior action determined that the corporate defendant was not the alter ego of defendants Dolton, Potts and King, named herein, while defendant Rathbun was not even a party to the prior litigation. By its finding in the prior action the court determined that as to the therein named individual defendants the plaintiff had no contract whatever—that her contract was solely with the corporate defendant. Manifestly plaintiff had no contract to rescind insofar as these defendants are concerned. And having no contractual relationship with defendants herein plaintiff's only remedy against them was an action ex delicto. The existence of alternative remedies is required as a condition precedent for the application of the rule of election of remedies. Here, the most that can be said is that plaintiff misconceived her remedy against the individual defendants. In fact, the remedy upon which she expected to rely when she instituted the initial action, the court determined, had never been available to her. She now resorts to a remedy to which, under the facts pleaded in her complaint herein, she is entitled. Before a person can exercise an option or preference between two courses both of such courses must have an actuality of existence. The findings of the court in the prior action clearly determine that appellant at no time had a contract with respondents. Therefore, as to them, she never had a choice of remedies but was limited to an action ex delicto to recover damages for a fraud allegedly practised upon her by them. Never having been parties to a contract with appellant, the respondents could not breach the covenants thereof. The corporate defendant in the prior action, which the court held was the only party to the contract with appellant, is not a party in the case at bar. Furthermore, under the facts here present, we

are not impressed that by filing both the prior and the instant action appellant has inflicted upon respondents any unconscionable, unfair and unjust detriment which would justify recourse to the doctrine of estoppel, upon which the rule of election of remedies is founded. In 9 R.C.L. 963, it is said: "Even where a party has pursued a remedy which would have entitled him to some relief, and later discovered facts which disclose a better remedy, he may follow the better remedy if no such conditions of injury amounting to an estoppel have resulted to the other party." We, therefore, hold that appellant did not elect her remedy by the prior action.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and DORAN, J., concur.



60 Cal.App.2d 841

SCHILLER v. SCHILLER.

Civ. 13960.

District Court of Appeal, Second District, Division 3, California.

Oct. 14, 1943.

Divorce ⇐235

Where complaint asking for a divorce and alimony alleged that wife was without sufficient income for her support and that husband was regularly earning at least $450 per month and evidence disclosed necessity for alimony, court did not abuse its discretion by providing, in interlocutory divorce decree entered upon husband's default, for payment of $125 per month alimony, though complaint made no reference to property settlement agreement for monthly payments in the same amount.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action for divorce by Mabel L. Schiller against William A. Schiller, wherein an interlocutory judgment of divorce was entered directing defendant to pay $125 per month for the support and maintenance of plaintiff. From an order refusing to vacate the portion of judgment awarding alimony, defendant appeals.

Order affirmed.

Francis D. Adams, of Los Angeles, for appellant.

H. M. Lineman and Mab Copland Lineman, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Respondent in this case secured by default on April 15, 1942, an interlocutory decree of divorce, by the terms of which her husband was directed to pay her for her support and maintenance the sum of $125 per month for the balance of her lifetime or until she should remarry. The decree, as originally made, contained the following language: "Defendant is also ordered to pay plaintiff the further sum of $150.00 in installments of $25.00 on the 16th day of each month commencing April 16, 1942, to be paid at No. 1124 Van Nuys Building, 210 West 7th Street, Los Angeles, California."

On May 19, 1942, counsel for appellant made a motion to set aside the interlocutory judgment of divorce on the ground that the court was without jurisdiction of the persons or property of the defendant and was without power to enter interlocutory judgment in the case. The motion to set aside the interlocutory decree was taken under submission and on July 16, 1942, was denied by the trial court, but the decree, by the same order, was modified by striking out the above mentioned language providing for the additional payment of $150 in $25 monthly installments.

Although the motion which was passed upon by the trial court was one to set aside the interlocutory judgment, the appeal which defendant has filed is an appeal "from that part of that certain order made and entered by the Court in this action on the 16th day of July, 1942, wherein said Court refused and denied defendant's motion to vacate provisions awarding alimony to the plaintiff, as provided in the Interlocutory Judgment of Divorce, entered April 20, 1942." The appellant's brief states that the appeal has been taken from the order denying the motion of defendant to set aside the interlocutory decree of divorce and from the judgment, but reference to the transcript satisfies us that there is no appeal here from the interlocutory decree

of divorce but only from the order refusing to vacate the portion of the decree that provides alimony. It is contended: First, that there is no evidence as to the amount or necessity for the payment of any alimony; second, that neither the complaint nor the prayer contains any reference to an alleged property settlement which, it is claimed, the court indirectly approved by ordering certain payments of alimony as therein provided.

At the default hearing, the plaintiff's testimony, corroborated by her adult daughter, was a recital of cruelty involving mental anguish and physical violence, and included a presentation to the trial court of an instrument which was introduced as plaintiff's Exhibit 1, concerning which plaintiff's counsel made inquiry as follows:

"Q. I will show you here an instrument and ask you if that is your signature and that of your husband (showing a paper to the witness). A. Yes, it is.

"Q. It contains a settlement of your property rights? A. Yes, it does.

"Q. And you are satisfied with this? A. Yes, I am."

After hearing the testimony and receiving the instrument in evidence, the trial judge stated, "All right, decree granted. I would like to approve this agreement, but unfortunately it is no part of the prayer of the complaint." But upon consideration he decided to incorporate in the interlocutory decree which was granted an order for support and maintenance in the sum of $125 a month, payable in equal installments of $62.50 on the 16th and on the 1st day of each month commencing April 16, 1942, which was the amount agreed upon in the contract between the parties. This property settlement agreement, which was executed by the parties after the divorce action was filed and served, contained the following provisions: "That Whereas, a divorce action is pending between the parties hereto and they are desirous of entering into a property settlement whereby to determine and fix all their respective property rights, present and future, and the rights of either concerning alimony, separate maintenance, attorney's fees and rights of inheritance.

"First: First Party shall pay to Second Party for her support and maintenance and as part of the consideration of this agreement, the sum of One Hundred Twenty-five ($125.00) Dollars a month for and during her lifetime, or until her remarriage, payable on the 16th and 1st days of each month beginning the 16th day of April, 1942. * * *

"Sixth: Nothing in this agreement is intended to appear as a waiver upon the part of either of said parties to maintain a suit for divorce against the other, but in the pending case or in any case for divorce or separate maintenance, this agreement shall be conclusive as between the parties as to their property rights and their respective rights to alimony, maintenance and support."

The complaint alleged that "plaintiff has not sufficient income from any source for her support, or with which to employ counsel for services necessarily rendered and to be rendered in this action, or with which to pay necessary costs herein; that the defendant is able-bodied and steadily employed as an industrial engineer with the Vultee Aircraft Corporation, and as such is, as this plaintiff is informed and believes, and therefore so alleges, earning the sum of $450.00 or more per month, and that defendant has ample and sufficient means and income to enable him to pay to plaintiff a reasonable amount per month for her support, pendente lite and permanently, and for court costs, and also a reasonable sum as and for counsel fees." The prayer was for a decree of divorce; that the court make an order directing defendant to pay to plaintiff a reasonable sum per month for her support and maintenance, both pendente lite and permanently; that the court award plaintiff her equitable share of any community property belonging to the parties. In regard to community property, an allegation in the early part of the complaint was to the effect that "the parties own certain property which is their community property, but this plaintiff has not sufficient information or belief to enable her to allege the extent and character thereof save and except that in part the same consists of certain equities in life insurance policies."

It appears that sufficient evidence was introduced in this case to justify the court in deciding that alimony was necessary and there is nothing to show that the award constituted an abuse of discretion. See Horton v. Horton, 1941, 18 Cal.2d 579, 582, 583, 116 P.2d 605; Brown v. Brown, 1915, 170 Cal. 1, 5, 147 P. 1168. On the contrary, and having in mind the undenied

allegations of the complaint concerning the earning power of the appellant, the amount ordered paid by the court for the support and maintenance of plaintiff each month seems so reasonable as to give appellant no cause of complaint. Order affirmed.

SHINN, J., and SHAW, Justice pro tem., concur.



61 Cal.App.2d 21

PLXWEVE AIRCRAFT CO. et al. v. GREENWOOD et al.

Civ. 14209.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1943.

1. Pleading ⇐35

Where allegations of first count of complaint, if sustained, would entitle plaintiffs to have defendants held constructive trustees for plaintiffs' benefit, second count which merely incorporated allegations of first count and stated that an actual controversy had arisen between plaintiffs and defendants in that plaintiffs claimed that by reason of allegations of first count defendants were constructive trustees for plaintiffs in respect to the matters alleged, was superfluous.

2. Appeal and error ⇐863

On appeal from judgment of dismissal after trial court sustained demurrer to amended complaint without leave to amend, the inquiry was confined to a consideration of whether amended complaint stated sufficient facts with sufficient certainty to entitle plaintiffs to have demurrer overruled and cause proceed to trial.

3. Attorney and client ⇐123(1)

Relation of attorney and client is "confidential" in nature and any contract entered into between them while relation continues, whereby attorney obtains an advantage from client, is presumed to have been made by client under undue influence of attorney.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation."

4. Trusts ⇐283(1)

Though trustee is not precluded by statute from dealing with his beneficiary, if he does deal with beneficiary in such manner as to obtain an advantage, trustee has the burden of showing that transaction was fair. Civ. Code, § 2235.

5. Attorney and client ⇐129(2)

A complaint which alleges facts showing that an attorney entered into a transaction with his client and obtained an advantage therefrom states a cause of action for appropriate relief as against attorney, and burden of showing that transaction was fair is one of "affirmative defense".

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Defense".

6. Trusts ⇐371(2)

Amended complaint alleging that majority stockholder when in need of additional capital to continue operations through corporation was induced by reason of trust and confidence in his attorney who refused to disclose identity of parties interested in transaction to sell assets of corporation, as the result of which attorney derived secret profits, stated a cause of action against attorney as "constructive trustee".

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Plxweve Aircraft Company and Ralph Hemphill against Allan D. Greenwood, Plxweve Manufacturing Company and P. Bruce Murchison for an accounting, to establish a trust and for declaratory relief. From a judgment of dismissal in favor of last-named defendant after his demurrer to second amended complaint had been sustained without leave to amend plaintiffs appeal.

Judgment reversed with directions.

Chas. L. Nichols and George Acret, both of Los Angeles, for appellants.

Richard C. Hart, of Los Angeles, for respondent.

DORAN, Justice.

[1, 2] This is an appeal from a judgment of dismissal in favor of one of the defendants in an action for an accounting, to establish a trust and for declaratory relief. The judgment was entered after the defendant's demurrer to plaintiffs' second amended complaint was sustained without leave to amend. The complaint is in two counts and the demurrer interposed was both general and special as to both counts. The second count merely incorporates the allegations of the first count and then states that an actual controversy has arisen between plaintiff and defendants in that plaintiffs claim that by reason of the allegations set forth in the first count the defendants are constructive trustees for plaintiff in respect to the matters alleged. If the allegations of the first count of the complaint are sustained the plaintiffs would be entitled to have defendants held constructive trustees for the benefit of plaintiffs. The second count therefore adds nothing to the complaint and may be considered superfluous. As to the allegations of the complaint contained in the first count, "the inquiry here, in the light of the grounds specified in defendant's demurrer, is confined to a consideration of whether the amended complaint stated sufficient facts with sufficient certainty to entitle plaintiff to have the demurrer overruled and to have the cause proceed to trial." Genuser v. Ocean Acc., etc., Corp., 42 Cal.App.2d 673, 675, 109 P. 2d 753, 754.

The complaint in question sets forth the following facts in substance: Appellant Hemphill is the owner of 60% of the stock of appellant Plxweve Aircraft Company and supplied all of the cash capital of that corporation, in the sum of $30,000, and in addition made substantial loans to the corporation to assist it in carrying on its operations. The corporation was engaged in developing and building a new type of aircraft. Respondent at all times mentioned in the complaint acted as the attorney for appellants. By the month of April, 1941, appellant corporation had depleted its capital through its operations and was in need of new capital. It is alleged on information and belief that respondent and defendant Greenwood, the general manager, vice president and a director of appellant corporation, were in a position to secure new capital, but instead entered into a plan or agreement between themselves to secure the capital for the benefit of a new corporation. Respondent and said defendant induced appellant Hemphill to agree to sell the assets of appellant corporation for $30,000 upon terms contained in an agreement which is set forth in full in the complaint. Appellant Hemphill executed said agreement upon the recommendation of respondent and because of Hemphill's trust and confidence in respondent as attorney; and respondent so induced appellant Hemphill for the purpose of enabling the defendants to secure for their own personal benefit certain profits and advantages. The agreement in question reads in part as follows:

"This will serve as my agreement relative to subcontracting operations of the Plxweve Aircraft Company insofar as I am personally affected, and insofar as my influence upon the Board of Directors is concerned in the ratification thereof.

"It is my understanding that you contemplate the organization of a company of approximately twenty or twenty-five thousand dollars, the purpose of which will be to engage in subcontracting work. It is also my understanding that it is the desire of the principals of this enterprise that the efforts toward the completion of the present Plxweve airplane be continued and maintained with the view in mind of obtaining an A. T. C. license.

"It is my understanding that you propose that Plxweve Aircraft Company, a corporation, transfer and assign all of its developments relative to the subcontracting woodwork, and assign all of its machinery and equipment and to pay therefor, and its present contract for rental of machinery and equipment, and that the subcontracting company also take on all of the employees now on the payroll, either in the engineering division or in the shop."

Respondent represented to appellant Hemphill that respondent would have only a nominal interest in the new corporation; and it is alleged that appellant would not otherwise have entered into the transaction. It is also alleged that respondent "intentionally refrained from making known, and expressly refused to make known," the identities of the parties interested in the transactions in question. The deal to sell

the assets of appellant corporation was ratified by the board of directors; and through thus gaining control of the assets, the defendants obtained secret profits and advantages in excess of $10,000, according to plaintiffs' information and belief.

Are the allegations set forth in substance above sufficient to found a cause of action to establish an involuntary trust where a relation of trust and confidence, as between attorney and client, existed between defendant and plaintiff?

[3] "The rule is well established that the relation of attorney and client is confidential in character, and that any contract entered into between them while that relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney." Cooley v. Miller & Lux, 156 Cal. 510, 523, 524, 105 P. 981, 986, citing Kisling v. Shaw, 33 Cal. 425, 440, 91 Am.Dec. 644.

[4] "'The relation of attorney and client is of a fiduciary character and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, "are presumed to be entered into by the latter without sufficient consideration and under undue influence." This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair.' See, also, Sanguinetti v. Rossen, 12 Cal.App. 623, 107 P. 560." Clark v. Millsap, 197 Cal. 765, 783, 242 P. 918, 925, quoting from Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265. Also see Hawkins v. Faries, 49 Cal.App.2d 186, 189, 121 P.2d 20.

[5, 6] It follows that, in general, a cause of action has been stated for appropriate relief when facts are alleged which show that an attorney has entered into a transaction with his client and has obtained an advantage therefrom. The burden of showing the transaction to be fair in such a case is one of affirmative defense. Respondent contends that the complaint shows affirmatively that the transaction in question was fair. But it is alleged in substance in the complaint that at a time when appellant Hemphill was in need of capital to carry on his operations through appellant corporation, respondent took advantage of this situation to prevail upon appellant to part with his control of the undertaking, with a consequent advantage to respondent; and that this transaction was achieved through the relation of trust and confidence which existed between appellant and respondent; and that a full disclosure of the facts was not made to appellant. It should also be stated that the verbatim recital of the terms of the agreement to transfer the assets is insufficient to show the transaction to be a fair one, in view of the allegations as to the purpose of defendants in inducing Hemphill to execute the agreement, the secret profits said to have been derived by defendants, and the failure of defendants to disclose all the facts to appellant Hemphill, together with the allegations of the existence of a relationship of trust and confidence as between appellants and respondent. On the facts as alleged appellants should be entitled to a trial of the cause. The allegations of the complaint are not such as to mislead the defendants.

The judgment is reversed, with directions to the trial court to overrule the demurrer to the second amended complaint herein, allowing defendant Murchison sufficient time to answer.

YORK, P. J., and WHITE, J., concur.



61 Cal.App.2d 17

FITZGERALD v. MILLION DOLLAR THEATRE, Inc., et al.

Civ. 14182.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1943.

1. Theaters and shows ⇐6

A theater owner owes patron reasonable care to see that she is not injured on premises, but is not "insurer" of patron's safety and can be held liable for injuries to her only if owner knows or should know of existing danger.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

2. Negligence ⇐121(2)

In personal injury suit, where plaintiff's testimony tends to prove injury, but no competent evidence is offered to prove more, judgment must be rendered for defendant.

3. Evidence ⇐123(10)

In action for injuries to theater patron accidentally kicked by another patron, where plaintiff testified that she did not know how long she remained unconscious, other patron's apology to plaintiff after she regained consciousness, was not admissible in evidence as of such spontaneous nature as to form part of transaction within "res gestae" rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

4. Theaters and shows ⇐6

In action for injuries to theater patron, accidentally kicked by another patron while sitting in last row of seats, testimony that witness had seen patrons of same theater climb over seats from one row to another on previous occasions was inadmissible, in absence of proof that any such custom prevailed at time of plaintiff's injuries or that they were caused by such acts.

5. Theaters and shows ⇐6

Evidence *held* insufficient to establish liability of theater owner and manager for injuries to patron as result of being accidentally kicked by another patron trying to climb over seat in which injured patron was viewing performance.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Hazel Fitzgerald against the Million Dollar Theatre, Inc., R. G. Pollack, and another for personal injuries caused by a blow received by plaintiff during a moving picture performance in defendant corporation's theater. Judgment for named defendants, and plaintiff appeals.

Affirmed.

Porter C. Blackburn and Marion P. Betty, both of Los Angeles, for appellant.

Chase, Barnes & Chase and Stanley N. Barnes, all of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant litigation is based upon a claim for personal injuries alleged to have been suffered by appellant from a blow she received in the back of her head and neck while viewing a motion picture performance in respondent theatre. At the trial, evidence was restricted to the establishment of liability and at the close thereof, judgment was rendered in favor of the defendants, Million Dollar Theatre, Inc., and R. G. Pollack. This appeal is prosecuted from such judgment.

From the testimony of appellant it appears that during the year 1941, she went to the respondent theatre, was conducted to a seat by an usher using a flashlight and after she was seated for "about 15 or 20 minutes * * * all of a sudden I felt some licks on my head and neck, and I felt faint and was out for some time, I don't know just how long, and when I came to a man apologized to me, he was sorry he hit me; he didn't see me. * * * After that * * * I went in the lobby and there I walked up to the rest room and got a bath towel for my head, and the maid came over and I got a nickel from her and made a telephone call and went home." She also testified that she was seated "in the middle section about the center on the last row" in the theatre and that after she recovered consciousness, an usherette "took me by the arm and took me upstairs. * * * I was crying. I didn't say anything only I wanted to make a telephone call. * * * I think there was one person in the office. I am not sure, but the maid talked to me in the rest room." In answer to the question: "When you were struck did you see the person that struck you?", appellant answered: "All I know is that something hit me and I went out, and I told you I was hysterical and was crying." She was then asked what was said to her after she came to by the man who apologized to her. To this question an objection made by respondents' counsel to the effect that it was not binding on any of the respondents and was hearsay as to them, was sustained by the court.

Respondents' objections were also sustained to the following offers of proof submitted by appellant's counsel:

(1) "Mr. Betty: I offer to prove that the man standing behind her stated he was sorry that he kicked her; he didn't see her; he was trying to get over the seat and had kicked her. And this was in the presence and hearing of an employee of the theatre, the usher."

(2) "We offer to prove by these other witnesses that during the year 1941 prior to the accident they both entered the theatre at least twice a month, one of them at certain times and the other at other times, and during those times they observed the constant habit of men and boys climbing over seats, and in the process of doing so that they put their legs over the back of seats; and on no occasion was there any interference with that process by the operators of the theatre or the employees, and at no time did the usherettes or any of the employees protest or do anything to prevent it happening, and at other times they were joggled during the performance by this conduct of the other people."

It is here contended by appellant:

(1) The law charges the defendant theatre corporation with the duty of guarding the safety of its patrons against danger arising from the conduct of other patrons or third persons if such conduct is within the express or implied knowledge of the said corporation.

(2) That it was error to bar appellant's evidence tending to show how she sustained her injury through the introduction of the declaration of a co-defendant who perpetrated the deed, where such declaration formed a part of the transaction.

(3) That it was error for the court to foreclose appellant from introducing evidence of the custom approved by the respondent theatre corporation which permitted the wrongful use by patrons of the backs of seats as a passageway to the front of the theatre.

[1] The case of Worcester v. Theatrical, etc., Corp., 28 Cal.App.2d 116, 119, 82 P.2d 68, 69, which was an action for damages for personal injuries brought by plaintiff, a patron of defendant's theatre, who was kicked by a sailor sitting behind her apparently asleep, but who was later found to be intoxicated—answers appellant's first point in the following language: "There is no doubt that the respondent owed to the appellant a reasonable degree of care to see that she was not injured on the premises. However, the respondent was not an insurer of appellant's safety and could be held liable only where it knew, or should have known, of existing danger. There is no evidence of any actual knowledge on the part of respondent of the sailor's condition prior to the accident."

[2] In the instant case, appellant's testimony tended to prove an injury, but no competent evidence was offered to prove more than that. Under such circumstances, the decision of the trial court was not only justified, it was the only possible decision. Marple v. Manspeaker, 88 Cal.App. 682, 263 P. 1022.

Appellant testified she "felt some licks on my head and neck" and then passed out. She did not know what hit her. She claimed a man apologized to her saying he was sorry that he hit her, but while he was joined as a co-defendant herein as John Doe, he was never served and was not produced as a witness.

In Williams v. Southern P. Co., 133 Cal. 550, 554, 65 P. 1100, 1102, it is stated: "Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ. A narrative, even if given during the occurrence, is inadmissible * * *", for the reason that it is not a spontaneous outgrowth of the occurrence.

See, also, Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 466, 106 P.2d 895, and Heckle v. Southern P. Co., 123 Cal. 441, 56 P. 56.

[3] Appellant testified she did not know how long she remained unconscious, consequently, it cannot be said that the apology which she received from some man, who spoke to her after she regained consciousness, was of such a spontaneous nature as to form a part of the transaction.

[4] Appellant's attempt to prove as a custom what the witness Park had seen in the theatre on previous occasions, namely, that patrons in their endeavor to reach front seats in the theatre, instead of using the aisles, climbed over the seats from one row to another, was properly rejected by the trial court, because of lack of proof that any such custom prevailed at the time appellant was viewing the performance, or that her injuries were caused by such acts. It should not be overlooked, in this connection, that appellant was seated in the last row of seats in the theatre.

[5] In the circumstances presented by the record herein, the evidence produced is insufficient to establish liability on the part of respondents for the injuries received by appellant.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



61 Cal.App.2d 55

KERR GLASS MFG. CORPORATION v. ELIZABETH ARDEN SALES CORPORATION.

Civ. 14103.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1943.

1. Contracts ⇐25

An agreement that parties will, in future, make such contract as they may then agree upon, cannot be made basis of a cause of action.

2. Contracts ⇐147(3)

The determination of whether agreement sued upon was preliminary or final turns upon intent of parties which must be determined by a construction of instrument taken as a whole.

3. Landlord and tenant ⇐22(4)

Where instrument purporting to be a lease provided that building to be constructed on demised premises by plaintiff and be rented by defendant according to final plans to be prepared and approved within the future, in absence of such final plans and approval thereof there was no cause of action for breach of the instrument.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Kerr Glass Manufacturing Corporation against Elizabeth Arden Sales Corporation for damages for breach of lease. From a judgment dismissing the action and from a minute order sustaining a demurrer to plaintiff's amended complaint, plaintiff appeals.

Appeal from minute order dismissed and judgment affirmed.

Thorpe & Bridges, of Los Angeles, for appellant.

Neil S. McCarthy, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendant executed an instrument in writing which they denominated a lease of real property. With one exception it is definite and certain as to terms, description of premises, quiet enjoyment, remedies upon default, rental, and all other usual and necessary parts of a lease.

The controversy here involved revolves around the agreement of the plaintiff to erect a building upon the demised premises to be rented in part by the defendant. Therefore, that part of the lease is as follows:

"Lessor covenants and agrees that, upon the execution of this lease, it will proceed to construct a building upon that real property in the City of Beverly Hills, County of Los Angeles, State of California, described as: (description) and thereafter prosecute the erection of same until completed.

"Said building shall be constructed generally in accordance with the preliminary leasing plans and outline specifications therefor which are attached hereto, approved in writing by both the lessor and the lessee, and by reference made a part hereof the same as if set forth in full herein, and the final plans and specifications hereinafter referred to. The final plans and specifications shall be prepared by the lessor within a reasonable period of time, and shall be approved in writing by both the lessor and the lessee before the commencement of the construction of said building, and upon said final plans and specifications being approved by the parties hereto as aforesaid, they shall become a part of this lease by reference the same as if set forth in full herein, and neither party to this lease shall unreasonably withhold its approval thereof."

The amended complaint alleges that plaintiff prepared the final plans and specifications but defendant unreasonably failed and refused to approve the same, and the building was not erected, to the damage of plaintiff. Demurrer to the complaint was sus-

tained without leave to amend, and judgment for defendant followed, from which judgment plaintiff has appealed.

Defendant maintains that the lease is merely an agreement to make an agreement, and, therefore, is not binding upon the defendant in any way, either in an action upon the agreement itself or for damages for its breach. This for the reason that the final plans and specifications for the erection of the building to be prepared by the lessor and approved by the lessee were not approved.

[1] An excellent statement of the principle relied upon by defendant is to be found in Dillingham v. Dahlgren, 52 Cal.App. 322, at page 330, 198 P. 832, at page 835: "an agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon."

Also see Howard v. Burrow, 77 Cal.App. 4, 245 P. 808; Los Angeles Soda Works v. Southern California Aquazone Co., 103 Cal.App. 105, 284 P. 253; Toms v. Hellman, 115 Cal.App. 74, 1 P.2d 31. In the last mentioned case 115 Cal.App. at page 78, 1 P.2d 31, a number of California cases in support of the proposition are collected.

[2] Therefore to solve the present case, the question to be determined is whether the agreement was preliminary or final. Did that part of the clause relative to erecting a building in which the parties agreed to prepare and approve final plans and specifications leave a material condition to be left for future agreement?

In Pacific Imp. Co. v. Jones, 164 Cal. 260, at page 263, 128 P. 404, at page 406, it is said: "The next point made by appellant is that the instrument is not a lease, but a mere executory agreement to make a lease. The question is one of intent of the parties, and this must be determined by a construction of the instrument taken as a whole. Tiffany on Real Property, vol. 1, sec. 37; Taylor's Landlord and Tenant, § 38."

[3] After careful reading and consideration of the writing here in question, it is apparent that approval of the final plans and specifications was an essential prerequisite to a binding contract between the parties. Upon its face additional terms were to be agreed upon before they were to be bound by it. This view is supported by the fact that the exhibits attached to the amended complaint show that defendant lessee was to rent and occupy a relatively small portion of the ground space of the building to be erected. And apparently plaintiff still labored under its misconception of the effect of the contract in verifying the amended complaint seeking to recover from the defendant architect's fees for preparing plans for the entire building, and other claims of the same comprehensive character.

The appeal from the minute order is dismissed; the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



61 Cal.App.2d 82

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. EGENHOFF.

Civ. 12548.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1943.

1. Waters and water courses ⇐160

The practical construction placed upon agreement granting plaintiff an easement to construct and maintain a dam on defendant's property during certain periods of the year by plaintiff would be held to fix limits of the easement under the agreement.

2. Easements ⇐42

Where grant is general as to extent of burden to be imposed on servient tenement, an exercise of the right, with acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner.

3. Waters and water courses ⇐160

Where plaintiff had easement under agreement to construct and maintain a dam

on defendant's property during certain periods of each year, and thereafter plaintiff moved location of the dam some 150 feet downstream, if defendant acquiesced in such changed location, plaintiff acquired same rights, and no others, in the new location.

4. Waters and water courses ⇐160

Where plaintiff had easement under agreement to construct and maintain a dam on defendant's property during certain periods of each year, and thereafter plaintiff moved location of the dam some 150 feet downstream, if change of location was not consented to by defendant, extent of plaintiff's easement at new location would be measured entirely by extent and character of plaintiff's adverse user for statutory period.

5. Waters and water courses ⇐144

The prescriptive rights to use of waters of a stream are stricti juris, and should not be extended beyond the actual user.

6. Waters and water courses ⇐160

Where originally a dam constructed by plaintiff on defendant's land pursuant to easement to maintain dam on defendant's property during certain periods of each year had been constructed of loose sand and gravel which could be removed by two men digging an opening in the center of dam with picks and shovels, the use of materials necessitating use of power-driven machinery and dynamite to remove dam, thereby increasing hazard of flooding, constituted an improper increase of burden of the easement, in absence of defendant's consent thereto.

7. Waters and water courses ⇐160

Evidence supported finding that installation of two pumps at dam constructed by plaintiff on defendant's land pursuant to an easement were installed at defendant's request, so that burden of the easement had not been improperly enlarged in such respect.

8. Waters and water courses ⇐160

Evidence established that placing of 24-inch pipe in bottom of dam constructed by plaintiff on defendant's land pursuant to easement did not materially increase burden of the easement.

9. Waters and water courses ⇐160

Evidence supported finding that plaintiff, which constructed a dam on defendant's property pursuant to an easement to maintain dam during certain periods of each year, was entitled to allow waters to accumulate between present location of dam and former location of the dam, subject to duty to operate two pumps.

10. Trial ⇐365(2)

A finding that plaintiff could not operate canal for distribution of water to public without great loss of water and property damage from overflow unless permitted to use dam and levees on defendant's land did not amount to a finding that public use in the dam had intervened, thereby remitting defendant to an action for damages only by way of reverse condemnation, in view of finding that smaller dam, as constructed by plaintiff in 1936 and theretofore, was reasonably sufficient.

11. Highways ⇐159(1)

The maintenance of a dam by plaintiff upon defendant's land pursuant to easement could not be enjoined as a "public nuisance" because of flooding of county road on occasions when dam was allowed to remain in place during period of flood waters in the creek, where plaintiff under its easement had no right to leave dam in during period of flood waters.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

12. Nuisance ⇐72

Where maintenance of dam by plaintiff upon defendant's land in compliance with limitations of easement would not result in special injury to defendant, even if the maintenance of the dam constituted a technical public nuisance because it was without approval of State Department of Public Works, the public authorities alone could intervene. St.1929, p. 1505, § 2, as amended by St.1933, p. 2148; Civ.Code, § 3493.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Inc., against Nora M. Kuns Egenhoff to quiet plaintiff's title to an easement to construct and maintain a dam on defendant's property during certain periods of each year, and to enjoin defendant's interference therewith, wherein the defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals.

Reversed.

Whitehurst & Logan, of Patterson, for appellant.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant from a judgment quieting plaintiff's title to an easement to construct and maintain a dam on defendant's property during certain periods of each year and enjoining defendant's interference therewith.

Plaintiff is a corporation engaged in furnishing water for irrigation in the San Joaquin Valley. It maintains for this purpose a canal which passes through defendant's lands within a two hundred foot right of way. The canal runs approximately north and south. At a point on defendant's land the San Luis Creek with a flow generally from west to east crosses defendant's canal at approximately a right angle. Like most Central California streams, San Luis Creek has a torrential flow during the rainy season and becomes dry or practically so during the rainless period from spring to autumn. There is an opening in the westerly side of plaintiff's canal at the point where it is crossed by San Luis Creek. This permits the waters of the creek when it is flowing to enter the canal, and the waters of the canal when it is flowing to back westerly up the bed of the creek.

By means of a gate in the easterly bank of the canal which is opened when the creek is flowing, the creek waters pass across the canal and into the creek bed on the easterly side. When the creek is dry and water is flowing in the canal, the dam which is the subject matter of this action is constructed across the creek between levees which extend westerly from the canal along the banks of the creek, so that the waters from the canal back up the creek bed westerly only to this dam. In the autumn at the time of the first rains which start the flow of water in San Luis Creek this dam is annually removed.

The attempt to maintain a balance between the flow of water in its natural course through the creek in fall and spring and a flow of water in the canal for irrigators who desire to use it in early spring and late fall has resulted at times in late spring rains running down the creek after the dam was constructed and early fall rains starting a flow in the creek while the dam was still in place and water still flowing in the canal, with occasional flooding of defendant's land and resultant friction between the parties. Plaintiff recognizes, however, that under its easement it is entitled to construct the dam only after the flood waters have ceased to flow through the creek in the spring and is bound to remove it in time to permit the first flood waters to flow through the creek in the fall, and on at least two occasions shown by the testimony plaintiff compensated once the defendant and another time her tenant for damage from flooding caused by the dam being in place when water in considerable quantity came down the creek.

In the spring of 1941 defendant prevented plaintiff from constructing the dam and the complaint in this action was filed. The complaint is in two counts, one alleging a prescriptive easement to construct and maintain the dam, and the second alleging an easement by agreement of the parties entered into in 1916 in compromise of an earlier suit brought by plaintiff to establish its right to maintain the dam. By answer and cross-complaint defendant admitted the existence of an easement in plaintiff to maintain a dam but limited to such times as the dam would not interfere with the natural flow of water in San Luis Creek and further limited to a light earthen dam which would readily be washed away by the flood waters of the creek; and alleged the installation and operation of pumps on the dam, the placing of a twenty-four inch pipe in the base of the dam and the backing up of water behind the dam all within the prescriptive period and to defendant's damage.

[1, 2] Before examining in detail the grounds urged by defendant for a reversal, it will simplify the discussion to notice certain rules of law in their application to certain features of the case as disclosed by the evidence. The agreement of 1916 relied on by plaintiff was very general in terms, acknowledging the plaintiff's right to maintain the levees on either side of, and a dam across, San Luis Creek for the purpose of retaining the waters flowing through its canal, as set forth on a plat attached to the agreement. The character of the dam and the manner of its construction were in no way described. The dam as constructed under the agreement in 1916 and so long as it continued to be constructed in the same location was of gravel and light material scraped up from the creek bed and, after an opening had been made in it with shovels, it was readily washed away by the flood waters of the creek. The practical

construction thus placed upon the 1916 agreement by the plaintiff itself must be held to fix the limits of the easement under the agreement. "Where the grant is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner." 9 Cal.Jur. 951; Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851, 113 Am.St.Rep., 349, 7 Ann.Cas. 851.

[3, 4] The testimony shows that about 1926 plaintiff moved the location of the dam some 150 feet downstream. The trial court made no finding as to whether or not defendant acquiesced in this changed location and we deem it immaterial on this appeal. If defendant acquiesced the plaintiff acquired the same rights, and no others, in the new location, the same rights simply being transferred to the new location. Vargas v. Maderos, 191 Cal. 1, 214 P. 849; Wallace Ranch W. Co. v. Foothill D. Co., 5 Cal.2d 103, 116, 53 P.2d 929. Any additional rights, if thereafter acquired, must be by plaintiff's adverse user for the statutory period. On the other hand, if the change of location was not consented to by defendant then the extent of the easement at the new location would be measured entirely by the extent and character of plaintiff's adverse user for the statutory period. Moore v. California Oregon Power Co., 22 Cal.2d 725, 745, 140 P.2d 798; North Fork Water Co. v. Edwards, 121 Cal. 662, 666, 54 P. 69; Anderson v. Southern Cal. Edison Co., 77 Cal.App. 328, 337, 246 P. 559. Since the judgment quieted plaintiff's title to the easement at the present location, any greater rights than those exercised at the old location must in either event depend upon adverse user over a five year period.

The evidence showed without contradiction that within the five year period of the statute of limitations the size of the dam had been greatly increased from a width across its top of from three to five feet, to a width across its top of approximately eighteen feet. The trial court found in this connection: "That it is true that in the year 1936 and prior thereto, the said dam across San Luis Creek was smaller than the dam constructed across said Creek in the year 1942; that in the year 1936 and prior thereto said dam was constructed to such height and slope as was reasonably required to hold back the water of the Outside Canal which enter said Creek, and the Court finds that such smaller dam is reasonably sufficient to block off the water of the Outside Canal entering said Creek, and that it is unnecessary for the plaintiff to build the larger dam which it built in the year 1942; but the Court further finds that the top width of said dam must be of a width reasonably necessary to permit the installation of said pumping equipment."

We shall discuss the portion of this finding referring to pumping equipment at a later portion of this opinion. What is to be noticed now is the finding, which was followed by the decree, that the plaintiff's easement was limited to a dam of such size as is reasonably required to hold back the waters of the canal, that being the extent and manner of the usage of the easement shown by the evidence to a time within the prescriptive period.

[5, 6] The evidence further showed that originally the dam had been constructed of loose sand and gravel scraped up from the bed of the creek and that in the fall when it was necessary to remove the dam to permit the first flow of the creek to pass through all that was necessary was for two men to dig an opening in the center of this dam with picks and shovels and the water when it started to flow through would wash away the dam with some assistance from the workmen in breaking down the sides. At some time not clearly fixed by the evidence the material used in the construction of the dam was changed by the addition of clayey material from the banks of the creek and the evidence showed without contradiction that this material so changed the character of the dam that it could not be removed so as to permit the autumn flow of the creek to pass through except by the use of a bulldozer and charges of dynamite. The plaintiff failed to prove that the construction of the dam of this firmer material had continued for the prescriptive period and the trial court made no finding on defendant's qualified denial and allegation that the easement was limited to the construction of "only a light and narrow earthen structure for such dam so that any portions not removed would readily wash away and permit the full natural flow of said creek to continue down the channel." The judgment likewise fails to specify the material of which the dam should be constructed. In this the trial court was in error. As reiterated in Moore v. California Oregon

Power Co., supra, 22 Cal.2d 725, 140 P.2d 798, 804, "prescriptive rights are stricti juris and should not be extended beyond the actual user." It seems obvious that the burden of the easement was extended by the change of materials necessitating the use of power driven machinery and dynamite to remove the dam, instead of shovels and picks as theretofore, with the increased delay and hazard of flooding attendant thereon. The hazard of flooding is further increased by the use of materials which the waters of the creek could not themselves wash away once an opening had been made, as was the case with the lighter material theretofore used. The plaintiff could not thus without the consent of defendant materially increase the burden of the easement which it had theretofore acquired and enjoyed. 9 Cal. Jur. 952, and cases cited in notes 6 and 7.

The trial court further found and decreed that all that was reasonably necessary to permit the flow of the creek through the dam was to make an opening therein measuring at least forty feet through the base thereof. The evidence as we have heretofore pointed out failed to show the construction of a dam of materials which would not readily be washed away by the waters of the creek over the prescriptive period necessary to give the plaintiff a right to construct it otherwise. If the dam is constructed of such lighter material the evidence shows without contradiction that the waters of the creek will themselves wash the materials of the dam away substantially to the width of their natural flow. No right, prescriptive or otherwise, was shown in plaintiff to maintain any portion of the dam through the period of normal flow of the creek which if constructed of material from the creek bed would be naturally washed away by the flow of its waters.

[7] The trial court found "that on numerous occasions said defendant * * * complained to plaintiff that water, during the late spring and summer, after said dam had been installed, was accumulating above said dam from seepage and demanded of plaintiff that said accumulated water be removed; that in order to comply with said demands of defendant, plaintiff has since the year 1936 installed two pumps, operated two gasoline motors, on the upper side of said dam and by means thereof has pumped the water which has accumulated from seepage above said dam over said dam to the lower side thereof."

It is claimed that this finding insofar as it finds that the pumps were installed at defendant's request is not supported by the evidence. The witness Mott however testied that due to wetter years and increased irrigation on lands draining into the creek above the dam the creek since 1935 had run some water through the summer, that he thought they first put the pumps in in 1935 and that "this new irrigation and wetter years caused water to accumulate in the creek channel above the dam, about which condition Mrs. Egenhoff complained, and we (the canal company) put pumps in there to keep the water down and put it over the levee." This sufficiently supports the finding in the respect complained of, and justifies the conclusion of the trial court that the burden of the easement had been enlarged in this respect with defendant's consent. 16 Cal.Jur. 286-288.

[8] Defendant also complains of the trial court's finding that the placing of the twenty-four inch pipe in the bottom of the dam did not materially increase the burden of the easement. The purpose of the pipe is to drain off the late spring flow after the dam is put in and before water starts flowing in the canal. It is equipped with a valve which can be closed before the canal water backs up to the dam. The evidence shows that on one occasion the valve was not closed before the canal water was turned in and some of this water flowed through the pipe to the upstream side of the dam causing flooding of defendant's land. We are satisfied that, despite this incident which was due to the carelessness of plaintiff's employees, the trial court's conclusion is correct. Properly operated the installation and use of the pipe through the dam will not increase the burden of the easement.

[9] Defendant also attacks a finding that plaintiff is entitled to allow waters to accumulate between the point of location of the present dam and the old dam, subject to the duty to operate the two pumps. The finding is supported by evidence of the present size of the pond above the dam and the testimony of Alwin Fittje "that there is no more pond above the dam than there has been the past ten years."

[10] Plaintiff points to a finding: "That the operation and maintenance of

said dam and said levees are necessary in the operation of said Outside Canal, and without the use of said dam and levees, and each of them, said plaintiff would not be able to operate said canal, as aforesaid, and would be unable to distribute water to the public without great loss of water and property damage from overflow, and both the public and plaintiff will suffer great and irreparable damage if plaintiff is not able to operate and maintain said dam and levees and each of them." From this plaintiff argues that this amounts to a finding that a public use in the dam as described in the judgment has intervened and the defendant is thereby remitted to an action for damages only, by way of reverse condemnation. Peabody v. City of Vallejo, 2 Cal.2d 351, 378, 40 P.2d 486; Miller & Lux v. Enterprise C., etc., Co., 169 Cal. 415, 424, 147 P. 569.

This finding, however, must be read in connection with the other finding hereinabove quoted, that the smaller dam as constructed in 1936 and theretofore "is reasonably sufficient." Reading the two findings together it is plain that the court did not find that a dam constructed of the lighter material formerly used would not be entirely adequate for all purposes. The court simply failed, as above noticed, to make any finding on that material issue.

[11] Finally, defendant argues that the dam constitutes a public nuisance especially injurious to defendant and for that reason should be enjoined. This is based on two factors: 1. The flooding of the county road on the occasions when the dam was allowed to remain in place during a period of flood waters in the creek, and 2. That the maintenance of the dam without the approval of the state department of public works is a violation of Stats. 1929, chap. 766, p. 1505, providing for the supervision of dams by the department of public works.

The flooding of the highways can only occur from the maintenance of the dam if plaintiff leaves the dam in during a period of flood water in the creek. Under its easement it has no right to do this, and the maintenance of the dam in strict accordance with its rights, which includes the obligation to remove it in periods of flood, can under no possibility result in a flooding of any public highway.

[12] The statute relied upon defines the word "dam" to mean (sec. 2, Stats. 1929, p. 1505, as amended by Stats. 1933, p. 2148) "any artificial barrier * * * across a stream channel, watercourse or natural drainage area, which does or may impound or divert water, which is or will be either twenty-five feet or more in height from natural streambed to crest of spillway, or which has or will have an impounding capacity of fifty acre feet or more," etc.

It is argued that the dam here under consideration will, if allowed to remain in place during flood periods, impound more than fifty acre feet of water in the creek and since it "may" do so it comes within the terms of the act. The court found that "said dam is not used for the purpose of impounding the waters of San Luis Creek, but for the purpose of preventing the water from the Outside Canal from backing up said Creek; that any water impounded above the dam is either water that has seeped through said dam from the Outside Canal or is water that has collected above the dam from seepage water entering said Creek, and said quantity in either case is small and is removed by operation of said pumps."

It is clear that the maintenance of the dam in accordance with the strict terms of the easement, only during the dry period from spring to fall, neither "does or may impound or divert water" amounting to fifty acre feet, and if a violation of the statute (a point which we find it unnecessary to decide), is at most a technical and not a substantial violation thereof. In any event, the exercise of the easement strictly according to its terms will result in no injury to defendant not within the contemplation of the parties in the creation of the easement and in no injury to defendant of the character sought to be prevented by the statute. If a technical public nuisance the public authorities alone may intervene since the maintenance of the dam in compliance with the limitations of the easement will not result in special injury to defendant. Sec. 3493, Civ.Code; Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A. L.R. 468.

It seems proper to add that if the parties on a second trial produce evidence to support a more specific finding as to the actual dimensions of the dam as theretofore constructed and as necessary to reasonably accomplish the purpose of the easement, it would be better practice, and a discouragement to future friction and possible litigation, to set out definitely in the findings and

decree the permissible dimensions of the dam which plaintiff is entitled annually to construct and maintain.

For the errors herein discussed the judgment is reversed.

NOURSE, P. J., and SPENCE, J., concur.



61 Cal.App.2d 92

LIGGETT v. PHILLIBER et al.

Civ. 6795.

District Court of Appeal, Third District, California.

Oct. 22, 1943.

1. Drunkards ⇐2(1)

An affidavit in inebriacy proceeding need only contain some facts which indicate that alleged inebriate has lost the power of self-control or is subject to inebriety. St. 1937, p. 1142, § 5400.

2. Drunkards ⇐2(1)

An affidavit, stating that woman was so badly addicted to use of alcoholic stimulants as to have lost her self-control, that she used vulgar language, was quarrelsome, threatened to kill her brother, had no control over herself in use of liquor, and was dangerous, was sufficient to confer upon court jurisdiction of proceeding for woman's commitment to state hospital, and to support subsequent hearing and commitment. St.1937, p. 1142, § 5400.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by Mabel P. Liggett against Charles L. Philliber and others, to recover damages for alleged false imprisonment, wherein defendants filed a demurrer. From a judgment for defendants, after sustaining the demurrer without leave to amend, plaintiff appeals.

Affirmed.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

Huston, Huston & Huston and Robert H. Schwab, Jr., all of Woodland, for respondents.

SCHOTTKY, Justice pro tem.

Appellant commenced an action against respondents to recover damages for alleged false imprisonment, her complaint alleging in part that:

"* * * for many years last past plaintiff has been a widow residing with her minor son of the age of fifteen years in her home in the Town of Davis, * * *.

"* * * the defendants acting together and in concert, each conspiring with the other against the plaintiff with the intent and for the purpose of causing the arrest, imprisonment and commitment to the Mendocino State Hospital of the plaintiff caused to be made and sworn to an affidavit, * * * Exhibit 'A' * * * made a part hereof.

"* * * the defendants in the manner, with the intent and for the purpose heretofore stated caused the said affidavit to be filed in the Superior Court * * * County of Yolo and when said affidavit was so filed did cause to be procured an order and judgment of said court for the arrest of plaintiff and her imprisonment in and commitment to said * * * Hospital, and upon said affidavit did cause the arrest, imprisonment and confinement of plaintiff in said hospital and did deprive her of her liberty for a period of twenty-three days, all * * * without any right, authority, legal process or commitment and against the will of plaintiff.

"* * * by reason of the aforesaid arrest, imprisonment and confinement plaintiff suffered great physical distress, * * * to the plaintiff's general damage in the sum of $25,000.00.

"* * * by reason of said * * * arrest, * * * plaintiff was compelled to engage * * * counsel for the purpose of procuring her release * * * from said * * * imprisonment * * * and was compelled to apply to the Superior Court * * * County of Mendocino for a Writ of Habeas Corpus which said writ was granted * * * by virtue of said writ plaintiff was discharged * * * from said imprisonment * * * plaintiff was compelled to expend * * * in counsel fees and other expenses caused by said * * * arrest, * * * and procuring her discharge therefrom the sum of $244.75."

The trial court made an order sustaining respondents' demurrer to the complaint without leave to amend, and this appeal is from the judgment entered in favor of respondents on such order.

In support of her contention that the court erred in sustaining respondents' demurrer to her complaint, appellant makes two points: First, that the affidavit upon which the inebriacy proceedings were based was insufficient, and that, therefore, the court acquired no jurisdiction; and, second, that the court having acquired no jurisdiction, all of the subsequent proceedings were illegal and void, and respondents who initiated them by filing the affidavit are liable for damage for false imprisonment.

It is apparent, therefore, that the entire argument of appellant is predicated upon the contention that the affidavit was insufficient. If the affidavit was sufficient there can be no doubt that appellant's complaint failed to state a cause of action and that the trial court was correct in sustaining respondents' demurrer without leave to amend. We will, therefore, first consider the question of the sufficiency of the said affidavit, which reads as follows:

"* * * that there is now in said county in the City of Davis, a person named Mabel P. Liggett who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control.

"The said Mabel P. Liggett is so badly addicted to the use of alcoholic stimulants as to have lost her self control; she uses vile and vulgar language, is quarrelsome and has threatened to kill her brother, Charles L. Philliber and his wife, and has no control over herself in the use of alcoholic liquor; she is dangerous and a menace to herself and the members of her family;

"That said person is not of bad repute or bad character apart from her said habit of the intemperate use of stimulants. That there is reasonable ground for believing, and affiant believes, that the said person, if committed to a State Hospital, will be permanently benefitted by treatment therein. And that by reason thereof said person is a fit subject for commitment to the State Hospital for the care and treatment of the insane, and ought to be confined therein as an inebriate under the provisions of section 2185c of the Political Code of the State of California."

Section 5400 of the Welfare and Institutions Code, St.1937, p. 1142, provides that "whenever it appears by affidavit to the satisfaction of a magistrate of a county that any person is so far addicted to the intemperate use of stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety," he shall issue a warrant of apprehension and such person shall be brought before the Superior Court and a hearing shall be held.

[1] It should be borne in mind that a proceeding under the inebriacy act is not in any sense a criminal proceeding but is for the benefit of the alleged inebriate and the public at large, and it would in our opinion be contrary to the intent of the legislature and would make it difficult for inebriates to receive the help contemplated by the statute if courts were to hold that an affidavit to invoke jurisdiction must conform to all the niceties of pleading of the trained pleader. All that should reasonably be required is that the affidavit should contain some facts which indicate that the alleged inebriate has lost the power of self-control or is subject to inebriety.

Appellant has cited the following cases which she contends show that the affidavit here involved was insufficient: Henley v. Superior Court, 162 Cal. 239, 121 P. 921; In re Watson, 63 Cal.App. 424, 218 P. 600; In re Liggett, 187 Cal. 428, 202 P. 660; In re Crowley, 95 Cal.App. 219, 272 P. 787.

In Henley v. Superior Court, supra, the affidavit merely set forth that Henley "is so far addicted to the intemperate use of stimulants as to have lost the power of self-control." In issuing a writ prohibiting the Superior Court from proceeding with a hearing based on this affidavit, the court held that the naked opinion of the affiant that a person has lost the power of self-control is not sufficient but that the affidavit must state some facts to support the conclusion.

In Re Watson, supra, the affidavit alleged that "on June 4, 1923, James Warren Watson had been for a period of several weeks last past, and then and there is a person who from the inordinate use of alcoholic liquor and the influence thereof is irresponsible in his acts and insane therefrom." In granting a writ of habeas corpus, this court, following Henley v. Superior Court, held that no specific acts were alleged to support the conclusion of the maker of the affidavit that petitioner had lost the power of self-control through inordinate drinking.

In Re Liggett, supra [187 Cal. 428, 202 P. 661], the court, in denying the petition for a writ of habeas corpus, said: "The petitioner claims that the affidavit was insufficient to give the court jurisdiction to proceed because it does not state the facts necessary to bring the case within the provisions of the aforesaid section. In this behalf he refers to the case of Henley v. Superior Court, 162 Cal. [239], 240, 121 P. 921. That case holds that an affidavit which merely states that the person named 'is so far addicted to the intemperate use of stimulants as to have lost the power of self-control,' and states no other facts tending to show the truth of such allegation, is insufficient to give the court jurisdiction to proceed. That was a proceeding in prohibition, and the writ was issued in accordance with this conclusion. In the present case the affidavit not only contains the allegation above quoted, but proceeds to allege that Liggett has been addicted to the excessive use of intoxicating liquors for more than five years last past and has been continuously intoxicated for six months preceding the making of the affidavit. Whether the additional facts tend to show the truth of the first allegation or not, it cannot be denied that they do show that the patient to be examined is 'subject to dipsomania or inebriety,' and this is sufficient to bring him within the purview of the statute and give the court jurisdiction to proceed."

In Re Crowley, supra [95 Cal.App. 219, 272 P. 788], the affidavit alleged that Eva Crowley was "so far addicted to the intemperate use of stimulants as to have lost the power of self-control. * * * Has lost all self-control and will power from the excessive use of stimulants—quarrelsome and threatening." In granting a writ of habeas corpus this court cited Henley v. Superior Court and In re Watson as authority for the rule that facts and not conclusions must appear in the affidavit filed at the institution of the matter, and held that the affidavit was insufficient.

Respondents argue that none of cases cited by appellant hold that an affidavit worded as is the one here in question was insufficient, and respondents cite the case of In re Conmy, 20 Cal.App.2d 666, 67 P.2d 754, in which case this court, in denying a writ of habeas corpus, said, 20 Cal.App.2d at pages 668, 669, 67 P.2d at page 756: "In the proceedings now under consideration, an examination of the affidavit filed by the wife of the petitioner shows not only the opinion of the affiant that John C. Conmy (otherwise known as John C. Conway), had lost the power of self-control by reason of the excessive use of intoxicating stimulants, but sets forth in addition thereto his acts in striking, or what we might say, physically assaulting one Mrs. Fred Lhumann, and also the physical assault of the petitioner upon the affiant, in that he did strike and beat her and threaten to kill her (the affiant). These are specific acts which tended to show, and from which a reasonable inference might be drawn or conclusion reached, that the power of self-control had been lost."

[2] Bearing in mind the rules laid down in the cited cases, and also bearing in mind that each affidavit must stand upon its phraseology, we are convinced that the affidavit in the instant case was sufficient both to confer jurisdiction upon the court and to support the subsequent hearing and commitment. The said affidavit did in our opinion set forth sufficient "specific acts and doings" to justify and support the conclusion that appellant had lost her self-control, and it is difficult for us to understand how anyone can read the affidavit and reach any other conclusion. The statement that "Mabel P. Liggett is so badly addicted to the use of alcoholic stimulants as to have lost her self-control," standing by itself, is a mere conclusion and under the authorities would be insufficient. But this language is immediately followed by "she uses vile and vulgar language, is quarrelsome and has threatened to kill her brother, Charles L. Philliber and his wife, and has no control over herself in the use of alcoholic liquor; she is dangerous and a menace to herself and the members of her family." This language is certainly susceptible of the construction that appellant was indulging in alcoholic liquors to the extent that she could no longer control herself in its use and as a result she used vile and vulgar language and was quarrelsome and threatened to kill her brother and his wife. These are not the acts of a normal person, and we must hold that an affidavit containing such allegations substantially complied with the provisions of the Welfare and Institutions Code and was sufficient to initiate the inebriacy proceedings and justify a hearing in the Superior Court. To hold otherwise would in our opinion be establishing a standard for such affidavits that would interfere with the

benefits that the Inebriacy Act was intended to confer because it would mean that no layman could venture to invoke the benefit of this act to assist any chronic alcoholic who had lost his power of self-control.

We conclude, therefore, that the affidavit was sufficient both to confer jurisdiction upon the court and to support the subsequent proceedings, and that the trial court did not err in sustaining appellant's demurrer to the complaint without leave to amend. This conclusion makes it unnecessary to discuss the other points argued in the brief.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



ZINN et al. v. EX-CELL-O CORPORATION et al.

Civ. 12302.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1943.

Rehearing Denied Nov. 13, 1943.

Hearing Granted Dec. 6, 1943.

1. Principal and agent ⇐38

Performance within the time specified in agency contract having once been waived, agent was entitled to notice and a reasonable time thereafter within which to comply with terms of contract before a forfeiture thereof could be declared.

2. Corporations ⇐617(2, 5)

Dissolution of corporation prevented effectual rescission of sale of the capital stock therein and left an action which originally was in the alternative for rescission or damages based on alleged fraudulent procurement of sale as an action for damages for fraud only.

3. Election of remedies ⇐3(1)

There was no inconsistency in action for rescission of sale of capital stock allegedly procured by fraud or in the alternative for damages for such fraud.

4. Action ⇐36

Reduction of action for rescission of sale of capital stock allegedly procured by fraud or in the alternative for damages to a simple action for damages eliminated the question of laches so that action could be maintained at any time within the period of the statute of limitations.

5. Contracts ⇐94(1)

A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on, afford as complete a ground for rescission as numerous false representations.

6. Principal and agent ⇐81(5)

Distributing agent having brought about execution of contract for the purchase of a machine from principal subject to trial with option to purchase additional machines on specified terms was entitled to commissions on whatever sales were made pursuant to such contract, though meantime agency contract was forfeited for agent's breach thereof.

7. Brokers ⇐52

A broker having obtained an option is entitled to a commission when customer exercises option within the life thereof by entering into the transaction which broker was employed to negotiate.

8. Principal and agent ⇐81(5)

An agent selling goods on commission is entitled to a commission on goods sold by him during continuance of the agency, though goods were not delivered or paid for or even though orders were not received by principal until after termination of agency relationship.

9. Principal and agent ⇐81(5)

Where agency contract contemplates that agent shall receive compensation for sales of which agent was the procuring cause, agent is entitled to commission on sales procured by him though sales were actually consummated by principal after termination of the agency.

10. Principal and agent ⇐81(5)

Where services to be performed by agent are severable, agent may, in absence of a contrary provision in agency contract, recover for services performed before the termination of the relationship.

11. Contracts ⇐274

A party rightfully exercising right under terms of contract to cancel it after it has been partially performed by the other party is required to place the other party in statu quo and may not cancel contract so as to affect injuriously any rights that have already accrued to the other party in its partial execution.

12. Fraud ⇐58(1)

Finding that termination of agency contract rendered valueless agency corporation capital stock, the sale of which allegedly was procured by fraud, was not sustained by evidence disclosing that as the result of trial-option contract brought about by corporation before termination of agency, sales were consummated entitling corporation to commissions which after deducting all outstanding indebtedness would have rendered its stock worth approximately $2.50 per share.

13. Fraud ⇐58(4)

Evidence that stockholders relied on false representations that agency corporation had placed no machines for its principal, inducing belief that when agency contract was cancelled stock in agency corporation would be valueless, did not sustain finding that sale of stock was not induced by fraud, such finding being predicated on erroneous premise that, agency contract being rightfully cancelled, agency corporation would not be entitled to commission on sales resulting from its efforts.

14. Fraud ⇐50

Where fraudulent representations are calculated to induce the action of party to whom they are made, it is presumed that his action was induced thereby, and to defeat his right of relief on the ground of fraud, evidence must be introduced to show affirmatively that he did not rely on the false representations.

15. Fraud ⇐58(4)

Evidence that stockholders of agency corporation learned shortly after cancellation of agency that a machine for which corporation had had the exclusive agency was on trial in its territory and took no action to rescind sale of stock to agency corporation's principal did not sustain finding that sale was not induced by fraud, where stockholders relied on principal's false representation that machine was placed on trial pursuant to arrangement effected by principal after cancellation of agency.

16. Corporations ⇐174, 307

There is no such privity between officers or stockholders of a corporation as to impute the knowledge of one to another in his individual capacity.

17. Fraud ⇐59(3)

The measure of damages for fraudulent procurement of sale of capital stock was the difference in actual value between what stockholders received and what the shares were in fact worth, the "actual value" of the stock being its actual intrinsic value determined by actual worth of corporate assets and not the "market value" of the stock. Civ.Code, § 3343.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Value" and "Market Value".

18. Fraud ⇐57

In determining measure of damages for fraudulent procurement of sale of capital stock, future profits may be shown for the light they throw on the actual value of the stock at the time of its fraudulent purchase. Civ.Code, § 3343.

19. Fraud ⇐18

To be "material", a representation must be of such character that if it had not been made, the contract or transaction would not have been entered into.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Representation".

20. Fraud ⇐66

A finding that sale of capital stock would not have been made but for the fraudulent representations of buyer's representative will establish the materiality of such representations.

21. Appeal and error ⇐1212(3)

Where trial court's finding that fraudulent representations were made by buyer and believed by sellers was supported by the evidence and case was reversed and remanded for lack of evidence to support finding that sale was not induced by such representations, it was necessary to retry only the issues of inducement and damages.

NOURSE, P. J., dissenting.

Appeal from Superior Court, San Francisco County; Robert McWilliams, Judge.

Action by J. A. Zinn and others against Ex-Cell-O Corporation and others to rescind a sale by plaintiffs to named defendant of shares of the capital stock of Sealed-Pure Systems, Inc., or to recover damages for alleged fraudulent procurement of such sale. From an adverse judgment, plaintiffs appeal.

Judgment affirmed in part and in part reversed with directions.

Livingston & Livingston, of San Francisco, for appellants.

Webb, Webb & Olds, U. S. Webb, and Walter K. Olds, all of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiffs have appealed from an adverse judgment in an action for rescission or damages based on the alleged fraudulent procurement of a sale by them to defendant Ex-Cell-O Corporation of shares of the capital stock of Sealed-Pure Systems, Inc., a corporation.

Defendant Ex-Cell-O Corporation (hereinafter called Ex-Cell-O) is a manufacturer of machines designed for the manufacture of cardboard milk containers. Plaintiff Zinn and the other plaintiffs were stockholders in a Washington corporation known as Gold Star Creameries which in 1937 had constructed a building in Everett, Washington, for the purpose of bottling milk in cardboard containers. Zinn conceived the idea of not only installing one of Ex-Cell-O's machines in the factory of Gold Star Creameries, but also of obtaining an exclusive agency from Ex-Cell-O for marketing their machines on the Pacific Coast. In this latter project he interested plaintiff Kemp, who advanced enough money to finance a trip by Zinn to San Francisco and to Ex-Cell-O's head offices in Detroit, Michigan. In San Francisco Zinn interviewed officers of Fibreboard Products Co., who are large manufacturers of cardboard on the Pacific Coast. They became interested to the extent of expressing a desire to get an exclusive contract for the manufacture of the cardboard blanks which are used to make the milk containers, but refused to commit themselves as to whether, in the event Zinn secured an agency from Ex-Cell-O, Fibreboard Products Co. would purchase stock in a corporation proposed to be formed to handle such agency. Zinn proceeded to Detroit and as a result of his negotiations there, which were later continued in Seattle, on October 30, 1937, Ex-Cell-O entered into a contract with plaintiffs Zinn and Kemp and defendant Malkson, making them its exclusive distributing agents for the Pacific Coast states and Hawaii. We only notice respondents' claim that in the negotiation of this agreement Zinn made certain false representations to Ex-Cell-O to point out (1) That there was no such issue made by the pleadings; (2) No finding was made on this subject; and (3) It is entirely immaterial since Ex-Cell-O continued with the contract long after any such representations must have been known by it to be false, if any were in fact made. These individuals then incorporated Sealed-Pure Systems, Inc. (hereinafter called Sealed-Pure), with a capital stock of 10,000 shares of no par value, and with the consent of Ex-Cell-O, assigned to it their rights under their agency contract. About the same time Ex-Cell-O entered into a contract with Fibreboard Products Co. giving it the exclusive right to manufacture the cardboard blanks to be used in its machines in the same territory. The agency contract provided that Sealed-Pure should place three machines within 90 days and within 6 months one machine in Seattle, one in either Oakland or San Francisco and one in Los Angeles.

One machine was immediately placed with Gold Star Creameries at Everett, Washington, in the vicinity of Seattle, which apparently is conceded to have been a substantial compliance with the requirement that a machine be placed in Seattle, but no others were placed within 90 days. Gold Star Creameries got into financial difficulties and, apparently with the acquiescence of Ex-Cell-O, Sealed-Pure lent considerable sums to Gold Star Creameries in the belief frequently expressed in correspondence introduced in evidence that it would be fatal to the prospect of placing other milk packaging machines in the Pacific Coast territory if the first one installed in this territory should prove a failure. As a result of these loans Sealed-Pure also encountered financial troubles and disputes arose between Zinn and Kemp on the one hand and Malkson on the other, with the result that in February, 1938, the sales manager of Ex-Cell-O went to Seattle and arranged that Sealed-Pure should open an office in San Francisco with Malk-

son as general manager and Zinn should devote his attention exclusively to the business of Gold Star Creameries.

Gold Star Creameries continued to operate at a loss and was unable to make any payments to Sealed-Pure on its indebtedness, with the result that Malkson was short of funds and arranged for advances from Ex-Cell-O on the security of Gold Star Creameries' notes.

During all of this time Ex-Cell-O had taken no step to cancel the agency agreement, and in January expressly agreed to an extension of the 90 day clause "providing aggressive sales effort is made."

Zinn, and later Malkson, had devoted a great deal of time in an attempt to place machines with Lucerne Cream and Butter Company (hereinafter called Lucerne), a subsidiary of Safeway Stores, Inc. (hereinafter called Safeway), an operator of chain-store groceries in the Pacific Coast territory. By July, 1938, these negotiations reached such a promising point that Ex-Cell-O was asked to send a representative to San Francisco with full power to negotiate a contract. Defendant Bixby, representing Ex-Cell-O, came to San Francisco from Detroit in answer to this request and Bixby and Malkson succeeded on July 25, 1938, in securing a contract with Lucerne for the placing in Oakland of one machine on ninety days' trial with option to purchase it for $32,500 and the option to purchase additional machines at $37,500 each. This contract is set out in the findings hereinafter quoted.

While in San Francisco Bixby told Malkson that Ex-Cell-O planned to cancel the Sealed-Pure agency. Malkson said that he was sorry but asked Bixby to engage him as Pacific Coast agent if this was done. Bixby proceeded to Seattle and three days after the Lucerne contract was signed, on July 28, 1938, met plaintiffs Zinn, Kemp and Nelson. He told them that Sealed-Pure had failed to place any machines as required by its contract and that Ex-Cell-O was going to cancel the agency, and that on cancellation their stock would be valueless. They first demurred to the proposed cancellation and Zinn made some unsuccessful attempts to raise additional funds. They then negotiated with Bixby for the sale of their stock to Ex-Cell-O and Bixby told them that he would try to get $1 per share for their stock but they would have to take the Gold Star Creameries' notes held by Ex-Cell-O in part payment. Zinn then said to Bixby in the presence of the others: "How do I know that you haven't already got an order in your pocket or have made some deal that we don't know anything about?" Bixby replied: "If I had an order in my pocket or had made any deal I would tell you about it."

The agency contract was subsequently cancelled, the stock sold to Ex-Cell-O on the basis suggested, Sealed-Pure was dissolved and Ex-Cell-O appointed Malkson as its Pacific Coast agent.

Within a short time after July 28, 1938, Lucerne bought six machines pursuant to its contract of July 25, 1938, and on August 13, 1938, one machine was bought by Jerseymaid Milk Products Co. of Los Angeles. So within half a month of July 28, 1938, three machines had been placed, one in Seattle, one in Oakland and one in Los Angeles, thus satisfying both provisions of the contract for the placing of machines above noticed, although not within the times specified. This is important in view of the trial court's finding, which is not questioned on this appeal: "that Sealed-Pure Systems Inc. was entitled to notice from Ex-Cell-O Corporation that Ex-Cell-O Corporation intended to terminate and cancel said contract and to a reasonable time thereafter within which to comply with its terms and conditions before a forfeiture thereof could be declared."

[1] Performance within the time specified in the contract having once been waived, the finding that Sealed-Pure was entitled to notice and a reasonable time thereafter to perform follows settled law. 6 Cal.Jur. 357-8 and cases cited in notes 17 and 18; 17 C.J.S. Contracts, § 506, p. 1081 and cases cited in note 73.

[2-4] Two other matters may be preliminarily disposed of: (1) The Court found that defendant Malkson was not a party to the fraud. This finding is not attacked on appeal and the judgment in favor of this defendant must be affirmed. (2) The action was in the alternative, for rescission or damages. The sale of plaintiffs' stock cannot be effectually rescinded since Sealed-Pure has since been dissolved. This leaves the case as a simple action for damages for fraud. "There is nothing inconsistent in his asking for rescission first and damages if he cannot have it." Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445, 447. Being reduced to an action for dam-

ages the question of laches is out of the case, and the action may be maintained at any time within the period of the statute of limitations. Stevens v. Sacramento Suburban Fruit Lands Co., 109 Cal.App. 120, 121, 292 P. 699.

This brings us to the main points on appeal, that certain of the findings are not supported by the evidence. The findings are rather elaborate and for a clear understanding of the questions involved must be quoted at some length, as follows:

"III. The court finds that it is true that on or about July 28th, 1938, at Seattle, Washington, defendant Ex-Cell-O Corporation by defendant Bixby, as its officer and agent as aforesaid, offered on behalf of said Ex-Cell-O Corporation and subject to its approval, to purchase from plaintiffs the stock in said Sealed-Pure System Inc., which was owned by them respectively in the amounts hereinafter set forth and to pay them therefor the amount paid by them respectively for said stock, to-wit: one dollar per share. * * * It is true that for the purpose of inducing plaintiffs to accept said offer said Bixby at said time and place also informed plaintiffs that said Sealed-Pure Systems, Inc. was in an unsound financial condition and that he also represented to them that none of said machines referred to in paragraph two of said complaint and which were being manufactured by said Ex-Cell-O Corporation as therein alleged, had been placed by Sealed-Pure Systems, Inc. in California as required by said contract of October 30th, 1937; also that although there were prospects pending in California with certain firms for the leasing of certain of said machines that none of said firms had executed or was then ready or willing to execute a contract for the purchase or leasing of any of said machines; that said Bixby also represented to said plaintiffs at said time and place that said Sealed-Pure Systems, Inc. needed thirty thousand dollars in cash in order to effect the purposes contemplated by and provided for in its said contract with Ex-Cell-O Corporation, and that said sum was not available in whole or in any substantial part, and that all methods that had been resorted to by Sealed-Pure Systems, Inc. to raise additional capital for said Sealed-Pure Systems, Inc. had failed; said Bixby at said time and place and for the same purpose represented to plaintiffs that, as the representative of said Ex-Cell-O Corporation, he planned on recommending to said company the cancellation of said contract between said Sealed-Pure Systems' Inc. and said Ex-Cell-O Corporation by reason of the fact that said Sealed-Pure Systems, Inc. had failed to carry out the terms of its said contract in certain respects and particularly in that said Sealed-Pure Systems, Inc. had failed to place the number of machines called for under the terms of said contract and that as a result said Sealed-Pure Systems, Inc. was in default under said contract; said Bixby also then and there represented to plaintiffs that in the event the said contract was so cancelled plaintiffs' stock in said Sealed-Pure Systems, Inc. would have no value whatsoever.

"IV. That it was not true that none of said machines so manufactured by Ex-Cell-O Corporation had been placed by Sealed-Pure Systems, Inc. as represented by Bixby, but on the contrary the court finds on or about July 25th, 1938 said Sealed-Pure Systems, Inc. through the instrumentality of its California manager, defendant Malkson, had brought about the execution of a contract between Ex-Cell-O Corporation and the Lucerne Cream and Butter Co. and/or Safeway Stores, Inc. for the placing of one of said machines in Oakland, California, which contract provided in part as follows:

" 'It is expressly understood that we (Safeway Stores, Inc., and/or Lucerne Cream and Butter Company) are to have free use of this machinery for a period of ninety days after installation. If for any reason we decide not to keep this machine we will properly crate same and return it to your plant at Detroit. We are to pay the cost of shipping both ways. If we do not notify you that we are to return the machine within ninety days after installation we are to promptly make payment of $32,500. This price is f. o. b. your plant at Detroit, Michigan'.

"At the same time, and as a part of the same transaction, Safeway Stores, Inc., and Ex-Cell-O Corporation executed an agreement, reading as follows:

" 'July 25, 1938

" 'Ex-Cell-O Corporation,

" '1200 Oakland Boulevard,

" 'Detroit, Michigan.

" 'Gentlemen:

" 'We are enclosing our purchase order No. 4972 covering one complete paper milk bottling machine at a cost of $32,500.00.

"'Any future machines ordered before December 31, 1939, we agree to pay you $37,500.00 for each machine upon the same conditions as outlined in the attached purchase order.

"'Very truly yours,

"'ADK:SD Safeway Stores, Inc.,
"'A. D. Kirkland

"'Accepted: Ex-Cell-O Corporation
"'By H. G. Bixby,
"'Secretary, 7/25/38'

"The court further finds that the facts with reference to the execution of said contract pertaining to said machine were intentionally withheld by defendant Bixby from plaintiffs because he intended to recommend to Ex-Cell-O Corporation that the said contract between Ex-Cell-O Corporation and Sealed-Pure Systems, Inc. be cancelled and because the said Bixby did not believe that it was possible for the said Sealed-Pure Systems, Inc., while it was controlled by plaintiffs, ever to make a success within any reasonable time of the business of marketing said machines in the territory assigned to it, and because the said Bixby believed that if it were possible for Ex-Cell-O Corporation to acquire the said stock of plaintiffs the possibility of trouble and litigation with Sealed-Pure Systems, Inc. and with plaintiffs would be prevented.

"VI. 'The court also finds that Sealed-Pure Systems, Inc. did not, up to the time that said representations were made by the said Bixby as aforesaid, place the number of machines called for and required in said contract or place more than two machines in all, including one placed with said Lucerne Cream and Butter Co., and/or Safeway Stores, Inc., up to the date when the said representations were so made. But the court also finds that said Ex-Cell-O Corporation did not take any steps to rescind, cancel or terminate said contract at the different times when the said Sealed-Pure Systems, Inc. fell in default under said contract by reason of its failure to place said machines.

"VII. '* * * It is true that at the time the said representations were made by the said Bixby as aforesaid, Sealed-Pure Systems, Inc. had certain prospects for the possible placing of certain of said machines which if contracts therefor were entered into by said prospects within a reasonable time and under certain conditions, would give the stock of Sealed-Pure Systems, Inc. a value of one hundred thousand dollars or more as alleged by plaintiffs. It is also true that Bixby's references to said prospects in his conversations with plaintiffs on or about July 28th, 1938 did not adequately or correctly describe the extent of the interest of certain of said prospects in said machines nor the possibility of the number of said machines that the statements made by one or more of said prospects suggested that they might take. But the court also finds that all of said prospects were at all times known to defendant Malkson who at all times was an officer and director and the California representative of Sealed-Pure Systems Inc. and also a stockholder in said corporation with the plaintiffs herein. The court also finds that certain of said prospects were known to plaintiffs at all times as being interested in said machines with a view to the possible purchase or lease of one or more of them. * * *

"X. 'It is true that the plaintiffs believed and relied upon the representations made by Bixby as aforesaid except to the extent that they personally and directly acquired knowledge and through said Malkson as an officer of Sealed-Pure Systems, Inc. had imputed knowledge on certain of said subjects as found above. * * *

"XI. 'It is not true as alleged in paragraph twelve of said complaint that if plaintiffs had known that said misrepresentations made by said Bixby as found above were untrue plaintiffs would have rejected said offer and would have refused to sell said stock. The court finds that as set out above defendant, Sealed-Pure Systems, Inc. was in default under its contract with Ex-Cell-O Corporation and that plaintiffs believed that Ex-Cell-O Corporation had a right to declare said contract forfeited by reason of the failure of said Sealed-Pure Systems, Inc. to comply with the terms of said contract as aforesaid. The court also finds that said Ex-Cell-O Corporation did in fact have a right to terminate said contract by reason of the failure of Sealed-Pure Systems, Inc. to comply with its terms as set out above, and that the effect of the termination of said contract when, as the court finds, it was terminated by said Ex-Cell-O Corporation on or about the seventh day of August, 1938, by reason of the failure of Sealed-Pure Systems, Inc. to comply with its terms, was to render said stock of plaintiffs valueless. The court also finds that Sealed-Pure Systems, Inc. was entitled to notice from Ex-Cell-O Corporation that

Ex-Cell-O Corporation intended to terminate and cancel said contract and to a reasonable time thereafter within which tc comply with its terms and conditions before a forfeiture thereof could be declared. However, the court also finds that said Sealed-Pure Systems Inc. did not insist on said right but waived their right to such notice and to time within which to comply with said contract, and that both said Sealed-Pure Systems Inc. and plaintiffs acquiesced in the cancellation of said contract by Ex-Cell-O Corporation."

[5] It will be observed that the quoted findings are somewhat vague in certain particulars both as to what false representations were made and of what facts plaintiffs had independent knowledge, and in a sense contradictory in that they find that plaintiffs *relied* upon Bixby's misrepresentations but would have made the sale even if they had not been deceived. However, we will single out one clear false representation found to have been fraudulently made, that no machine had been placed under the contract in the face of Bixby's knowledge of the Lucerne agreement which he had himself signed three days before. As to this false representation both the findings and evidence are clear that it was believed and relied upon by plaintiffs, and it is settled that "a single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on, afford as complete a ground for rescission as if it had been accompanied by a multitude of other false representations." 12 Cal.Jur. 741.

Appellants attack the finding that the effect of the termination of the agency contract between Ex-Cell-O and Sealed-Pure was to render appellants' stock in Sealed-Pure valueless, as contrary to the undisputed evidence. Under the contract between Ex-Cell-O and Sealed-Pure the latter was entitled to receive for the first two years twelve and one-half per cent of all rental payments received by Ex-Cell-O "under any standard lease-royalty agreement obtained by" Sealed-Pure. Under this contract Ex-Cell-O reserved the right to adopt other methods of placing the machines than by lease-royalty agreement and the evidence is clear that in the case of the contract with Lucerne Ex-Cell-O exercised this right and agreed to outright sales instead of lease-royalty agreements. Under those circumstances it seems clear that some commission would be payable to Sealed-Pure on the sale price of the machines when received by Ex-Cell-O and the twelve and one-half per cent fixed in the contract as commission on lease-royalty agreements would at least prima facie establish the rate of commission to be paid in case Ex-Cell-O exercised its reserved right to make an outright sale. The court found that "on or about July 25th, 1938 said Sealed-Pure Systems, Inc. through the instrumentality of its California manager, defendant Malkson, had brought about the execution of a contract between Ex-Cell-O Corporation and the Lucerne Cream and Butter Co. and/or Safeway Stores, Inc." for the placing of one machine on trial for 90 days to be purchased for $32,500 or returned, and giving an option to purchase additional machines before December 31, 1939 at $37,500 each. In all six machines were purchased by Lucerne under this contract "brought about" by Sealed-Pure. It was apparently the theory of the learned trial judge that the termination of the agency contract operated to deprive Sealed-Pure of its right to commissions on these sales. This theory finds no support in any case that has been cited to us and the contrary conclusion is amply supported by authority.

[6, 7] It is apparent that when Sealed-Pure brought about the execution of the contract with Lucerne it had done all that was required of it to entitle it to receive commissions if, thereafter, Lucerne elected to purchase one or more machines pursuant thereto. The applicable rule is succinctly stated in 12 C.J.S., Brokers, § 86, p. 200: "Although the broker has obtained only an option, he is entitled to a commission when the customer exercises the option, within the life thereof, by entering into the transaction which the broker was employed to negotiate."

To the same effect are: 8 Am.Jur. 1094; Dinkelspiel v. Nason, 17 Cal.App. 591, 120 P. 789; Mitchell v. Derby Oil Co., 117 Kan. 520, 232 P. 224; Finnerty v. Stratton's Estate, 53 Colo. 17, 123 P. 667; Snead v. Wood, 24 Ga.App. 210, 100 S.E. 714; Mahoney v. Pitman, Tex.Civ.App., 43 S.W. 2d 143; Campbell v. Rawlings, 52 App.D.C. 37, 280 F. 1011.

Having fully performed the service which would entitle it to commissions upon sales subsequently made under the trial-option contract with Lucerne the only question remaining is the effect upon its right

to the commissions of the termination of its agency contract by Ex-Cell-O.

The applicable rule is thus stated in Vol. II Restatement of the Law of Agency, § 456, p. 1075:

"If a principal properly discharges an agent for breach of contract, * * * the principal is subject to liability to pay the agent, with deduction for the loss caused the principal by the breach of contract:

"(a) the agreed compensation for services properly rendered for which the compensation is apportioned in the contract, whether or not the agent's breach is wilful and deliberate."

[8, 9] Similarly it is said in 3 C.J.S., Agency, § 187, p. 88: "The rule that the agent is entitled to recover for services rendered before his discharge is particularly applicable where the contract of agency is severable. Accordingly, an agent selling goods on commission is entitled to a commission on goods sold by him during the continuance of the agency, although the goods were not delivered or paid for, or even where the orders were not received by the principal, until after the termination of the relationship. If the contract contemplates that the agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency."

[10] Again in 3 C.J.S., Agency § 189, p. 91 we read: "Where the services to be performed by the agent are severable, he may, in the absence of a contrary provision in the agency contract, recover for services performed before the termination of the relationship."

The above quoted statements find ample support in decided cases involving situations not unlike that in the pending case. Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877; Sackett v. Centaur Motor Co., 189 Ill.App. 372; S. H. Greene & Sons v. Freund, 2 Cir., 150 F. 721; White Co. v. W. P. Farley & Co., 219 Ky. 66, 292 S.W. 472, 52 A.L.R. 541; Singer Sewing Mach. Co. v. Brewer, 78 Ark. 202, 93 S.W. 755; Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 N.W. 484.

In S. H. Greene & Sons v. Freund, supra, plaintiff was engaged by defendant to solicit and obtain orders for the bleaching, dyeing and printing of cotton goods for a commission on all orders obtained by him. Plaintiff submitted to prospective customers "price memos" covering the proposed work, which did not become binding on the customers until orders were sent to defendant by them. Upon plaintiff's discharge he sued defendant and recovered judgment for commissions on orders sent to defendant by customers after plaintiff's discharge but pursuant to price memos submitted to the customers by plaintiff before his discharge. This judgment was affirmed, the Circuit Court of Appeals saying at page 724 of 150 F.: "Having accepted the offers by ordering under them, the customers had entered into binding contracts with the defendants for, at least, the minimum amount, and the plaintiff was entitled to commissions upon the amount of work thus secured for defendant by his exertions."

[11] In White Co. v. W. P. Farley & Co., supra, plaintiff was discharged as selling agent for automobiles. The court said at page 475 of 292 S.W.: "Even when a party to a contract exercises the right under its terms to cancel it when it has been partially performed by the other party, he is required to place the other in statu quo; that is, he must not cancel it so as to injuriously affect any rights that have already accrued to the other in its partial execution. Here appellee * * * worked up a prospective sale to Kirk & Key, and had interested them in the purchase of a truck through his agency, whereby he would have upon its consummation been entitled to $840 in commission, and, if appellant under those conditions sought to terminate the agency, and had the right to do so under its contract, yet the law requires it to do justice to the opposite party, and to make him whole, and remunerate him for the service he has rendered in its execution."

In Sackett v. Centaur Motor Co., supra, plaintiff had an agency for the sale of automobiles on a commission "of the gross sales emanating" through his office. Plaintiff was discharged and claimed commissions on automobiles sold on orders given after his discharge pursuant to what amounted to options arranged by him before discharge. The court said at page 375 of 189 Ill.App.: "If the alleged contracts were nothing more than arrangements, when an 'arrangement' with a pro-

spective purchaser ripens into a sale, it gives a right to the agent to a commission for the reason that the agent's efforts are the efficient cause of the sale."

[12] We conclude that under its contract Sealed-Pure "obtained" the sales to Lucerne pursuant to the contract brought about by it, that it was entitled to the commissions on such sales despite the termination of its agency, and that for this reason the termination of the agency contract did not render the stock of Sealed-Pure valueless as found by the trial court.

The commissions on the sales made to Lucerne pursuant to the trial-option contract brought about by Sealed-Pure at twelve and one-half per cent would have amounted to $27,500. This, without more, after deducting all indebtedness then outstanding against Sealed-Pure, would have given its shares a value of approximately $2.50 per share at the time of their purchase from plaintiffs by Ex-Cell-O.

[13] In view of this fact and the further fact that the trial court found on substantial evidence that plaintiffs "believed and relied upon the representations made by Bixby", we approach the question whether the finding that "it is not true * * * that if plaintiffs had known that said misrepresentations made by said Bixby * * * were untrue plaintiffs would have rejected said offer and would have refused to sell said stock" finds any substantial support in the evidence. The whole basis on which the plaintiffs were dealing with Bixby was that on the cancellation of the agency contract their stock would be valueless. This belief was induced by the false representation wilfully made to them by Bixby that Sealed-Pure had failed to place any machines with customers except the one originally placed with Gold Star Creameries. Had Bixby fully and fairly advised plaintiffs, in answer to their query, of the contract with Lucerne and the negotiations leading up to it, which gave every reason to believe that the prospects of selling a considerable number of machines to Lucerne were good, and that these prospects had already crystallized into a contract which would entitle Sealed-Pure to very substantial commissions if machines were purchased under its terms, it is evident that the whole basis upon which the parties were dealing would have been changed completely. The belief of plaintiffs that their stock would be rendered valueless by the impending cancellation was induced by Bixby's false representation that no machines had been placed by Sealed-Pure, and plaintiffs would have known tha the stock had a substantial prospective value if Bixby had told them the truth. If they had known the truth, even though as found by the court "plaintiffs believed that Ex-Cell-O Corporation had a right to declare said contract forfeited", they would not have believed that by such forfeiture their stock would be rendered valueless. It was the belief that their stock was valueless which induced the sale to Ex-Cell-O on the basis of $1 per share, not the belief that Ex-Cell-O had a right to forfeit the contract. This belief in turn having been induced by Bixby's fraud, it follows that Bixby's fraud was the inducement to their sale and the finding that they would have sold their stock in the absence of the fraudulent misrepresentations finds no support in the evidence. In fact, reading the findings as a whole, it seems apparent that the trial judge's conclusion that the fraud did not induce the sale is based upon the false premise that the effect of the cancellation was to render the stock valueless.

The case on its facts is very like Pohl v. Mills, 218 Cal. 641, 24 P.2d 476. Before plaintiffs agreed to sell their stock Zinn had asked Bixby pointedly whether Sealed-Pure had placed any machines and Bixby falsely replied that it had not. In Pohl v. Mills, supra, a similar inquiry was made as to whether the subject of the contract was copyrighted. The court in that case at pages 652, 653 of 218 Cal., 24 P.2d at page 481, referred to this fact of inquiry as follows: "Moreover, the record clearly shows, from the testimony of the witnesses for the defendants themselves, that the plaintiff carefully inquired into the question of whether or not the structures were adequately protected by a copyright. * * * Entirely eliminating from consideration the testimony by the plaintiff that the representation that the Jumbo Lemon was a copyrighted structure was the inducing cause of his entering into the contracts, the record clearly shows that this was in fact the inducing cause, and that, if he had not been led to believe that the structure was copyrighted, he would not have invested his money in the business."

[14] Plaintiffs all testified that they would not have sold the stock if they had

not believed and relied upon Bixby's fraudulent misrepresentations. This testimony is buttressed by the rule that where, as here, the fraudulent representations are calculated to induce the action of the party to whom they are made it is presumed that his action was induced thereby, and in order to take away his right to relief on the ground of fraud, evidence must be introduced to show affirmatively that he did not rely on the false representation. 12 Cal.Jur. 827; Dow v. Swain, 125 Cal. 674, 58 P. 271; Troy, etc., Co. v. Drivers', etc., Co., 14 Cal.App. 152, 111 P. 121; De Garmo v. Petitfils Confiserie, 93 Cal.App. 261, 269 P. 692; Pohl v. Mills, supra, 218 Cal. at page 652, 24 P.2d 476.

[15] The only evidence pointed to by respondents to support the finding that the sale was not induced by Bixby's fraud is that plaintiffs Zinn and Nelson learned that Lucerne had a machine on trial shortly after cancellation of the agency and at that time took no action. Their testimony is, however, that relying on Bixby's false representation they believed that this was pursuant to an arrangement effected by Ex-Cell-O after the agency was cancelled. This explanation is corroborated by the fact that upon Zinn's learning in January, 1939, that a large quantity of cardboard for milk bottles had been ordered by Safeway from the Fibreboard Products Co. on August 1, 1938 (a date so close to the date of Bixby's false representations as to lead Zinn to suspect for the first time that a machine had already been placed when those representations were made), the investigation which culminated in this action was immediately begun. We cannot find any substantial evidence in these facts to support the finding that the fraud did not induce the sale of plaintiffs' stock.

[16] The suggestion in the findings that Malkson's knowledge of any facts was imputed to plaintiffs is without support in law. There is no such privity between the officers or stockholders of a corporation as to impute the knowledge of one to another in his individual capacity. Pitman v. Walker, 187 Cal. 667, 670, 203 P. 739.

[17, 18] There is some suggestion by respondents that the cause of action, if any, is in Sealed-Pure and not in plaintiffs. This is a misconception. Sealed-Pure has been dissolved. If not, it would have a cause of action for commissions earned. But because Sealed-Pure has been dissolved it is impossible for plaintiffs to have a rescission and they are remitted to their alternative action for damages. These are properly measured by the difference in actual value between what plaintiffs received for their shares and what the shares were in fact worth. Sec. 3343, Civ.Code. The actual value of the stock which is the measure of plaintiffs' damages under sec. 3343, Civ.Code, is "the actual intrinsic value of the stock, determined by the actual worth of the corporate assets, not the 'market value' of the stock." Note in 57 A.L.R. 1153 and cases therein collected. In determining this intrinsic value the only possible inquiry under the facts of this case lies in the proof of subsequent transactions which would have given Sealed-Pure a right to commissions but for its dissolution which was brought about by Bixby's fraudulent conduct. Future profits may be shown for the light that they throw on the actual value of the stock at the time of its fraudulent purchase. Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 271, 61 P.2d 944; Pittsburg Gauge Co. v. Ashton Valve Co., 184 Pa. 36, 39 A. 223, 224; Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264, 271, 54 Am.Rep. 676; Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 P. 312, 314; Macan v. Scandinavia Belting Co., 264 Pa. 384, 107 A. 750, 753, 5 A.L.R. 1502. The rationale of cases holding that subsequent experience may be looked to in fixing value at the date of the wrong is well expressed by Mr. Justice Cardozo in Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 53 S.Ct. 736, 739, 77 L.Ed. 1449, 1456, 88 A.L.R. 496: "To correct uncertain prophecies in such circumstances is not to charge the offender with elements of value nonexistent at the time of his offense. It is to bring out and expose to light the elements of value that were there from the beginning." Defendants Bixby and Ex-Cell-O, for whom Bixby acted, cannot escape liability because Bixby's machinations have made it difficult to assess the damages. Pye v. Eagle Lake Lumber Co., 66 Cal.App. 584, 590, 227 P. 193; Hacker, etc., Co. v. Chapman Valve Mfg. Co., supra, 17 Cal.App.2d 265, 267, 61 P.2d 944; Caspary v. Moore, 21 Cal.App.2d 694, 699, 70 P.2d 224; Seymour v. Oelrichs, 156 Cal. 782, 803, 106 P. 88, 134 Am.St.Rep. 154; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 174, 88 P.2d 698, 89 P.2d 386.

Since the judgment must be reversed because of the unsupported findings hereinabove discussed, upon the issue of damages the court on a second trial should determine whether plaintiffs, who were the majority stockholders in Sealed-Pure, had they known the truth, would have opposed the cancellation of Sealed-Pure's agency or insisted upon a reasonable time for performance, as the trial court found they were entitled to do. Within a very short time after the cancellation the evidence shows the provision of the contract for placing three machines would have been performed, since a sale was made to Jerseymaid Milk Products Co. in Los Angeles on August 13, 1938. This would have so completely changed the entire picture that Ex-Cell-O would no longer have had the right to cancel the agency contract for failure to place three machines, and might have enhanced the value of plaintiffs' stock to the point found by the trial court that "Sealed-Pure Systems, Inc. had certain prospects for the possible placing of certain of said machines which if contracts therefor were entered into by said prospects within a reasonable time and under certain conditions, would give the stock of Sealed-Pure Systems, Inc. a value of one hundred thousand dollars or more as alleged by plaintiffs." We consider it inappropriate to discuss other matters suggested by appellants which might operate to enhance their damages, since the amount or measure of damages is only in issue on this appeal to the extent that respondents have challenged the evidence as sufficient to support any judgment for damages.

[19, 20] The briefs contain much discussion of the failure of the trial court to find that the fraudulent representations were material. "To be material, a representation must be of such a character that, if it had not been made, the contract or transaction would not have been entered into." 12 Cal.Jur. 740-741. If the trial court finds on a retrial of that issue that the sale of the stock would not have been made but for the fraudulent representations, such finding will establish their materiality.

[21] There appears no necessity to retry all of the issues. The findings that fraudulent representations were made and believed are supported by the evidence. It will only be necessary to retry the issues of inducement and damages. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 583, 45 P.2d 972; Lindsay v. Mack, 5 Cal.App.2d 491, 497, 498, 43 P.2d 350.

The judgment is affirmed as to respondent Malkson. The judgment is reversed as to respondents Ex-Cell-O Corporation and Bixby, with directions to the trial court (following the formula of Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 702, 242 P. 709) to make new findings on the issues of (1) Whether the fraudulent representations found were an inducing cause of the sale of appellants' stock as alleged in their complaint, and (2) Damages, either upon the evidence already introduced and such further evidence as the parties may offer on those issues, or upon a complete retrial of those issues, as the trial court may elect.

SPENCE, J., concurs.

NOURSE, Presiding Justice (dissenting).

I dissent.

Plaintiffs sued for rescission of the sale of their corporate shares of the capital stock of Sealed-Pure Systems, Inc., or for damages if rescission could not be had. The defendants had judgment, and the plaintiffs appeal. This appeal is grounded upon the single issue whether the evidence supports the judgment. The majority opinion is based upon a statement of facts drawn chiefly from the testimony of a witness for plaintiffs, as to which testimony the trial judge openly expressed a doubt. It will be necessary here to give the other side of the story, accrediting to the integrity of the trial judge the inferences properly drawn from all the evidence in line with the established practice.

Defendant Ex-Cell-O Corporation (hereinafter called Ex-Cell-O) is a manufacturer of machines designed for the fabrication of cardboard milk containers, known as "Pure-Pak." Plaintiffs were stockholders in a Washington corporation known as Gold Star Creameries operating in Everett, Washington. Zinn conceived the idea of installing one of Ex-Cell-O's machines in the factory of Gold Star Creameries, and of obtaining an exclusive agency from Ex-Cell-O for marketing their machines on the Pacific Coast. In San Francisco Zinn approached officers of Fibreboard Products Co., who are manufacturers of cardboard products on

the Pacific Coast, and suggested to them an exclusive contract for the manufacture of cardboard blanks which are used to make the milk containers, upon condition that Fibreboard would purchase stock in a corporation to be formed by Zinn to handle the Ex-Cell-O agency. In these negotiations Fibreboard expressly refused to take any part either in the management of, or as a stockholder in, any corporation engaged in the distribution of the machines. Zinn then went to Detroit to negotiate a distributing contract with Ex-Cell-O. In these negotiations he falsely represented to Ex-Cell-O that he was the official representative of Fibreboard and desired for them an exclusive contract to manufacture the cardboard blanks in connection with the distributor's contract for the Pacific Coast. He also falsely represented to Ex-Cell-O that he had $1,000 in Seattle to be used in the interest of the distributors and that Fibreboard had agreed to take fifty per cent of the stock of a distributor's corporation. It is important to note these circumstances as supporting the trial court's opinion that the testimony of this witness could not be accepted as in all respects true. A representative of Ex-Cell-O contacted plaintiffs Zinn, Kemp, and Ellis, and Malkson in October, 1937, and made a tentative agreement with them to give them the exclusive coast agency to promote the sale, lease and installation of the machines upon a commission of 10% on sales and 12½% of royalties collected by them. The agreement was declared inoperative if rejected within fifteen days by an officer of Ex-Cell-O. Such rejection was conveyed in writing to Zinn et al., and on October 30, 1937, Ex-Cell-O entered into a new and different contract with Zinn, Kemp, and Malkson for distribution of the Pure-Pak machines on the coast. This is the contract under which the parties operated until its termination in 1938. These individuals then incorporated Sealed-Pure Systems, Inc. (hereinafter called Sealed-Pure) with a capital stock of 10,000 shares of no par value. Six thousand shares were subscribed and paid for by Malkson—the remaining four thousand were held to be used to raise additional capital. Five hundred shares were taken by Ex-Cell-O, which was given the right to name one director. The distributor's contract was thereupon transferred to Sealed-Pure, with the consent of Ex-Cell-O, and one machine was placed in Gold Star Creameries at Everett, Washington, a concern of which Zinn was the general manager and director, and the plaintiffs Kemp and Nelson were officers and directors. The activities of these plaintiffs in Gold Star Creameries are of importance since the only Ex-Cell-O machine placed by the individual efforts of these plaintiffs in pursuance with their contract was placed in this, their privately owned plant, at a time when the Gold Star Creameries was insolvent, as it had been almost from its incorporation in 1934. The agency contract with Ex-Cell-O required Sealed-Pure "to place three machines in said territory within ninety (90) days from the date hereof and within six (6) months from this date to have installations in three (3) individual dairies, one in Seattle, one in Los Angeles and one in Oakland or San Francisco"; the agency undertook to maintain trained operators in charge of all installations, and, at its own expense, to service and keep the machines installed in first class condition. It was stipulated that none of the machines were to be sold by the agency, but were in all cases to be leased under Ex-Cell-O's standard lease-royalty contract. For its services "as such distributors" Sealed-Pure was to receive as commission 12½ "of all rental payments received by Second Party under any standard lease-royalty agreement obtained by First Parties. * * *"

Under the contract of October 30, 1937, plaintiffs placed one machine with Gold Star Creameries, at Everett, Washington, and this ended their activities under the agency and was not even a substantial compliance with the requirements of the contract to place one machine in Seattle, one in Los Angeles, and one in San Francisco or Oakland. Long prior to that transaction Gold Star Creameries had been, and still was, in financial difficulties. Having installed the machine in the Gold Star plant in an effort to rehabilitate their failing interests in Gold Star, the plaintiffs represented to Ex-Cell-O that it would be a reflection on the prospects of the milk packaging machines if the first one installed in the territory should prove a failure because of the failure of Gold Star. As a result of these representations the acquiescence of Ex-Cell-O was obtained to loans from Sealed-Pure to Gold Star. Thereafter additional loans were made until these plaintiffs had milked Sealed-Pure of all its assets and Gold Star went into bankruptcy without payment to Ex-Cell-O of any part of the sums due upon the machine installed in Everett. Other

troubles arose between these plaintiffs and Malkson, who had advanced the greater part of the funds to Sealed-Pure. A representative of Ex-Cell-O went to Seattle to endeavor to settle the dispute. He arranged with plaintiffs that Malkson should go to San Francisco as general manager for Sealed-Pure and that Zinn should devote his attention exclusively to Gold Star Creameries. The other plaintiffs devoted their time to other interests and did little or nothing under the agency contract.

Zinn continued to devote the funds of Sealed-Pure to the protection of his investment in Gold Star Creameries and left Malkson in San Francisco without funds to pay his office rent, or office help. Malkson appealed to Ex-Cell-O and secured from it an advance of $1,250 to meet these necessary expenses. Because of the friction among the plaintiffs and their complete failure to make any progress in their agency contract with Ex-Cell-O, the defendant Bixby, at the request of Malkson, came to San Francisco in July, 1938, and these two succeeded in securing a contract with "Lucerne" in Oakland to install one machine on ninety days' trial, with option to purchase it for $32,500, and the option to purchase additional machines prior to December 31, 1939, for $37,500 each. The material portions of these contracts are set forth in the findings as follows: "'It is expressly understood that we (Safeway Stores, Inc., and/or Lucerne Cream and Butter Company) are to have free use of this machinery for a period of ninety days after installation. If for any reason we decide not to keep this machine we will properly crate same and return it to your plant at Detroit. We are to pay the cost of shipping both ways. If we do not notify you that we are to return the machine within ninety days after installation we are to promptly make payment of $32,500. This price is f.o.b. your plant at Detroit, Michigan.'

"At the same time, and as a part of the same transaction, Safeway Stores, Inc., and Ex-Cell-O Corporation executed an agreement, reading as follows:

"'July 25, 1938

"'Ex-Cell-O Corporation,
"'1200 Oakland Boulevard,
"'Detroit, Michigan.
"'Gentlemen:

"'We are enclosing our purchase order No. 4972 covering one complete paper milk bottling machine at a cost of $32,500.00.

"'Any future machines ordered before December 31, 1939, we agree to pay you $37,500.00 for each machine upon the same conditions as outlined in the attached purchase order.

"'Very truly yours,
"'Safeway Stores, Inc.
"'A. D. Kirkland

"'ADK:SD
"'Accepted: Ex-Cell-O Corporation
"'By H. G. Bixby,
"'Secretary, 7/25/38'"

While in San Francisco Bixby told Malkson that Ex-Cell-O intended to cancel the Sealed-Pure agency because of its failure to make any progress under the contract. Malkson told him that he was sorry that a cancellation would be made because of his holdings in Sealed-Pure, but suggested that he be engaged as Pacific Coast agent if the contract should be cancelled. Upon this plaintiffs base their charge of conspiracy against Malkson. Following the execution of the contracts with Lucerne Bixby went to Seattle and met plaintiffs Zinn, Kemp, and Nelson. He informed them that he intended to cancel the agency because of Sealed-Pure's failure to place machines in the territory. They agreed with him that he had a right to cancel the contract and made no objection as to time or sufficiency of notice. The plaintiffs urged a settlement in lieu of a complete cancellation and Bixby told them he would endeavor to get them one dollar a share for their stock in Sealed-Pure, but that they would have to assume the notes of Gold Star Creameries which Ex-Cell-O held. Zinn then said to Bixby in the presence of the others, "How do I know that you haven't already got an order in your pocket or have made some deal that we don't know anything about?" Bixby replied, "If I had an order in my pocket or had made any deal, I would tell you about it." These are the representations upon which plaintiffs' charge of fraud is based, and which the trial court found were made as alleged and were untrue. But, before this statement was made the plaintiffs had concurred that the agency contract must be cancelled because of failure to perform any of its terms.

Pursuant to the contract of July 25, 1938, Lucerne purchased the trial machine on December 5, 1938, and later purchased five additional machines. On August 16, 1938, Jersey Maid Milk Products Co. of Los Angeles procured a lease of a machine which was subsequently converted into a

sale. However, the sale of plaintiffs' stock in Sealed-Pure, upon which their cause of action is based, did not take place until after some or most of these machine sales were made. Inasmuch as the trial court found that the plaintiffs acquiesced in the cancellation of the agency contract and the dissolution of the Sealed-Pure Corporation these dates are important: July 25, 1938, conditional sale and option contract with Lucerne; July 29, 1938, agreement to sell stock of Sealed-Pure and disincorporate; August 7, 1938, written notice of cancellation of agency contract received by plaintiffs; August 16, 1938, lease of one machine to "Jersey Maid"; September 16, 1938, sale of two machines to Lucerne; November 29, 1938, sale of three machines to Lucerne; and December 5, 1938, purchase of the floored machine by Lucerne. For six or seven months prior to July 29th, 1938, plaintiffs knew that Safeway and Lucerne were definite prospects to take a machine "on a trial basis." In August, 1938, plaintiffs knew that a machine had been installed, or "floored" with Lucerne. In the same month a mechanic employed in plaintiffs' Gold Star plant at Everett, Washington, was sent to San Francisco to make the trial installation with Lucerne and he so informed Zinn; August 27, 1938, Zinn wrote to Bixby stating that he knew of the California deal with Safeway. On August 30, 1938, plaintiffs completed negotiations for the sale of their stock in Sealed-Pure, but continued as stockholders until its dissolution. September 1, 1938, Bixby wrote to Zinn admitting the fact of the Lucerne deal; in the same month other plaintiffs learned these facts from publications in the commercial press; on October 17, 1938, the plaintiffs, either individually or by proxy, attended a meeting of Sealed-Pure and adopted a resolution for the voluntary dissolution of the corporation; on November 5, 1938, plaintiffs Zinn and Kemp attended a directors' meeting and voted for a resolution of dissolution. All those actions were taken by plaintiffs without any protest that their actions had been induced by the then known fraudulent representations.

Upon this evidence the trial court found that the charges of conspiracy with Malkson were not true, and there is no evidence in the record which would have supported a contrary finding. It also found that the representations made to plaintiffs by Bixby in reference to the placing of machines under the agency contract were untrue; that he intended to recommend to Ex-Cell-O the cancellation of the agency contract in which event plaintiffs' holdings in Sealed-Pure would be worthless; that at the time these representations were made the contract with Safeway Stores had been executed, and that this fact was withheld from the plaintiffs; that the defendant Malkson had no knowlege of these representations at the time and had no part in the negotiations for the sale of plaintiffs' stock; that Sealed-Pure had defaulted in its agency contract, but that Ex-Cell-O had taken no steps to cancel it; that it was not true that, at the time the representations were made, Sealed-Pure had contracted for the sale of five machines or had made any contract other than the option agreement of July 25, 1938; that plaintiffs at all times knew that these prospects were possible for the purchase or lease of one or more machines; that it was true that plaintiffs believed and relied upon the false representations "except to the extent that they personally and directly acquired knowledge" of the transactions above noted; that on August 30, 1938, they agreed to sell their stock in Sealed-Pure to Ex-Cell-O; but that it was not true that if they had known that said misrepresentations were untrue they "would have rejected said offer and would have refused to sell said stock;" that, on July 28, 1938, Sealed-Pure was in default on its agency contract; that plaintiffs believed that Ex-Cell-O had the right to forfeit the agency contract; that Ex-Cell-O did have such right and exercise it on August 7, 1938; that the effect of such cancellation was to render the stock of Sealed-Pure valueless. It was also found that Sealed-Pure was entitled to notice of cancellation and a reasonable time to comply but that both the corporation and these plaintiffs waived these rights, and acquiesced in the cancellation of the agency contract.

Primarily the appellants attack the finding that, if they had known the truth, they nevertheless would have sold their stock at the price received; their contention is stated: "Does not the evidence show without conflict that the Safeway contracts gave the shares of stock a value much greater than the price received for them?" Stripped of all the surplus matter in the briefs, this is the only issue involved in the controversy. If the evidence "without conflict" shows that the shares of stock had a greater "actual value" at the time the sale was made than the defendants paid for them, the plaintiffs would be entitled to re-

cover the difference between the "actual value" and the price they received. Section 3343 of the Civil Code. On the other hand, if the evidence fails to show that the "actual value" was in excess of the price received, the plaintiffs would not be entitled to recover here, unless they had proved some "additional damage" within the code section and for this they do not contend.

I am satisfied from a review of the record that appellants not only failed to prove the actual value of the shares of stock, but that they failed to prove any facts from which this court could hold that the trial court erred in not finding that the actual value was greater than that which they received. I am reminded of the undisputed evidence of the total failure of the plaintiffs to make any progress in fulfillment of the agency contract, of their constant troubles and bickerings among themselves, of their dissipation of all the assets of the Sealed-Pure Corporation and their use of these funds to protect their independently operated Gold Star Creameries.

These facts stand as either conceded or not open to successful attack—the agency contract was cancelled prior to appellants' sale of their stock; appellants conceded their failure to perform and that good grounds existed for the cancellation; no attempt had been made at anytime to rescind, or avoid, the act of cancellation, but such act was confirmed and the right to attack it was forever waived by the voluntary dissolution of the Sealed-Pure Corporation, which was the contracting party; such cancellation, as of the date of August 7, 1938, rendered the stock of Sealed-Pure worthless, except for its speculative value in the interest in sales or options then made. These facts account for the findings of the trial court that the appellants had failed to comply with the terms of the agency contract, and that, though they believed and relied upon the false representations (except as to their knowledge of the trial installations), they would have accepted the offer to sell their stock notwithstanding. Though at first glance these findings seem inconsistent, they are not necessarily irreconcilable. There is nothing wrong with the theory of the trial court that a party may believe and rely upon fraudulent representations to sell his property, but may suffer no damage because he would have sold at the same price, or less, if the misrepresentations had not been made. The effect of the findings, taken as a whole, in substance is that, though the representations were false and misleading, and though appellants believed they were true, and so acted upon them, nevertheless, appellants were in such unfavorable financial difficulties that they were willing to accept the offer of one dollar a share for their stock in Sealed-Pure and were not induced by the representations to make the sale. Since they are unable to rescind this sale because the corporation has been dissolved and they cannot be restored to their former rights, they are now reduced to an action for damages based upon these fraudulent inducements, and in such action they are confined to the plain rules of an action at law uncontrolled by the equities as in a case of rescission.

Explanatory of the unsatisfactory state of the evidence to prove recoverable damages I quote from the opinion of the learned trial judge filed before the findings of fact and conclusions of law were signed:

"I am also convinced, from the evidence, that in order to soften the blow to Sealed-Pure Systems and its stockholders (the cancellation of the agency contract) he (Bixby) did misrepresent the situation as it existed in California. However, had he made no representations of any kind in regard to conditions in California I have concluded, after a careful consideration of the testimony and the correspondence covering this most important phase of the case, that the result, insofar as the cancellation of the contract is concerned, would have been the same. That is to say, in my opinion, the contract held by Ex-Cell-O Corp. would still have been cancelled and plaintiffs would have acquiesced in such cancellation, and would have contented themselves with doing as they actually did, namely with attempting to salvage some part of their original investment. They had appreciated for a long time that the sword of Damocles was hanging over their company and were not surprised when it finally fell. Moreover it must be borne in mind that when Bixby represented to Zinn and his associates, as I believe he did, that no sales had been consummated in California, and that the company had no immediate prospects for consummating sales, the plaintiffs then knew that Safeway and Jersey Maid were possible customers and that Malkson was still working on them.

"The most material misrepresentation by Bixby was in regard to the agreement that had been entered into with Safeway, under which that company agreed to purchase a

machine under what amounted, for all practical purposes, to an 'on trial' basis. But when Zinn gave his deposition he admitted that, when he learned in the latter part of August, 1938, that the Safeway Company was using an Ex-Cell-O Corp. machine, he took no action, not only because of his reliance on the correctness of Bixby's representations made to him on July 28th and 29th, but also because he knew that an offer had theretofore been made to the Safeway Company to install a machine on trial. The implication is clear from his testimony, that even if he had known that Scott had 'floored' a machine on trial, as he expressed it, that would not have been a factor of serious moment to him. It will be recalled that in October, 1937, Ex-Cell-O Corp. had offered to allow Safeway to try out a machine for three or four months and to return it if it did not prove satisfactory at the end of that period. Zinn evidently felt in late August, 1938, when informed of the Safeway installation, that if all that had happened was that a machine had been installed by Safeway on trial, the circumstance was of no particular importance. If such an arrangement was considered of no importance by Zinn, I infer that, under all the circumstances, it would not have been considered of any more importance by any of the other stockholders." And, as explanatory of the finding that it was not true "that if plaintiffs had known that said misrepresentations made by said Bixby as found above were untrue plaintiffs would have rejected said offer and would have refused to sell said stock", the trial judge, in his written opinion, said that after an "extensive review of the background" that "the stock had no greater value at the time the exchange was consummated than the amount the sellers received for it."

Reference to the opinion of the trial judge may be had "for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case." Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 750, 47 P.2d 273, 278; Inskeep v. Bear Creek Co., 54 Cal.App.2d 723, 729, 129 P.2d 401. The opinion requested counsel for plaintiffs to submit a draft of findings in accord with the views expressed in the opinion, and it is fair to assume that the trial court relied upon counsel to submit findings in accord with such request.

When a party sues for damages in a case of this kind it is elementary that the burden is upon him to plead and prove that he has suffered actual harm and to what extent. Fraud which has produced and will produce no injury or harm furnishes no ground for recovery of damages. As was said in Board of Commissioners v. Younger, 29 Cal. 172, 176: "Neither Courts of law nor equity enforce obligations or redress wrongs which are such only in foro conscientiæ, and are followed by no loss or damage."

What then is the damage suffered by appellants? They sold their stock in Sealed-Pure for one dollar a share, which they now contend would have been worth much more if the agency contract had not been cancelled; if the corporation had not been dissolved; and if all the options had terminated in sales of the machines; and if all the subsequent sales of Ex-Cell-O machines had been negotiated under the agency contract. Since the enactment in 1935 of section 3343 of the Civil Code this State has followed the minority, or "out-of-pocket", rule as to the measure of damages in cases of this kind. That section provides in part that: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." Prior to the enactment of the code section our courts followed the majority, or "benefit-of-the-bargain", rule. This accounts for the holding in Spreckels v. Gorrill, 152 Cal. 383, 390, 92 P. 1011, and the statement in 25 Cal.Jur. p. 563 and the authorities there cited. Though courts and text writers have criticised the "out-of-pocket" rule, others have defended it on the "common sense" basis that: "a person is not cheated, when that which he gets is worth all that he pays for it. Pittsburg L. & T. Co. v. Northern C. L. Ins. Co., C. C., 140 F. 888, 898. But, whatever the theories as to the equities of the two rules, we are bound here by the statute which expressly declares that the measure of damages shall be the difference between the "actual value" and the price paid. Rothstein v. Janss Inv. Corp., 45 Cal.App.2d 64, 73, 113 P.2d 465; Jacobs, v. Levin, 58 Cal.App.2d Supp. 913, 137 P.2d 500; Feckenscher v. Gamble, 12 Cal.2d 482, 500, 85 P.2d 885; 24 Am.Jur. p. 58; Restatement of the Law of Torts, § 549.

Applying the rule to the case here appellants were entitled to recover the difference between the "actual value" of the shares of stock and the price of one dollar a share which they received. In the case of a small business concern like Sealed-Pure, whose stock is not traded in the open market, it may be difficult to reach a value of its shares at any particular time. But, where proof is made essential to recovery the difficulty of producing it does not excuse the entire absence of it.

I am familiar with the rule that one "whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered" cannot escape liability because the precise damages cannot be measured with exactness. 15 Am.Jur. p. 412. The rule is referred to in part and its underlying principle applied in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 254, 73 P.2d 1163, and Elsbach v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651. But, where the one at fault has done nothing to make the proof of damages difficult, recovery cannot rest upon mere conjecture or surmise, but the proof must be made "with such certainty as the nature of the tort and the circumstances permit." Restatement, Torts, § 912. Thus, where the suit rests upon the tortious interference with a business it is necessary to show "not only a likelihood of profit but also a chance for loss." idem. p. 579.

It is a fair inference from all the evidence that Sealed-Pure stock was a liability rather than an asset when these parties were negotiating on July 29, 1938. The corporation was then heavily in debt, and burdened with internal dissension. If Lucerne should exercise its option which was executed prior to the cancellation of the agency contract Sealed-Pure would be entitled to some commissions as payments of the purchase price were made. 8 Am.Jur. 1094; 12 C.J.S., Brokers, § 86, p. 200. But there is some uncertainty as to what commissions were payable under the form of contract which was made with Safeway. Under the terms of the agency agreement Sealed-Pure was entitled to a commission of 12½% "on all rental payments" received by Ex-Cell-O "under any standard lease-royalty agreement" obtained by Sealed-Pure, the commission becoming payable only when rental payments were received by Ex-Cell-O. But it should be noted that the agency contract expressly prohibited a sale and limited the agent to the right to procure a lease upon a standard "lease-royalty agreement." The tentative contract executed by the appellants, but not approved by Ex-Cell-O, authorized a sale and fixed the commissions on sales at 10%. When the parties were dealing on July 29, 1938, for the sale of Sealed-Pure stock, had they known at that time the truth of all the transactions Bixby had had with Safeway, they would have been confronted with the possibility of a value to their stock based upon a claim to a reasonable commission for the "sale" of the first machine, and the possibility of a further commission if Safeway should exercise its option on the five other machines. There was the prospect of a commission of $3,250 for the sale of the first machine, and the far more speculative prospect of commissions amounting to over $18,000, payable at some indefinite time. As against these indefinite prospects the parties were confronted with the realities of an outstanding indebtedness of over $6,000 and of the immediate necessity of raising a large sum of money to carry on the agency. The testimony of Bixby is that he estimated that $30,000 was necessary for that purpose, that the appellants did not dispute his estimate, but that they concurred with him that they were unable to finance the venture, or to carry on the agency.

Hence, if no misrepresentations had been made, and if appellants had been given full knowledge of the entire transaction with Safeway, the trial court was given no foundation upon which it might rest a judgment determining the differences between the actual value of appellants' shares and the amount they received for them. If appellants had known all that Bixby and Ex-Cell-O knew on July 29th—that one machine was to be installed with Lucerne on trial and that if "any future machines" were ordered Lucerne or Safeway would pay $37,500 each for them,—it is pure conjecture to say whether their shares in Sealed-Pure were then worth more than one dollar each. Since the code section establishes the measure of damages it became incumbent upon appellants to prove value according to that formula. This principle is well stated in Martin v. Tully, 44 Cal.App.2d 226, 234, 112 P.2d 282, 286, where the court says: "Ordinarily, in an action for damages as the result of fraud in the exchange of property, the method of ascertaining such damages is to present proof of market value. If this is not obtainable, proof may be offered of actual or

intrinsic value, which, upon a motion for nonsuit, need not be closely scrutinized if in fact it shows a prima facie case of difference in value from which a reasonable inference may be drawn that a party has been damaged. Peek v. Steinberg, 163 Cal. 127, 124 P. 834. *If there is no proof of value, the damage has not been proved.*" (Emphasis ours.) This is not a case where the trier of the facts possesses the common knowledge of the values enabling him to determine the amount of recovery—such as a suit to recover the reasonable value of legal services, or to recover for personal injuries. Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann.Cas. 49; Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917; Ferrari v. Mambretti, 58 Cal.App.2d 318, 136 P.2d 326.

As to defendant Malkson the appellants did not have a cause of action against him at any time, and judgment in his favor was proper. In my opinion the judgment as to all respondents should be affirmed.



61 Cal.App.2d 67

SERVICE TANK LINES v. JOHNSON, State Treasurer.

Civ. 12540.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1943.

Hearing Denied Dec. 16, 1943.

Automobiles ⇐97

Agreement whereby owner of trucks hired for transportation of petroleum products agreed to supply equipment with operators to be under control of owner of products transported was not a "hiring" or "leasing" of equipment as would exempt owner from license fee or tax for transportation of persons or property for hire. St.1933, p. 928, as amended; St.1939, p. 2654, § 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Hiring" and "Leasing".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Service Tank Lines against Charles G. Johnson, as Treasurer of the State of California, to recover certain taxes theretofore assessed against plaintiff. Judgment for defendant, and plaintiff appeals.

Affirmed.

Paul J. Fritz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

WARD, Justice.

An action to recover certain taxes assessed under the provisions of an act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the highways, etc., in the State of California. Stats.1933, Ch. 339, p. 928, as amended by Stats.1935, Ch. 780, p. 2176, as amended by Stats.1937, Ch. 679, p. 1919, as amended by Stats.1939, Ch. 944, p. 2653. The act provides for a tax of three per cent upon gross receipts from the operation of trucking equipment. Statutes 1939, p. 2654, sec. 1(a), provides: "The term 'operator' shall include all persons engaging in the transportation of persons or property for hire or compensation by or upon motor vehicles upon any public highway in this State, either directly or indirectly, *and shall include any person who shall furnish any motor vehicle for the transportation of persons or property under a lease or rental agreement when pursuant to the terms thereof such person operates such motor vehicle, or exercises any control of or assumes any responsibility for, or engages either in whole or in part, in the transportation of persons or property* * * *." (Portion italicized indicates the change in the 1939 statute.)

The Caminol Company, Ltd., a corporation engaged in the business of refining and marketing petroleum products, for a certain period hired plaintiff's trucks to be used in their transportation, payment depending upon the number of "hauls" made. In April of 1939 the parties entered into a written agreement providing that for a period of twelve months, for a stipulated sum per month, plaintiff would supply, with its equipment, a competent driver or oper-

ator, both equipment and driver or operator to be at all times under the full control and direction of Caminol. Plaintiff further agreed to pay the salary of such operator; to replace him if he should be or become unsatisfactory to Caminol, and to carry and pay for workmen's compensation insurance; to carry public liability and property damage insurance in specified amounts, protecting the parties to the agreement, and to hold Caminol harmless from all liability in connection with the operation of the equipment; also to supply adequate licenses, gas, oil, etc., in connection therewith. Either party could cancel the agreement upon fifteen days' notice to the other. The evidence indicates that the trucks were operated in conformity with the agreement.

Plaintiff contends that the exclusive power and control over the trucks was passed to Caminol under the above agreement, which constitutes a hiring or leasing; and that there is a fundamental difference in the business relations of the parties as they existed before and after its execution.

The trial court prepared the following written opinion, founded upon the evidence introduced, which we adopt as part of this opinion:

"I think that the contracts or agreements between the parties hereto fail to disclose a lease or leases and appear to have had no other result than to effect a relatively unimportant change in the manner in which plaintiff transacted its business. A close examination of the 'leases' and a comparison of what was done under them with what had been done before when the plaintiff had admittedly been employed to haul and transport the oil products of the so called lessees, will show that the leases made no substantial change in the way in which the parties conducted their business with each other.

"Both before and after the leases the equipment was devoted to what appears to have been the same service; it was used in each instance to transport the oil products of the lessee. Under the leases a named sum per month was paid for the use of the various pieces of equipment in transporting the lessee's products.

"Prior to the leases plaintiff charged for such transportation in proportion to the hauling done and the time consumed in doing the work. But the leases appear to have made no substantial difference in this respect as the so called rent paid under the leases was practically the same as the charges made for like service before the leases were made.

"Before the leases were made the plaintiff paid his employees, kept his equipment in repair, services [sic] his trucks and supplied them with gasoline; protected his employees with Workmen's Compensation Insurance, and carried Public Liability and Property Damage insurance on his operations. All of this he continued to do and obligated himself to do under the lease agreements.

"The question is raised as to who controlled the employees while they were engaged in hauling for the lessee. The plaintiff employed them in the first instance. It is true that under the lease the plaintiff agreed to 'replace' any of such employees at the request of the lessee in case he was or became 'unsatisfactory' to such lessee. This does not mean that the employees were practically the employees of the lessee, or that they were under its control. It could not 'request' the removal of an employee at its mere whim. It could do so only when the employee proved 'unsatisfactory' which must be held to be nothing less than that in some appreciable way the man failed to properly do his work. The right to have capable operatives under the leases was no more than the duty of the plaintiff to the lessee prior to the lease; it was at that time an implied obligation of the contract of hauling that the work be properly done, in which case it could not be denied that it was 'satisfactorily' done. In other words before the leases as well as under them the work of the employees had to be satisfactory and competent.

"Further, under the leases after an employee had been 'replaced' he was succeeded by another employed by the plaintiff. It could hardly be claimed in such circumstances that the lessee had any more control and direction over the drivers of the trucks than it had previously when they reported for the performance of any hauling for which they had been summoned by the lessee, or sent by the plaintiff. Even in the latter case the employees would have to be told by the lessee with what product to load his truck and where and upon what conditions the load was to be delivered.

"No larger or different use or control over the equipment was exercised or given to the lessee than it enjoyed before the leases were made. Under each of the lease agreements it is provided that the 'motor vehicle equipment and said driver and operator shall at all times remain under the full control and direction of second party (lessee) and first party (plaintiff) shall have no voice as to the use or uses to which said motor vehicle equipment is put, or as to when or where the same shall be used.' This reads like a complete delivery to the lessee and the surrender of all control to it. But the evidence shows that after the leases there was a very slight difference in the place where the equipment was stored or placed when not in use; the terminal of plaintiff was 'across the street' from the refinery of the lessee, and because of plaintiffs obligation to supply gas and oil for the trucks the equipment was often at the terminal of plaintiff. So far as the use of the equipment was concerned it appears that it was described in the lease as suitable for transportation of property 'particularly gasoline, cashinghead, [sic] diesel fuel and crude oil.' No wider or different use of the equipment appears to have been made. The equipment was used exactly as it had been used before the attempted lease, over the same routes, driven by duel [sic] of the same owner and operated by the same man, or another chosen by the plaintiff. The only apparent difference between the parties following the leases is that by it the lessee had the exclusive use of the equipment for the carriage of his gasoline and oil products, whereas previously it was required theoretically to depend upon whether or not equipment was available at the time it sought to secure it.

"This difference however appears to have been merely nominal as the same trucks had been used in the service of the lessee before the leases and had given it the same service which it obtained from them under the new arrangement. I see nothing under the leases which changes in any substantial way the method by which the parties dealt with each other before they were made.

"As a consequence plaintiff must be held to have remained the operator of the equipment, and its income derived from the hauling done for the lessee must be held to be subject to the tax imposed upon it. The terms 'lease' and 'lessee' as used herein were used as simplification of description and not intended as holding them to be such."

In considering the act under the 1933 statutes, the court in Re Bush, 6 Cal.2d 43, 49, 56 P.2d 511, 513, dealing with the definition of the word "operator," said: "But the very phraseology employed likewise compels the conclusion that the act was not intended to be limited to such carrier service but was purposely phrased to include *in addition* other transportation upon the public highways for hire or compensation, directly or indirectly." In Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, at page 141, 130 P.2d 421, at page 424, considering the word "operation," as used in the law as it existed in 1935, the court said: "If the Legislature intended to exclude from 'operation' as defined every incidental service and activity customary and essential in the matter of transporting goods for compensation and hire, it could easily have said so. By failure to use any such limiting words the Legislature indicated its intention of not so limiting or circumscribing the meaning or scope of the act." In Consolidated Rock, etc., Co. v. State of California, 57 Cal.App.2d 959, 135 P.2d 699, considering the situation of a merchant transporting his own goods and adding transportation charges to the selling price, in which the 1937 amendments were involved, the court quoted from In re Bush, supra, and further said (57 Cal. App.2d at page 962, 135 P.2d at page 700): "The use of the qualifying adverb 'indirectly' gives the definition a very sweeping character, and were the question a completely novel one we would have no hesitation in holding that in such transaction the merchant was transporting property for compensation, at least indirectly. True he is not making a transportation charge as such (i. e. directly), but the result is no different than if he were, since the charge is added to the selling price of the goods and is thereby collected as effectively, although indirectly." See, Boessow v. Johnson, 10 Cal.App.2d 578, 52 P.2d 505.

Entremont v. Whitsell, 13 Cal.2d 290, 89 P.2d 392, is a case involving an agreement similar and in many respects identical to the one herein. The attempt of appellant to differentiate that case is not convincing. Entremont, a private carrier, and the State Department of Public Works instituted a proceeding in certiorari against

the Railroad Commission to secure the annulment of an order directing Entremont to collect from the Department certain undercharges, etc., contending that the contract between Entremont and the Department did not constitute an agreement for the transportation of property for compensation. At pages 295, 296 of 13 Cal.2d, 89 P.2d at page 394, the court said: "Although the solution of the problem is not entirely free from doubt, it is our opinion that this contract did not constitute the renting or leasing of equipment to the department but was a contract calling for the transportation of property by motor vehicle by Entremont. This conclusion follows from the fact that under the contract the possession and control of the trucks and the operators thereof did not pass to the department—the operators did not become the employees of the department—but such possession and control remained in Entremont. The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ.Code, §§ 1925, 1955. The record is clear that the only supervision exercised by the department over the operators of the trucks was to direct them where to load and unload the material hauled, when to go on or leave the job, and to inform the operators whether the load should be dumped or spread. The department had no power to discharge the drivers—that power, and the power of selection, rested in Entremont. That is a factor of some importance in ascertaining whether Entremont or the department controlled the operators. Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551. Moreover, the provisions of the contract indicate that it was not the intention of the parties that the department should exercise exclusive control over the operators. The contract required Entremont to keep the trucks in repair; to pay all expenses incidental thereto; to supply all oil, gas and other materials necessary for their operation; to carry compensation insurance on the drivers, and expressly provided the operators were the employees of Entremont. Further, under the contract, Entremont assumed all responsibility for damage or injury to other persons or property by reason of the operation of the trucks. This provision strongly implies that exclusive control was not conferred on the department." Ultimately, after considering leading cases submitted by each side, it was held that the transaction was not in fact a hiring or leasing of equipment. See Reavley v. State, 124 Tex.Cr.R. 528, 63 S.W.2d 709.

Other cases cited by appellant herein could easily be distinguished, but it does not seem necessary in view of the plain language of the respective statutes.

If, as held, plaintiff is liable under the 1937 statutes, it may be stated without further comment that the amendment of 1939, to include persons transporting property under a lease or rental agreement and exercising any control or assuming any responsibility in whole or in part, amply covers the facts at issue.

The judgment is affirmed.

PETERS, P. J., and DOOLING, J., pro tem., concur.



61 Cal.App.2d 821

C. G. ALLEN, Plaintiff and Appellant, v. Charles G. JOHNSON, as Treasurer of the State of California, Defendant and Respondent.

Civ. 12549.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1943.

Hearing Denied Dec. 16, 1943.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Paul J. Fritz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

WARD, Justice.

This action involves issues identical in law, and similar in fact, to Service Tank Lines v. Johnson, Treasurer, Cal.App., 141 P.2d 965. The only difference appears to be in dates and the equipment described. The actions were consolidated for trial, and

separate appeals filed. Upon the authority of that case, the judgment herein is affirmed.

PETERS, P. J., and DOOLING, J., pro tem., concur.



61 Cal.App.2d 58

PEOPLE v. TIDWELL et al.

Cr. 1841.

District Court of Appeal, Third District, California.

Oct. 19, 1943.

1. Witnesses ⇐53(3)

The amendatory statute specifying the exceptions where a spouse is a competent witness in a criminal action against the other manifests an intention to broaden the exceptions so that one spouse may testify against the other in cases other than those which involve criminal violence. Pen.Code, § 1322.

2. Witnesses ⇐61(1)

Act of husband in selling his wife for immoral purposes was a "crime against the person" of the wife, within statute making either spouse a competent witness against the other in actions for a crime committed against the person of the other where accused had virtually compelled his wife to submit to a violation of her person. Pen.Code, §§ 266f, 1322; Code Civ.Proc. § 1881.

See Words and Phrases, Permanent Edition, for all other definitions of "Crime Against the Person".

3. Witnesses ⇐61(1)

The personal injury to a wife, which permits admission of her testimony against her husband within the exception recognized at common law, is not confined to personal violence, but may include a tort against the wife, or a serious moral wrong inflicted upon her.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Rudolph Lee Tidwell and another were convicted of selling a female for immoral purposes, and they appeal.

Affirmed.

Thomas F. O'Hara, of Vallejo, for appellants.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Appellants were found guilty upon an information charging them with a violation of section 266f of the Penal Code, in that they did "wilfully and unlawfully and feloniously sell a female person, to wit, Sue Willia Tidwell, for immoral purposes." This appeal is from the judgment which followed said conviction.

The only witness in the case was Sue Willia Tidwell, the wife of appellant Tidwell. Neither of appellants testified. The facts, as testified to by Mrs. Tidwell, are substantially as follows:

She and appellant Tidwell arrived in Vallejo from Bakersfield on September 13, 1942, and moved into the home of her cousin, Mrs. Ward. That same evening they met appellant Johnie Smith at the "Knotty Pine", a cafe where drinking and dancing were indulged in, and Mrs. Tidwell and her husband danced there. Between dances they sat at a table, and the defendant Smith came into the place and told Tidwell that he wanted to see him for a few minutes. They went outside but were not gone very long. The defendant Tidwell returned to the cafe alone and told Mrs. Tidwell to get her hat and coat as they were going for a ride. They went outside and got into a car in which two sailors were seated in the rear seat; defendant Smith drove the car and Mrs. Tidwell sat between Smith and her husband in the front seat. Defendant Smith drove to Smith's house in Vallejo the entrance to which was through an alley. There was no conversation during the ride from the "Knotty Pine" to Smith's house. Defendant Tidwell took his wife to Smith's room which had in it a bed, a table, a two-burner stove, a dresser, some suitcases and mirrors. The defendant Smith and the two sailors remained outside the room. This was about 9:30 o'clock P. M. Then defendant Smith entered the room and said to defendant Tidwell: "It would be a swell setup and nobody would know anything about it." At this point defendant Smith went out of the room and Mrs.

Tidwell and her husband remained alone. Immediately after Smith's departure Tidwell told his wife that she would have to sell herself to the sailors for money. She protested and then he struck her and told her she had to do it or he would kill her, and that if she told anybody he would kill her, and that if he got caught he would have to go to the penitentiary. He then gave her instructions as to how to conduct her nefarious affairs with the sailors. He further told her that he could see no reason why he should work when he could make such easy money. Thereupon he went out of the room.

As the defendant husband left the room a sailor came in with defendant Smith. Smith told the sailor that he had to have 50 cents for the use of the room, and the defendant Tidwell collected $5 from the sailor, obviously the price of using his wife. Pursuant to this scheme and plan of the defendants and the threat made upon the prosecuting witness by her husband, she had intercourse with the first sailor that entered the room. After the first sailor had completed his purpose he left the room and the other sailor entered. As he arrived at the entrance to the room, Tidwell collected $5 from him also, and the defendant Smith appeared at the room and collected 50 cents from the second sailor for the use of the room. After the defendants had collected the above sums, the prosecuting witness had sexual intercourse with the second sailor, and thereafter the two sailors departed.

After the prosecuting witness had concluded such operations with both sailors, her husband returned to the room and told his wife they were returning to the "Knotty Pine" cafe and when she arrived outside she found that the two sailors were still there. She, the two sailors and the two defendants returned to the "Knotty Pine". When they arrived at the "Knotty Pine" the sailors separated from the other three and the defendant Tidwell gave the defendant Smith $3; this took place in front of the cafe.

When Mrs. Tidwell was called as a witness, appellants objected to any testimony being given by her upon the ground that under section 1322 of the Penal Code and section 1881 of the Code of Civil Procedure she was not competent to testify as she was the wife of the defendant Tidwell. This objection was overruled by the court and the witness thereupon testified as hereinbefore set forth. At the conclusion of her testimony the People rested and defendants made a motion for a directed verdict of "not guilty," which motion was denied by the court.

The sole ground upon which appellants rely for a reversal of the judgment is that the court erred in permitting the wife of appellant Tidwell to testify. Respondent concedes that the judgment must be reversed as to both appellants if the wife was not a competent witness. Section 1322 of the Penal Code reads as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section[s] 270 and 270a of this code or under any provisions of the 'Juvenile Court Law.'"

The question to be here determined is whether or not the crime with which appellants were charged was a crime against the person of the wife. Appellants contend most earnestly that "Section 266f has for its object and purpose the prohibition or prevention of a person selling a female person for immoral purposes" and that "the illicit nature of the act consists in the placing in custody for immoral purposes and for valuable consideration, and not the fact that the act indirectly concerns the body or person of the female." Appellants argue that section 266f cannot be construed as a crime against the person and that it is, therefore, not within the exception of section 1322 which permits a husband or wife to be a competent witness for or against the other in a criminal action for a crime committed by one against the other. So far as we are aware, this precise question has not been decided by any appellate tribunal in this state.

[1] Prior to its amendment in 1911, section 1322 of our Penal Code provided that neither husband nor wife was a competent witness in a criminal action except "in cases of criminal violence upon one by the other." But the amendment of 1911, p. 270, changed that part of the section to read

"except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, * * * or in cases of criminal violence upon one by the other, * * *." The amendment of 1911, in our opinion, shows the intention of the legislature to broaden the exceptions so that one spouse may testify against the other in cases other than those involving criminal violence.

[2] The specific charge against appellants was that they had sold Mrs. Tidwell, wife of appellant Tidwell, for immoral purposes, and the testimony of Mrs. Tidwell was to the effect that appellant Tidwell had threatened to kill her if she did not permit the illicit acts. We have, therefore, a case in which a husband has virtually compelled his wife to submit to a violation of her person. Can it be held, reasonably, that this is not a crime committed by the husband against the person of the wife? We do not think so. To so hold would be contrary not only to a sound and enlightened public policy, but would also be contrary to the meaning and intent of section 1322, supra.

We believe that the language of the United States Circuit Court of Appeals in Denning v. United States, 5 Cir., 247 F. 463, is quite applicable to the case at bar. That case involved a violation of the Mann Act, 18 U.S.C.A. § 397 et seq., and defendant was there charged with having persuaded his wife to go from one state to another for the purpose of prostitution. His conviction was based upon the testimony of his wife, and the question upon appeal was whether the wife was a competent witness. In holding that the wife was a competent witness in such a case, the court said, 247 F. at page 465: "The offense cannot be classed with those which merely offend the marital relation. It operates immediately and directly upon the wife. It is an offense against the wife. A primary purpose of the Mann Act was to protect women who were weak from men who were bad. Its protection was not confined to unmarried women. Its punishment was not intended to be limited to unmarried men. Men led by cupidity to the base crime have utilized marriage in the accomplishment of their ends. They should not be permitted to use marriage to prevent their punishment. They should not be permitted to invoke a sacred institution, and the rules established for its protection, to secure immunity from punishment for the most infamous crime that could be devised for its degradation."

[3] And in the case of Cohen v. United States, 214 F. 23, in which case a writ of certiorari was denied by the United States Supreme Court, 235 U.S. 696, 35 S.Ct. 199, 59 L.Ed. 430, the court said, 214 F. at page 29: "We are of the opinion that the personal injury to a wife which permits the admission of her testimony against her husband, within the exception recognized at the common law * * * is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a serious moral wrong inflicted upon her, and that in a case of the prosecution of a man for bringing his wife from one state to another with intent that she shall practice prostitution, in violation of the White Slave Act, his act in so doing is such a personal injury to her as to entitle her to testify against him."

Our conclusion is that the trial court did not err in permitting the wife of appellant Tidwell to testify in the case, and this makes it unnecessary to discuss any other arguments advanced in the briefs.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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SECOND SERIES

23 Cal.2d 58

McKNEW v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16916.

Supreme Court of California.

Oct. 11, 1943.

1. Witnesses ⇐201(1)

Under statute pertaining to privileged communications between attorney and client, the only subjects concerning which an attorney, without the consent of his client, may not be examined, are communications made by client to attorney or advice given thereon by attorney in course of professional employment. Code Civ. Proc. § 1881, subd. 2.

2. Witnesses ⇐222

The party who relies upon the rule that particular evidence sought to be elicited is privileged has burden of proof as to the relationship creating privilege. Code Civ.Proc. § 1881.

3. Witnesses ⇐21, 201(1)

Where information sought from attorney in proceedings before administrative committee of State Bar was name of and location of bank in which client had made a deposit which attorney witnessed, and it did not appear that transaction was connected with or that knowledge was acquired in course of any professional employment, attorney's acquisition of such knowledge was not a "privileged communication" and upon his refusal to answer questions pertaining thereto attorney was properly adjudged in contempt. Code Civ.Proc. § 1881, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Communication".

4. Witnesses ⇐206

Where an attorney is called in for purpose of witnessing a conversation or a transaction between client and a third person, he may be compelled to testify both as to the conversation and also as to the transaction to which he was a witness. Code Civ.Proc. § 1881, subd. 2.

5. Witnesses ⇐198(1)

The rule of privilege under which an attorney is prohibited from disclosing information received by him in his professional relation with client should be rigidly enforced within its limitations. Code Civ.Proc. § 1881, subd. 2.

6. Witnesses ⇐8, 21

Attorney who appeared before local administrative committee of State Bar in support of his defense to charges stated in order to show cause issued by committee and who was voluntarily sworn and testified in his own behalf waived service of subpoena upon himself and was the equivalent of a "person under subpoena" within meaning of statute authorizing the chairman of committee to report fact that a person under subpoena is in contempt of committee to superior court. St.1939, p. 352, § 6051.

See Words and Phrases, Permanent Edition, for all other definitions of "Person under Subpœna".

7. Witnesses ⇐21

Local administrative committee of the State Bar had authority to originate contempt proceedings against attorney against whom disciplinary proceedings were pending and who after being sworn and testifying in his own behalf refused to answer certain questions. St.1939, p. 352, § 6051.

In Bank.

Alfred H. McKnew was adjudged guilty of contempt of court for refusal to comply with an order directing him to answer certain questions propounded by a local administrative committee of the State Bar, and he petitions for review.

Affirmed.

Walter H. Duane, of San Francisco, and Joseph P. Lacey, of Oakland, for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

CURTIS, Justice.

Petition for review of an order of the Superior Court of the State of California in and for the City and County of San Francisco, adjudging petitioner guilty of contempt of court and directing that he be held in custody until he shall answer certain questions propounded to him at a hearing pending before Local Administrative Committee No. 4 of The State Bar in and for said city and county, which questions were set out in full in said order of commitment. On being informed that petitioner intended to institute proceedings to review said order in the superior court, a further order was made admitting petitioner to bail.

By an order to show cause of date January 9, 1939, petitioner was directed to appear before a local administrative committee of The State Bar to show why he should not be disciplined for professional misconduct, to-wit:

"Violating your oath and duties as an attorney and counsellor at law within the meaning of Subdivision 2 of Section 287 of the Code of Civil Procedure of the State of California, as the same are prescribed by Sections 278 and 282 of the Code of Civil Procedure of the State of California, and the commission of acts involving moral turpitude and dishonesty within the meaning of Subdivision 5 of Section 287 of the Code of Civil Procedure of the State of California, and in particular as follows:

"On June 15, 1937, one John McNeil executed a guaranty whereby he guaranteed the repayment of credit up to the sum of One Hundred Fifty Thousand Dollars ($150,000.00) to be extended by Continental Can Company to Stockton Food Products Company.

"Shortly thereafter Peter E. Fagan, representing the Continental Can Company, discussed with you, who were acting as said John McNeil's attorney, the financial status of said John McNeil. During the course of the conversations upon said subject had between you and said Peter E. Fagan you stated to said Peter E. Fagan that you knew of your own knowledge that said John McNeil had money on deposit in a San Francisco bank in excess of One Million Five Hundred Thousand Dollars, ($1,500,000); that you had seen deposit books showing Seven Hundred Fifty Thousand Dollars ($750,000.00) to the credit of John McNeil; and that on one occasion you had seen said John McNeil make another deposit of Seven Hundred Fifty Thousand Dollars ($750,000.00).

"In addition to said oral statements you wrote to said Peter E. Fagan on July 9, 1937, stating to him that said John McNeil had at that time on deposit, under his control, a sum of money many times in excess of One Hundred Fifty Thousand Dollars ($150,000.00), which said deposit would be made available to said John McNeil at a date not later than September 2, 1937.

"All said statements, both oral and written, made by you to said Peter E. Fagan were untrue, were known by you to be so at the time they were made by you to said Peter E. Fagan, were made by you for the purpose of deceiving said Peter E. Fagan and to induce him to extend credit to said Stockton Food Products Company."

A hearing was had upon said order to show cause before the local administrative committee. At this hearing, Peter E. Fagan, petitioner Alfred H. McKnew and said John McNeil were sworn and examined. Peter E. Fagan testified that McNeil negotiated with him for the purpose of securing certain credit from the Continental Can Company, of which Fagan was credit manager, for the Stockton Food Products, Inc., in which McNeil was interested. Fagan stated in substance that McNeil assured him that he had on deposit in a San Francisco bank a sum in excess of $1,500,000, over which deposit he had control and authority of disbursement. Fagan further declared that McNeil informed him that if he, Fagan, would communicate with petitioner Alfred H. McKnew, who was attorney for said McNeil, McKnew could satisfy him as to the reliability of the statements made to Fagan by McNeil. McNeil at no time informed Fagan as to the name of the bank in which said deposit had been made nor did McNeil inform Fagan that McNeil would reveal the name of the bank or the number of the bank account.

McNeil testified before said committee. He made no denial of any statement made by Fagan. He further testified that McKnew accompanied him to the bank where the deposit had been made and that he, McNeil, wanted McKnew to verify the facts of said deposit, and that McKnew was to keep the name of the bank a secret and not reveal it to other persons. He also testified that he showed the bank books to McKnew on the occasion of their visit to the bank; that McKnew was with him in the bank

when a deposit was made in said bank account, and that he informed McKnew that he could see the figures and the numbers in the account but not the names, and that McNeil had covered up the names. McNeil was then asked by the examiner for the committee whether the deposit was in his own name, but refused to answer the question on the advice of his counsel on the ground that the answer might tend to incriminate or degrade him. McNeil was then asked to state the name of the bank in which the deposit was made. Again on the advice of his counsel he refused to answer the question on the same constitutional grounds.

Petitioner testified before the committee that it was understood between him and McNeil that he was to keep the name of the bank a secret. He corroborated McNeil in every respect regarding the visit that the two made to the bank on the occasion of said deposit. McKnew was then asked to state the name and the location of the bank. He refused to do so, stating that the information as to the name and location of the bank was given to him before they went to the bank by his client, McNeil, with the distinct understanding that he would not disclose such information to any person, and that such information was privileged and confidential as having been received by him while acting as an attorney for his client, McNeil.

After petitioner had refused to answer these questions when testifying as a witness before the local administrative committee, proceedings were taken before said respondent court which resulted in an order directing him to answer the questions. A further hearing was then had before the committee and petitioner again refused to comply with the direction of said last-named order. Whereupon petitioner was cited before respondent court to show cause why he should not be adjudged guilty of contempt of court for his refusal to comply with the order of the respondent court directing him to make answers to said questions.

At the hearing on said order to show cause, the respondent court made and issued its order of commitment in the matter and adjudged petitioner guilty of contempt of court for failure to answer the questions. It was to review that order that this proceeding was instituted.

We think it clearly appears from the facts set forth in the record before us in this proceeding that on the occasion of petitioner's visit to the bank, at which time McNeil showed to him the bank book with the entries of deposits therein, petitioner was the general attorney for McNeil in legal matters in which McNeil was interested. In the original order to show cause issued by the local administrative committee, he was referred to as such, and the evidence both of petitioner and McNeil tends to show that such a relation existed between the two men. However, the evidence does not show that the disclosures concerning which petitioner was examined and which he refused to divulge related to, grew out of, or were in any way connected with, any existing professional employment of petitioner by McNeil. Without conflict, the evidence shows that McNeil was endeavoring to establish the financial rating of his company, and to prove to Fagan that the company was entitled to the extension of credit which McNeil had applied for. McNeil related to Fagan the circumstance of his depositing the sum of $800,000 in the bank, over which sum he claimed to have control, and referred Fagan to petitioner, who, he said, was present at the time the deposit was made and would corroborate his (McNeil's) statement respecting the deposit. Evidently McNeil's purpose in having petitioner accompany him to the bank at the time in question was to have petitioner witness the transaction and thereby be in a position to corroborate McNeil's claim that such a deposit had actually been made should McNeil have occasion in the future to require a witness to the transaction. The only service rendered by petitioner to McNeil, and the only service McNeil asked petitioner to render, was to act as a witness for him in the matter of the deposit in the bank of said sum of money. This service did not require any particular legal knowledge on the part of the person who might be asked to render it. It could have been performed as well and as effectively by a layman as by a lawyer. Therefore the question before us in this proceeding is whether disclosures made by a client to an attorney in a transaction of the nature just described are privileged and are protected by the provisions of section 1881, subdivision 2, of the Code of Civil Procedure of this state, which reads as follows: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional em-

ployment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

[1] It will be noted from this section of the code that the only subjects concerning which an attorney without the consent of his client may not be examined are communications made by a client to his attorney, or advice given thereon by him "in the course of professional employment."

[2] Preliminarily it may be stated that the law is well established that the party who relies upon the rule that the evidence sought to be elicited falls within the protection of the code provision has the burden of proof as to such relationship. Carroll v. Sprague, 59 Cal. 655, 660; Sharon v. Sharon, 79 Cal. 633, 677, 22 P. 26, 131; Collette v. Sarrasin, 184 Cal. 283, 288, 193 P. 571.

In the early case of Satterlee v. Bliss, 36 Cal. 489, at page 509, we find the law relative to privileged communications between client and attorney stated as follows: "Knowledge acquired during the time he is attorney is not privileged, unless it is acquired in the course and for the purposes of his employment."

In Carroll v. Sprague, supra, an objection was sustained to a question asked an attorney by the name of Burt, who was called for the purpose of impeaching a witness named Eckert, who had testified for the defendant. In holding that the trial court erred in sustaining the objection, this court said (page 659 of 59 Cal.): "The communication which Eckert made to Burt in regard to the ownership of the property in dispute was privileged, if made for the purpose of obtaining the professional advice or aid of the latter in some matter relating to said property, and that would be so if Eckert supposed at the time that Burt was his attorney, although in fact he was not. But it was incumbent on the party who objected to the examination of Burt as to what Eckert had told him, to show that the communication was privileged, and unless it was made when Eckert was seeking professional counsel, advice, or aid in relation to this same property, it was not privileged. It was not enough that Burt or Burt & Gale had 'incidentally or otherwise done a great deal of business for Eckert.' The material question was whether any professional counsel, advice, or aid had been solicited or given in relation to this particular property. As to that we are left wholly in the dark."

In the case of Collette v. Sarrasin, supra, an attorney had drawn a will for his client, and was thereafter called as a witness to testify regarding the delivery of a deed by the client for whom he drew the will. An objection was sustained to questions asked the attorney respecting the delivery of the deed. On appeal the judgment was reversed, this court holding that said objection was erroneously sustained. On page 286 of 184 Cal., on page 572 of 193 P., the court discussed the question in the following language: "The fact that Mr. Wilson had drawn a will two years before and retained possession thereof did not establish the relation of attorney and client with reference to the transaction concerning the deed. The only conversation with reference to the drafting of the deed, so far as we know, was the conversation with the defendant. The record leaves us wholly in the dark as to whether anything occurred between the witness and the deceased at the time the latter signed the deed which would establish the relation of attorney and client. If Mr. Wilson acted as a mere scrivener in drawing the deed, and if the deceased asked no advice concerning it and solicited no service from the attorney other than the delivery of the deed, it is clear that communications in that connection were not privileged, for the reason that the relation of attorney and client in the matter inquired about is not established and did not exist."

The authorities in support of this ruling found in the cited case are from many of the leading courts of this country.

On page 288 of this same decision we find it aptly stated [193 P. 573]: "It is manifest that, if an attorney has drawn a will for a client and retained possession of it at the client's request, this fact alone would not constitute him an attorney as to every communication to him made after the execution of the will. The question as to whether or not he was acting in the capacity of an attorney and the communications to him were privileged must be determined with relation to the particular transaction involved in the inquiry, and the burden of showing such relationship is on the party objecting to the evidence."

[3] The particular transaction respecting which petitioner was interrogated was the deposit by McNeil of the money in the

bank, and the particular information which it was sought to be gained from the questions asked petitioner was the name and location of said bank. This transaction, as we have before stated, was not shown to be connected with any professional employment of petitioner by McNeil. The name and location of the bank were not secured by petitioner in the course of any such professional employment. The information therefore respecting this transaction, and specifically as to the name and location of the bank in which the deposit was made, was not, under the decisions cited above, privileged. The questions propounded to petitioner as to the name and location of the bank should have been answered by him, and in refusing to so answer after being ordered to do so by the respondent court, petitioner was properly adjudged guilty of contempt.

The evidence before us clearly shows that McNeil neither asked petitioner for any legal advice nor did petitioner purport to give McNeil any legal advice respecting the transaction here involved. Under such a state of facts the law appears to be that any information gained by the attorney is not privileged. Ong v. Cole, 46 Cal.App. 63, 73, 188 P. 812. In the cited case the attorney testified to certain instructions relating to the delivery of a deed which the attorney had prepared for his client, which instructions were given him at the time the deed was prepared. It was held that the testimony of the attorney was properly admitted and in so holding this court said (page 73 of 46 Cal.App., page 816 of 188 P.):

"The testimony of Mr. Adams shows that Mrs. Ong communicated to him no fact for the purpose of getting any legal advice, and he gave her none. She stated to him that she had decided to deed the property at that time to the defendant, and asked him to prepare the deed. * * * As said in Hatton v. Robinson, 14 Pick., Mass., 416, 25 Am.Dec. 415: 'Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law and none was given.'

"It does not appear that any statement was made by Mrs. Ong to Mr. Adams for the purpose of getting any legal advice from him, and under the circumstances we hold that his testimony, as it appears in the transcript, does not come within the rule of privilege. It was not a case: '(1) Where legal advice of any kind is sought, (2) from a professional legal adviser as such.' (Wigmore on Evidence, sec. 2292)—and it was not error to permit him to give the evidence."

[4] There are decisions to the effect that where an attorney is called in for the purpose of witnessing a conversation, or a transaction between his client and a third person, he may be compelled to testify both as to the conversation and also as to the transaction to which he was a witness. The case of Mitchell v. Towne, 31 Cal.App. 2d 259, 87 P.2d 908, is in many respects such a case. There the court on page 265 of 31 Cal.App.2d, on page 912 of 87 P.2d discusses the question as follows: "Appellant further contends that the trial court erred in admitting in evidence a letter addressed to Lawrence Livingston and signed by McClure; and in permitting the witness Wagner, an attorney in the employ of Livingston, to testify concerning certain conversations between Livingston and Wagner. The foundation of this contention is that said communications were privileged communications between an attorney and his client. Code Civ.Proc. sec. 1881, subd. 2. The record shows that Wagner was called into Livingston's office for the purpose of witnessing the conversation and not in his professional capacity. It is true that the privilege extends to communications made in the presence of an attorney's clerk, but this is true only where the clerk is present in that capacity. Where, as here, he is present for the express purpose of witnessing a conversation and the client acquiesces in his presence as such, the case does not differ from one where statements are made in the presence of a third party who is not an attorney. The letter, to which reference was made above, was dictated by Livingston in the presence of Wagner and was then signed by McClure. Under these circumstances the privilege was waived both as to the letter and conversation. Communications between attorney and client are privileged only when they are intended by the client to be confidential (Mission Film Corp. v. Chadwick Pictures Corp., 207 Cal. 386, 278 P. 855), and if they are made in the presence of a third party, who is present as a witness, it cannot be said that they were intended to be confidential. Moreover, Code of Civil Procedure, section 1881, subdivision 2, expressly relates only

to communications made to an attorney 'in the course of professional employment.'"

The leading case of Coveney v. Tannahill, 1 Hill, N.Y., 33, 37 Am.Dec. 287, contains an interesting discussion by the Supreme Court of New York on numerous phases of privileged communications between attorney and client. The question as to whether an attorney who is called in to witness a business transaction between his client and a third person, may be compelled to testify over the objections of his client as to what took place at said meeting is discussed in the following manner (1 Hill, N.Y., page 36, 37 Am.Dec. page 290): "I will not undertake to say how far the distinction between the communications and the acts of the client may extend, but there can be no good reason for excluding the attorney when he has witnessed a transaction in the way of business between his client and a third person; as the adjustment of an account, the execution of a deed, the payment of a sum of money, the giving up of securities, or the like. It is not necessary that a man should have an attorney to witness his dealings with third persons; and if one is called in, I can see no reason why he, like any other person who was present, should not be sworn to prove what was done."

[5] Petitioner has not attempted to refute the force of any of the authorities cited above or to show their inapplicability to the present case against him. He has cited numerous authorities in support of the public policy of protecting communications between attorney and client, but he has failed to show that he has brought himself within the protection of that policy. We are in thorough accord with the rule of privilege under which an attorney is prohibited from disclosing information received by him in his professional relations with his client, and believe it should be rigidly enforced. But this rule has its limitations, as indicated by the provisions of section 1881, subdivsion 2 of the Code of Civil Procedure, in confining its scope to communications made by the client [illegible] advice given thereon by the attorney "in the course of professional employment." Petitioner has failed to show that the information which he was asked to divulge was acquired by him in the course of his professional employment by his client.

[6, 7] Finally petitioner contends that the Local Administrative Committee of The State Bar was without any authority to originate contempt proceedings against him. Section 6051 of the Business and Professions Code, St.1939, p. 352, makes it the duty of the chairman of a local administrative committee which has a disciplinary proceeding pending before it, to "report the fact that a *person under subpoena* is in contempt of the * * * committee to the superior court in and for the county in which the proceeding * * * is being conducted and thereupon the court shall issue an attachment * * * directed to the sheriff * * * commanding the sheriff to attach such person and forthwith bring him before the court." (Emphasis ours.) It does not appear that petitioner was under subpoena when he was testifying before said committee and refused to answer the questions set out in the order of commitment. On the other hand, he appeared before the committee in response to the order to show cause issued by it and, in support of his defense to the charges stated in the order to show cause, he was voluntarily sworn as a witness in said proceeding, and testified in his own behalf. It was while he was such a witness and was so testifying that he refused to answer said questions. By appearing before the committee and voluntarily testifying in the proceeding then pending, petitioner thereby waived the service of a subpoena upon himself. He was then in precisely the same position, in respect to his duty to testify and answer all pertinent and proper questions asked of him, as if his attendance had been compelled by the issuance and service of a subpoena upon him "to appear and give testimony before * * * the committee." No authority is cited by petitioner in support of his final contention and in our opinion it is without merit.

For reasons stated herein, the order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

23 Cal.2d 1

McCORDIC v. CRAWFORD et al.

L. A. 18613.

Supreme Court of California.

Oct. 6, 1943.

1. New trial ⇐116(2)

Under statute limiting the time for granting a new trial, it is left to the prevailing party to take the initiative in insuring the finality of the judgment by serving upon his opponent written notice of entry of judgment, and, when he does so, the 60-day period within which a motion for new trial may be made and granted begins to run. Code Civ.Proc. § 660.

2. New trial ⇐116(2)

Under statute relating to notices of intention to move for new trial, there is no restriction on the right to move for new trial until the date of service of a written notice of entry of judgment. Code Civ. Proc. § 659.

3. New trial ⇐116(2)

Under statutes limiting the time for granting new trial and relating to notices of intention to move for new trial, a notice of entry of judgment in which it appears that judgment was entered earlier than it actually was entered does not make the rights of the prevailing party subject indefinitely to litigation by grant of new trial to losing party. Code Civ.Proc. §§ 659, 660.

4. New trial ⇐116(2)

Under statute limiting trial court's jurisdiction to grant a new trial to a 60-day period after service of written notice of entry of judgment, error in an unessential detail does not defeat the purpose of the notice, but the notice must identify the judgment and advise the opposing party that it has been entered. Code Civ.Proc. § 660.

5. Constitutional law ⇐70(1)

When the Legislature fixes a 60-day period after service of notice of entry of judgment during which the trial court has jurisdiction to grant a new trial, it is not for the Supreme Court to override the limitation outright because an otherwise correct notice falls short of a perfection not prescribed by statute. Code Civ. Proc. § 660.

6. New trial ⇐116(2)

A notice of entry of judgment, which referred accurately to the book and page where judgment was entered but erroneously stated that the judgment had been entered on the day previous to the day on which judgment was entered, started running the 60-day period during which trial court had jurisdiction to grant a new trial. Code Civ.Proc. § 660.

7. Theaters and shows ⇐6

A proprietor or an operator of a place of amusement owes legal duty to exercise due care to protect from injury individuals coming on his premises by his invitation.

8. Theaters and shows ⇐6

A proprietor or an operator of a place of amusement must see that his premises are in a reasonably safe condition for use of persons coming thereon by his invitation.

9. Theaters and shows ⇐6

Failure of proprietor or operator of a place of amusement to exercise reasonably careful supervision of appliances or methods of operating concessions under his management constitutes a breach of his duty to exercise due care to protect from injury persons coming onto his premises by his invitation.

10. Master and servant ⇐320, 321

The proprietor or the operator of a place of amusement is liable for injuries received on his premises by invited member of public as result of an independent contractor's or concessionaire's negligence when such proprietor's or operator's failure to exercise reasonably careful supervision over appliances or methods of operating concessions under his management is shown to have proximately resulted in such injuries.

11. Master and servant ⇐315

The owner, the occupier, or the possessor of premises on which amusement is being operated, as well as proprietor or operator thereof, owes duty to exercise care for protection of patrons from injury and is responsible for independent concessionaires' negligence resulting in injuries to patrons.

12. Master and servant ⇐315

That there was no negligence on part of defendant and that negligence, if any, leading to plaintiff's injuries while he was riding a "Loopa" was attributable to defendant's concessionaire operating "Loopa", did not relieve defendant from liability on ground that defendant did not adver-

tise the amusement area on which the "Loopa" was operated, where defendant as proprietor of the area shared the proceeds of the concession maintained thereon for the public.

13. Master and servant ⇐330(3)

Evidence warranted finding that defendant would have discovered defect in strap of "Loopa" operated by its concessionaire, had it exercised reasonable care to inspect it and that its failure to do so was the proximate cause of injury received by invitee when stitching in strap came apart while invitee was riding device, entitling invitee to recover for his resulting injuries.

14. Master and servant ⇐329

Allegation that defendant was the proprietor of an amusement pier and negligently equipped, constructed, and maintained a device on its premises, was sufficient to admit proof that defendant maintained the pier, received 25 per cent. of the gross receipts of the concession for the device, and failed to inspect it to test its safety.

15. Pleading ⇐428(7)

Where testimony was given during the trial without objection, defendant could not complain of insufficiency of pleadings.

EDMONDS, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Robert Lees McCordic against Samuel M. Crawford and others for injuries received by plaintiff when a strap on an amusement device broke. The action was abandoned as to defendant Mardi Gras Association and verdict was directed in favor of defendant Russell Lasher. From a judgment for plaintiff and an order denying its motion for judgment notwithstanding the verdict, defendant Abbot-Kinney Company appeals.

Affirmed.

Prior opinion 130 P.2d 464.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, and Reginald I. Bauder, of Los Angeles, for respondent.

TRAYNOR, Justice.

Venice Pier is leased from the city of Venice by defendant Abbot-Kinney Company and is maintained and repaired by the latter. The carnival attractions on the pier are operated by concessionaires under contract with Abbott-Kinney Company. Defendant Samuel Crawford was authorized to operate a "Loopa" on the pier, under an oral agreement that the company receive 25 per cent of the gross receipts. The Loopa was somewhat like an old-fashioned swing, with a board suspended by steel rods from an axle some fifteen or twenty feet above the ground. It was so constructed that riders standing on the board could cause the swing to make a complete circle around the axle. The feet of the riders were strapped to the board and their shoulders to the steel rods. A sign by the device stated: "They are safe. Riders are securely fastened in the Loopas." There was evidence that an expert rider would place no strain on the straps, but that an inexperienced rider might place a strain of up to 360 pounds on each strap. The straps were made of leather folded over and stitched at various places. Those in use when plaintiff was injured had been stitched shortly before that time by a shoe repairer. Crawford had tested some of the straps by fastening them to a solid support and jumping on them, but he did not test the straps placed on the swing where the accident occurred.

On August 10, 1940, the stitching in one of the shoulder straps came apart while plaintiff, Robert McCordic, was riding the Loopa. He fell from the machine, and his head struck violently against the ground. He was hospitalized for more than three months. He commenced this action in May, 1941 against defendants Crawford, Abbot-Kinney Company, Venice Mardi Gras Association, and Russell Lasher, who was in charge of the Loopa when the accident occurred. During the trial the action was abandoned as to the Mardi Gras Association, and a verdict was directed in favor of defendant Lasher. A verdict was returned in favor of plaintiff against the other defendants, and on January 14, 1942, judgment was entered for plaintiff. On January 16th, a written notice of entry of judgment was served on defendants. It referred accurately to the book and page where the judgment was entered but erroneously stated that the judgment had been

entered on January 13, 1942. In due time a motion for a new trial was made, and on March 19, 1943, more than 60 days after the service of the notice of entry of judgment, a new trial was granted. If the notice of entry of judgment was valid, the motion for new trial was automatically denied upon the expiration of the 60-day period. The court was thereafter without jurisdiction to enter a contrary order, and plaintiff had a right enforceable by mandamus to have execution issued upon the judgment. Kahn v. Smith, Cal.Sup., 142 P.2d 13; Payne v. Hunt, 214 Cal. 605, 7 P.2d 302; Kraft v. Lampton, 13 Cal.App. 2d 596, 57 P.2d 171; Holquin v. Allison, 97 Cal.App. 126, 274 P. 1037. To protect itself against this possibility, defendant Abbot-Kinney Company appeals from the judgment for plaintiff and from the order denying its motion for judgment in its favor notwithstanding the verdict. It is contended that the notice of entry of judgment was invalid and did not start the 60-day period running because it contained an inaccurate date of entry of the judgment.

The necessity of setting limits to the time for granting a new trial is recognized in section 660 of the Code of Civil Procedure, which provides: "Except as otherwise provided in section 12a of this code, the power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such motion is not determined within said period of sixty (60) days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court."

[1-6] It is thus left to the prevailing party to take the initiative in insuring the finality of the judgment by serving upon the opposing party written notice of entry of the judgment. When he does so, the time within which a motion for new trial may be made (Labarthe v. McRae, 35 Cal. App.2d 734, 97 P.2d 251) and granted (Gross v. Hazeltine, 206 Cal. 130, 273 P. 550) begins to run. A notice of intention to move for new trial must be filed "within ten (10) days after receiving written notice of the entry of the judgment." Code Civ. Proc. section 659. Until the date of service there is no restriction on the right to move for a new trial. Thus the date of service of notice of entry of the judgment marks the starting point in this regard as well as for the sixty-day period in which the court retains power to grant a motion for new trial. Since the date of entry of the judgment itself is of no significance in either case, a notice of entry of judgment in which it appears that the judgment was entered earlier than it actually was cannot serve to make the rights of the prevailing party subject indefinitely to litigation. Section 660 does not require that the date of entry of the judgment be even mentioned; it does not in fact prescribe any set form of notice. See 20 Cal.Jur. 176; Waddingham v. Tubbs, 95 Cal. 249, 30 P. 527; Santa Ana, etc., Co. v. Ernest Rurup Estate, 23 Cal.App.2d 445, 73 P.2d 908. Thus in Waddingham v. Tubbs, supra, a notice of entry of judgment was held sufficient even though it referred merely to the judgment heretofore entered. An error in the date is not significant when the date itself is not. An error in an unessential detail cannot defeat the very purpose of the notice authorized by section 660. What is essential is that the notice identify the judgment and advise the opposing party that it has been entered. The omission in the code itself of any particularization of the form of notice is in striking contradiction to the insistence upon a meticulous correctness of the unessential that would vitiate the provision for a sixty-day period in which the court can pass on a motion for new trial. When the Legislature has fixed this period at sixty days it is not for this court to fix it at sixty-one or any other number of days or to override the limitation outright because an otherwise correct notice fell short of a perfection not prescribed by the section. Lauritzen v. H. L. Judell & Co., 109 Cal.App. 168, 292 P. 536, which assumed that the law was otherwise, is disapproved. In Carpentier v. Thurston, 30 Cal. 123, relied on in the Lauritzen case, the court was concerned with a statute requiring that notice of intention to move for a new trial be filed within ten days after receipt of notice that judgment had been rendered. Notice was given that the judgment and findings had been signed. The court held that these acts did not amount to the rendering of the judgment, and that notice of other acts did not start the time running in which to move for new trial. There is nothing to indicate that because the notice was held defective on this ground it would have been held defective had it merely contained an inaccurate date of entry of judgment.

The unimportance of such an inaccuracy becomes apparent in the light of the Legislature's concern to limit the time within which the court has power to grant a new trial. Formerly the requirement that the motion for new trial be made within 10 days after receipt of notice of entry of judgment was not accompanied by any limitation on the time in which the court could dispose of the motion. Code Civ.Proc. (1901) sec. 659, 660. In 1915, however, section 659 was amended to provide that the time for making the motion could not be extended by order or stipulation. Section 660 was amended to limit the time in which the motion could be granted to three months. Stats.1915, p. 201, 202. In 1923 this period was reduced to two months, Stats.1923, p. 234 and in 1929 fixed at 60 days. Stats. 1929, p. 842.

[7-11] Defendant contends that there is no evidence of negligence on its part and that if any negligence led to the accident it is attributable to Crawford, the concessionaire. The law is well settled in this state, however, "that a proprietor, or one who operates a place of amusement, owes a legal duty to exercise due care to protect from injury individuals who come upon his premises by his express or implied invitation. He must see that such premises are in a reasonably safe condition. It constitutes a breach of this duty for him to fail to exercise reasonably careful supervision of the appliances or methods of operating concessions under his management. The proprietor or operator of such a place of amusement is liable to an invited member of the public for injuries received as the result of negligence on the part of an independent contractor or concessionaire when it is shown that the failure to exercise such supervision proximately results in injuries to a patron. The duty of exercising care, and the responsibility for the negligence of independent concessionaires, are extended by law to the owner, the occupier or the one in possession of the premises on which the amusement is being operated." Basye v. Craft's Golden State Shows, 43 Cal.App.2d 782, 788, 111 P.2d 746, 750; accord: Szasz v. Joyland Co., 84 Cal.App. 259, 257 P. 871; Johnstone v. Panama Pac. I. E. Co., 187 Cal. 323, 202 P. 34; Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78; Whyte v. Idora Park Co., 29 Cal.App. 342, 155 P. 1018; Engstrom v. Huntley, 345 Pa. 10, 26 A.2d 461; Hollis v. Kansas City, etc., Ass'n, 205 Mo. 508, 103 S.W. 32, 14 L.R.A.,N.S., 284; Stickel v. Riverview Sharpshooters Park Co., 250 Ill. 452, 95 N.E. 445, 34 L.R.A.,N.S., 659; Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 P. 941, 42 L.R.A.,N.S., 1070; Restatement Torts, sec. 344, p. 944; 22 A.L.R. 624; 29 A.L.R. 31, 736; 44 A.L.R. 204; 53 A.L.R. 855; 61 A.L.R. 1289; 98 A.L.R. 557.

[12] Defendant attempts to distinguish these cases on the ground that it did not advertise the amusement area. It is sufficient, however, that defendant, as the proprietor of Venice Pier, sharing in the proceeds of the amusement concessions, maintained the Pier as a place of amusement open to the public. Ibid.

[13] The evidence shows that defendant did not exercise a reasonably careful supervision of the concession in question. It failed to make any inspection of the device, to test its safety or even to question Crawford concerning its safety. The contention cannot be sustained that an inspection of the defective strap would not have revealed the defect, for the jury could reasonably conclude from the evidence that the defect would have been revealed by the very test that Crawford made of the other straps. The evidence shows that the defective strap was not strong enough to withstand a load of 160 pounds, a weakness that would have been revealed even by Crawford's simple test, which subjected the other straps to a much greater strain. The jury was clearly warranted in concluding that the defendant would have discovered the defect in the strap had it exercised reasonable care to inspect the Loopa and that its failure to do so was the proximate cause of plaintiff's injury.

[14, 15] Defendant contends that the pleadings do not charge the defendant with failure to exercise reasonable supervision of the device in question. The allegations of the second amended complaint, however, that defendant was the proprietor of the pier and negligently equipped, constructed, and maintained the device on its premises were sufficient to admit proof that defendant maintained the pier, received 25 per cent of the gross proceeds of the concession in question, and failed to inspect the device to test its safety. Moreover, testimony as to all these facts was given during the trial without objection.

The judgment and order appealed from are affirmed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

By the decision of a majority of this court, the appellant is deprived of a remedy peculiarly within the province of the trial judge to grant, which it had sought with due diligence in proper form and which the trial judge had decided should be given. In arriving at this conclusion, the majority opinion emphasizes but one of the two dates which start the running of the 60-day jurisdictional period within which the trial court is empowered to grant a motion for a new trial. The filing of the notice of intention to move therefor also starts the running of that period, and in the present case, as in Kahn v. Smith, Cal.Sup., 142 P.2d 13, the defendants filed such notice well within ten days from the service of the defective entry of judgment. See Code Civ.Proc. sec. 659. Certainly where each of the litigants serves and files a notice which limits the authority of the court to act, the court should hold that, as between the two, one incorrect in form is ineffective and the other authorizes judicial action which would be proper except for the conflict between it and the defective notice. Furthermore, the decision of the majority fails to apply well-accepted rules governing the scope of collateral attack upon appealable orders. See discussion in my dissent in Kahn v. Smith, 142 P.2d 13.

The limitations upon the power of the trial court to pass upon a motion for a new trial must be considered in connection with the purpose and policy of that procedure. Although it is primarily designed to secure a re-examination of the issues of fact, the motion also serves to bring to the notice of the court errors which may have been committed in the course of the trial (see grounds for new trial, Code Civ.Proc., sec. 657) and provides an opportunity for the correction of such errors without subjecting the parties to the expense and inconvenience of an appeal. Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138; and see cases cited in 39 Am.Jur., New Trial, sec. 17, pp. 42, 43. In establishing this procedure, the Legislature has recognized that the interests of justice may require an independent reweighing of the evidence by the trial judge after rendition of the verdict by the jury, and this court has, upon occasions, criticized the reluctance of trial judges generally to exercise their power of granting a motion for a new trial for insufficiency of the evidence and their inclination to acquiesce in a verdict which does not constitute the just conclusion to be drawn from the evidence. Green v. Soule, 145 Cal. 96, 102, 78 P.2d 337. In case after case it has been emphasized that the trial judge, unlike an appellate court, has had the same opportunity as the jury to observe the manner of the witnesses and to pass upon their credibility; as a consequence he cannot rely upon a conflict in the evidence to uphold the verdict but must exercise his duty to see that it is not clearly against the weight of the evidence. Rosenberg v. Geo. A. Moore & Co., 194 Cal. 392, 396, 229 P. 34; Greene v. Soule, supra, 145 Cal. at pages 102, 103, 78 P. 337; Bates v. Howard, 105 Cal. 173, 178, 38 P. 715; Dickey v. Davis, 39 Cal. 565, 569; Gardner v. Marshall, 56 Cal.App.2d 62, 66, 132 P.2d 833; Lasch v. Edgar, 46 Cal.App.2d 726, 730, 116 P.2d 949; Owings v. Gatchell, 32 Cal.App.2d 482, 487, 488, 90 P.2d 368; and see Tweedale v. Barnett, 172 Cal. 271, 274, 275, 156 P. 483; Empire Investment Co. v. Mort, 169 Cal. 732, 736, 147 P. 960; Gordon v. Roberts, 162 Cal. 506, 508, 509, 123 P. 288; Keogh v. Maulding, 52 Cal.App.2d 17, 19, 125 P.2d 858. For he is in a position to determine between the apparent and the real and to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to comprehend. Bates v. Howard, supra, 105 Cal. at page 178, 38 P. 715. The parties are entitled to the verdict of the jury in the first instance, but upon a motion for a new trial they are entitled to the independent determination of the judge as to whether such verdict is supported by the evidence. Green v. Soule, supra.

Undoubtedly these broad purposes have led the appellate courts literally to construe the limitations upon the exercise of this power. Thus this court has held that so long as the court "passes" upon the motion within the 60-day period, it has lawfully exercised its jurisdiction to determine the motion, and the signing and filing of the formal order or findings subsequent to the last day of that period do not affect the validity of its act. Spier v. Lang, supra, 4 Cal.2d at page 715, 53 P.2d 138; Holland v. Superior Court, 121 Cal.App. 523, 531, 9 P.2d 531. And although section 661 of the Code of Civil Procedure states that the motion, if heard by a judge other than the one who presided at the trial, "shall be ar-

gued orally or shall be submitted without oral argument * * * not later than ten (10) days before the expiration of the time within which the court has power to pass on the same," the court has construed the requirement as directory and not jurisdictional and upon that theory affirmed an order granting a motion for a new trial although the motion was submitted for decision but three days before the expiration of the 60-day period. Pappadatos v. Superior Court, 209 Cal. 334, 287 P. 342.

Under section 660 of the Code of Civil Procedure either of two dates may start the running of the 60-day jurisdictional period within which the trial court has the power to pass upon a motion for a new trial. The party in whose favor the judgment was rendered may fix the time by serving upon his adversary written notice of the entry of judgment. On the other hand, if such notice has not theretofore been served, the jurisdictional period commences upon the filing of the notice of intention to move for a new trial. The statute also provides that if the motion is not determined within the specified time, "the effect shall be a denial of the motion without further order of the court."

But in the present action, as in Kahn v. Smith, Cal.Sup., 142 P.2d 13 and in Lauritzen v. H. L. Judell & Co., 109 Cal.App. 168, 292 P. 536, the court granted the motion for a new trial within sixty days from the filing of the notice of intention to move therefor, hence it was acting within its jurisdiction if the notice of entry of judgment was ineffective. Three facts are particularly relevant in considering the rights of the parties under these circumstances. In the first place, the delay in passing upon the motion for a new trial is in no way attributable to the appellant, who acted promptly, filing its notice of intention on the seventh day following the entry of judgment. Secondly, the action of the trial judge in granting the motion shows that he intended to determine it by a ruling and not to have it denied by the lapse of time specified in the statute. And, finally, the respondent did not challenge the merits of the ruling by an appeal from the order. Giving effect to the purpose of the motion and the desirability of promoting the prompt administration of justice by allowing trial judges to set aside determinations not justified by the weight of the evidence and to correct errors which would otherwise be the basis of expensive and time-consuming appeals, any departure from strict regularity in the notice of entry of judgment should render it ineffective as a limitation upon the exercise of this power. Contrary to the respondent's assertion, the cases of Lauritzen v. H. L. Judell & Co., supra, and Weeks v. Coe, 36 App.Div. 339, 55 N.Y.S. 263, were not decided upon the ground that the error in the notice misled the opposing party to his detriment, but upon the doctrine just stated.

Applying this rule of construction to the facts of the present case, the notice of entry of judgment set forth an erroneous date of entry. As a consequence the notice did not limit the power of the court to pass upon the motion for a new trial and, as the court granted the motion within sixty days from the filing of the appellant's notice of intention to move for a new trial, it was acting within the jurisdictional period. And it may not be said that Abbot-Kinney Company by appealing from the judgment has waived its right to question the sufficiency of the notice, particularly since it has consistently urged in its briefs that the order granting the new trial is valid and that the appeal is taken only to safeguard its rights.

Nor is the appellant now precluded from asserting that the service of the notice of entry of judgment did not fix the jurisdictional period for a ruling on a motion for new trial by failing to appeal from the order denying its motion to strike the notice of entry of judgment. For, assuming that such an order is appealable, the denial was not necessarily a ruling determining the effect of the notice. The court may have agreed with the argument of counsel that the defect prevented the service of the notice from limiting the power of the court to pass upon the motion for new trial, but, in the exercise of its discretion, decided that the notice showing the error should remain a part of the record upon which it acted in ruling upon the motion for a new trial. Also, if the error rendered the notice ineffective no real object would be served by striking it from the files. Furthermore, the fact that the notice might be ineffective for one purpose would not necessarily mean that it is ineffective for other purposes.

In relying upon the cases of Waddingham v. Tubbs, 95 Cal. 249, 30 P. 527, and Santa Ana, etc., Co. v. Ernest Rurup Estate, 23 Cal.App.2d 445, 73 P.2d 908, the majority opinion fails to recognize the rule that a stronger showing is required to justify in-

terference with an order granting a new trial than with one which has been denied. See Abercrombie v. Thomsen, 59 Cal.App. 2d 331, 337, 138 P.2d 701. Thus Waddingham v. Tubbs, supra, is clearly distinguishable from the present action, for there the court not only denied the motion for a new trial but also held that there was no error in the facts stated in the notice of entry of judgment. And in Santa Ana, etc., Co. v. Ernest Rurup Estate, supra, another case where the motion for new trial was denied, the notice of entry of judgment was in the customary form and correctly contained all of the necessary data.

For these reasons, I believe, as no appeal was taken from the order granting a new trial, the judgment was vacated and the appeal should be dismissed.

SHENK and CURTIS, JJ., concurred.



23 Cal.2d 12

KAHN et al. v. SMITH, County Clerk.
L. A. 18341.

Supreme Court of California.
Oct. 6, 1943.

As Amended on Denial of Rehearing
Nov. 4, 1943.

1. Mandamus ⇐4(3)

Mandamus was an appropriate remedy to compel a county clerk to issue a writ of execution, despite the availability of appeal from invalid order granting new trial to defendants, since an appeal was not an adequate remedy.

2. Mandamus ⇐4(1)

While mandamus does not lie if there is another adequate remedy, where an appeal would be inadequate, failure to appeal does not render the trial court's determination res judicata.

3. New trial ⇐116(2)

A notice of entry of judgment, misstating the date on which the judgment was entered, started running the 60-day period during which the trial court had jurisdiction to grant new trial, and hence, where order purporting to grant new trial was entered more than 60 days after service of the notice, order was invalid and plaintiffs were entitled to execution on the judgment. Code Civ.Proc. § 660.

4. Time ⇐11

Fractions of days are disregarded if they do not affect the substantial rights of a party.

5. Judgment ⇐276

Where record showed only that service of notice of entry of judgment took place on the day on which judgment was entered and did not disclose the hour at which either event took place, notice of entry of judgment was shown not to have been served prematurely, where the substantial rights of the parties were not affected. Code Civ.Proc. § 660.

6. New trial ⇐116(2)

In determining whether order granting new trial was valid as having been entered within 60 days after service by mail of notice of entry of judgment, statute allowing an additional day to act after service by mail was inapplicable, since the trial court was not an "adverse party" within the statute. Code Civ.Proc. §§ 660, 1013.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Party".

7. Mandamus ⇐190

Successful petitioners' request for attorney's fees in mandamus action was denied in absence of express statutory authorization therefor. Code Civ.Proc. § 1021.

EDMONDS, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Original mandamus proceeding by Fred J. Kahn and another against B. J. Smith to compel respondent as County Clerk to issue a writ of execution.

Writ granted.

Laurence B. Martin, of Los Angeles, for petitioners.

Joel E. Ogle, Co. Counsel, and Forgy, Reinhaus & Forgy, all of Santa Ana, for respondent.

TRAYNOR, Justice.

On August 25, 1939, Fred J. Kahn and his wife, Alice J. Kahn, brought suit against the San Diego Orange Growers and Glann Feldner. On August 22, 1940, Mr. and Mrs. Kahn served notice on the defendants in that action that the judgment in their favor had been entered on the preceding day. They were in error, the judgment actually having been entered on the 22nd. Their error was the result of misinformation in a letter to them from the county clerk. On August 30th, the defendants served and filed a notice of intention to move for a new trial. The motion was granted on October 22nd, more than sixty days from the date on which the notice of entry of judgment was served. Mr. and Mrs. Kahn filed a notice of appeal from the order granting the new trial, but immediately thereafter filed a withdrawal of appeal. Subsequently they sought a writ of execution from the county clerk, which was refused. They now petition for a writ of mandamus to compel the clerk to issue a writ of execution.

[1-3] If the order granting a new trial was not valid, the clerk should have issued the writ of execution, and mandamus is the appropriate remedy to enforce the performance of that duty despite the availability of an appeal. Payne v. Hunt, 214 Cal. 605, 7 P.2d 302; Kraft v. Lampton, 13 Cal.App.2d 596, 57 P.8d 171; Holquin v. Allison, 97 Cal.App. 126, 274 P. 1037; see 16 Cal.Jur. 837.

While mandamus does not lie if there is another adequate remedy, an appeal is not regarded as adequate in this type of case. Payne v. Hunt, supra; Kraft v. Lampton, supra; Holquin v. Allison, supra; Christ v. Superior Court, 211 Cal. 593, 296 P. 612; Middlecoff v. Superior Court, 220 Cal. 410, 31 P.2d 200; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; Harrison v. Superior Court, 3 Cal.App.2d 469, 39 P.2d 825. Mandamus is available as an alternative remedy in cases where an appeal would be inadequate, and the failure to appeal cannot therefore render the trial court's determination res judicata. Payne v. Hunt, supra; Middlecoff v. Superior Court, supra; Conklin v. Superior Court, 1 Cal.2d 601, 36 P.2d 386; Kraft v. Lampton, supra; Holquin v. Allison, supra; Moch v. Superior Court, 39 Cal.App. 471, 179 P. 440; Harrison v. Superior Court, supra. The contention that the service of the notice did not start the sixty-day period running because the notice of entry of judgment misstated the date on which judgment was entered must be rejected for the reasons given in McCordic v. Crawford, Cal.Sup., 142 P.2d 7.

[4, 5] Respondent contends that there has been no showing that the notice of entry of judgment was not served prematurely. The record shows only that service took place on the day on which judgment was entered and does not disclose the hour at which either event took place. It is ordinarily impossible, however, to prove the hour at which an act such as entry of judgment occurred, for records are not kept in such minute detail. Cosgriff v. Board of Election Commissioners, 151 Cal. 407, 409, 91 P. 98. Fractions of days are disregarded if they do not affect the substantial rights of a party. Cosgriff v. Board of Election Commissioners, supra; Bellmer v. Blessington, 136 Cal. 3, 68 P. 111; Scoville v. Anderson, 131 Cal. 590, 63 P. 1013; Gray v. Maier & Zobelein Brewery, 2 Cal.App. 653, 658, 84 P. 280. In this case they do not, for the time limit for making a motion for new trial and the time limit for the court to pass on such motion starts from the day and not the hour of service.

[6] Respondent invokes section 1013 of the Code of Civil Procedure allowing an additional day after service by mail "* * * if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party * * *". This section is inapplicable here, for the court is not an adverse party.

[7] Petitioner's request for attorney's fees in this action must be denied, under the rule that attorney's fees are not ordinarily awarded to the successful party without express statutory authorization. Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847; see Code Civ.Proc., sec. 1021; 7 Cal.Jur. 286.

Let the peremptory writ of mandamus issue as prayed.

GIBSON, C. J., and CARTER, J., and PETERS, Justice pro tem., concurred.

EDMONDS, Justice (dissenting).

To me, the conclusion reached by my associates is directly contrary to the fundamental rule that where the trial court has affirmatively acted upon a motion for a new trial, the limitations upon the exercise of such jurisdiction will be construed,

wherever possible, so as to sustain the action as a proper exercise of its jurisdiction. Spier v. Lang, 4 Cal.2d 711, 714, 715, 53 P.2d 138; Pappadatos v. Superior Court, 209 Cal. 334, 287 P. 342; Holland v. Superior Court, 121 Cal.App. 523, 531, 9 P.2d 531. Certainly the settlement of disputed issues in the trial court is to be favored, and an order determining that justice requires another hearing of them should not be set aside unless it may be said that there has been an abuse of discretion or the successful litigant, by a strict compliance with the statute, has limited the authority to act.

The sixty-day jurisdictional period provided by section 660 of the Code of Civil Procedure, within which the trial court has the power to pass upon a motion for new trial, is set in operation either by the service of written notice of the entry of judgment, or, if such notice has not theretofore been served, by the filing of the notice of intention to move for a new trial. In my opinion, for the reasons stated by me in McCordic v. Crawford, 142 P.2d 7, when the trial court has granted a motion for a new trial within sixty days from the filing of the notice of intention so to do, the reviewing court should require that a notice of entry of judgment, effective to start the earlier running of the jurisdictional period, be completely accurate on its face.

In, addition, the conclusion reached in the majority opinion is contrary to accepted principles governing collateral attack upon appealable orders. Implicit in the order granting the new trial is the trial court's determination that the notice of entry of judgment was ineffective to limit its jurisdiction to pass upon the motion. Even though, under the views of the majority of this court, that decision was erroneous, it became final when the petitioner failed to appeal from it and is now res judicata. See Gore v. Bingaman, 20 Cal. 2d 118, 121, 124 P.2d 17; Clary v. Hoagland, 6 Cal. 685, 688. The determination, although erroneous, is not subject to collateral attack.

But, in any event, the petitioners are not entitled to the remedy they now seek to invoke. As a general rule, the writ of mandate issues only "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ. Proc. § 1086; Irvine v. Gibson, 19 Cal.2d 14, 118 P.2d 812; Dobyns v. Cheshire, 9 Cal.App.2d 77, 48 P.2d 743; Hitch v. Superior Court, 2 Cal.App.2d 406, 38 P.2d 190. The existence of a remedy by appeal generally precludes resort to mandamus. Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042; Petaluma, etc., Dist. v. Superior Court, 194 Cal. 183, 228 P. 24; Hanlon v. Superior Court, 124 Cal.App. 485, 12 P.2d 963. Moreover, ordinarily the writ of mandamus is not the proper remedy to invoke against an order made in excess of jurisdiction. Nider v. City Commission, 36 Cal.App.2d 14, 25, 97 P.2d 293; Levy v. Superior Court, 66 Cal. 292, 5 P. 353; Elliott v. Paterson, 65 Cal. 109, 3 P. 493; Robbins v. Mulcrevy, 101 Cal.App. 300, 281 P. 668.

Even though a judgment be void on its face for want of jurisdiction, mandamus will not lie to compel its vacation where the petitioner could have appealed from the order denying his motion to vacate the judgment. Andrews v. Police Court, supra. And, said the court, the loss by neglect of a legal remedy equally convenient, beneficial and effective does not require the granting of a writ of mandate in the absence of a sufficient showing of excuse for the failure to pursue it. An annotation in 145 A.L.R. 1042, 1044-1059, to this most recent pronouncement of the court states: "It is one of the fundamental principles underlying the entire law of mandamus that the existence of another specific, legal remedy, fully adequate to afford redress to the party aggrieved, presents, in the absence of statutory provisions to the contrary, a complete bar to relief by extraordinary writ of mandamus." And the California decision is cited as the latest judicial approval of "the rule universally recognized * * * that a writ of mandamus will be denied where a party has lost his ordinary remedy through his own neglect." Other California decisions cited as applying this doctrine include Bush v. International Alliance, T. S. E., 55 Cal. App.2d 357, 130 P.2d 788; Coffey v. Los Angeles Firemen's Relief Ass'n, 22 Cal.App.2d 510, 71 P.2d 328; Tulare County v. Woody, 132 Cal.App. 459, 22 P. 2d 743; Howland v. Superior Court, 127 Cal.App. 695, 16 P.2d 318; C. Scheerer & Co. v. Hutton, 7 Cal.App. 524, 94 P. 849.

These principles bar relief in the present proceeding. The petitioners perfected a timely appeal from the ruling of the court granting a new trial. This is the statutory method for one aggrieved by such a determination to attack it. See

Lauritzen v. H. L. Judell & Co., 109 Cal. App. 168, 292 P. 536. But after the appeal had been pending for seven months, the petitioners abandoned it and then waited nine months before commencing the present proceeding. Since the loss by neglect of a legal remedy equally convenient, beneficial and effective does not permit the granting of a writ of mandate in the absence of a sufficient showing of excuse for the failure to pursue it, a fortiori, one who voluntarily abandons an appeal should be denied relief by a prerogative writ.

The compelling effect of this conclusion is not altered by the fact that the ostensible relief sought by the petitioner is the issuance of a writ of execution. For the clerk may be compelled to issue the writ only upon a determination that the order granting the new trial is void, and the petitioner has voluntarily abandoned the right to a decision upon that question by appeal.

The entire basis of the majority opinion's discussion of the availability of mandamus rests upon an assumption absolutely unsupported in fact or in reason. Thus it states: "While mandamus does not lie if there is another adequate remedy, an appeal is not always regarded as adequate."[1] The opinion then concludes, "Mandamus is available as an alternative remedy in cases where an appeal would be inadequate, and the failure to appeal cannot therefore render the trial court's determination res judicata." There is nothing in the majority opinion, nor are there any facts to support a conclusion that the petitioners could not adequately have obtained the same relief sought in the present proceeding by continuing their appeal from the order granting a new trial. Certainly there may be no assumption that the clerk would refuse to issue execution upon the judgment after a reversal of the order granting the new trial. And, of course, the conclusion that, since mandamus is available as an alternative remedy where an appeal would be inadequate, the failure to appeal cannot render the trial court's determination res judicata, falls with the unsupported premise that the right of appeal is here inadequate.

Under the established rule of stare decisis announced by this court to the effect that a case is not authority for a proposition not raised and considered (Gonzales v. Superior Court, 3 Cal.2d 260, 263, 264, 44 P.2d 320; Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 564, 59 P.2d 119; Oakland Pav. Co. v. Whittell Realty Co., 185 Cal. 113, 119, 120, 195 P. 1058), the cases of Payne v. Hunt, 214 Cal. 605, 7 P.2d 302, and Kraft v. Lampton, 13 Cal.App.2d 596, 57 P.2d 171, may not be relied upon for the statement upon which they are cited by the majority opinion. These cases assumed, but did not consider the question or decide, that mandamus was a proper remedy under the facts then before the court.

SHENK and CURTIS, JJ., concurred.

Rehearing denied; SHENK, CURTIS, and EDMONDS, JJ., dissenting.



23 Cal.2d 47

CITRON v. FRANKLIN.

S. F. 16763.

Supreme Court of California.

Oct. 6, 1943.

Rehearing Denied Nov. 4, 1943.

1. Corporations ⇐116

Where agreement granted to optionee an option to purchase 25 per cent. of optionor's corporate stock and provided that, if optionor sold his stock to others prior to exercise of the option, optionor would pay optionee 10 per cent. of excess of the amount so received over amount which optionor had paid into corporation, optionee was not required to exercise his option after such sale to others to be entitled to such excess. Civ.Code, § 3532.

2. Witnesses ⇐275(6)

Questions asked of plaintiff on cross-examination as to what he understood he was to receive under option contract on balance of stock which had not been sold were improper as not directed to interpretation which parties placed on contract, but simply to subjective understanding of one of parties.

[1] This statement in the majority opinion was modified, on denial of the petition for rehearing, to read: "While mandamus does not lie if there is another adequate remedy, an appeal is not regarded as adequate in this type of case."

3. Corporations ⇐116

Where option for purchase of stock providing for computation of purchase price upon amount which optionor had paid into corporation was executed contemporaneously with agreement for employment of optionee by corporation, and no method was provided to determine such amount and optionee was employed by corporation until after sale of optionor's stock to others, option impliedly required optionor to furnish information as to his investment in corporation when optionee attempted to exercise the option during the life thereof, and delay in furnishing such information would extend the option until a reasonable time after such information had been furnished. Civ.Code, § 1655.

4. Corporations ⇐116

Where option for purchase of stock provided that, if optionor sold the stock to others prior to exercise of the option, optionor would pay optionee 10 per cent. of amount received for stock in excess of amount which optionor had paid into corporation, and impliedly provided that optionor's delay in furnishing optionee information as to optionor's corporate investment, which determined price of stock to optionee, would extend the option, and optionor, although timely requested by optionee to do so, did not furnish such information before selling stock to others, option was extended to time of sale, and optionee was entitled to the specified amount. Civ.Code, § 1655.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by William J. Citron against J. J. Franklin on an option contract. Judgment for plaintiff and defendant appeals.

Affirmed.

Prior opinion 134 P.2d 23.

B. E. Kragen and George Olshausen, both of San Francisco, Lionel B. Benas, of Oakland, and Keyes & Erskine, of San Francisco, for appellant.

Clarence A. Linn, of San Francisco, for respondent.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the appellant. On such consideration we agree with the disposition of the appeal by the District Court of Appeal of the First Appellate District, Division Two, and adopt as the opinion of this court the opinion of that court prepared by Justice Spence, with the modifications that hereinafter appear.

"Plaintiff sought to recover upon a contract. The cause was tried by the court sitting without a jury and plaintiff had judgment against defendant J. J. Franklin in the sum of $2646.33." Defendant appeals from the judgment.

"Plaintiff had been engaged for many years in purchasing and booking motion pictures for use in the Hawaiian Islands. Defendant had been engaged for many years in exhibiting motion pictures. In 1934, defendant conceived the idea of organizing a corporation in the Hawaiian Islands and of forming a chain of motion picture theatres there together with a film exchange. In pursuance of this idea, defendant negotiated with plaintiff and, as a result of the negotiations, two written contracts were entered into on the same day, July 20, 1934.

"One of said contracts, attached to the complaint as Exhibit B, purported to be entered into between plaintiff and the corporation which had not then been organized. It was called a 'Purchasing Agency Agreement' and plaintiff was thereby employed by the corporation to act as its purchasing agent. It further provided that plaintiff should be elected vice-president of the corporation 'as soon as same may be conveniently done.'

"The other of said contracts, attached to the complaint as Exhibit A, was entered into by plaintiff and defendant personally. This is the contract upon which the present action was based. It recited that defendant was the owner of all the stock of the corporation, that plaintiff was the purchasing agent thereof and that defendant desired to grant plaintiff the option to purchase 25 per cent of all the stock owned by defendant. It was then agreed as follows:

" '1. That first party does hereby give and grant unto second party an option to purchase not more than twenty-five per cent (25%) of all the stock owned and held by first party in the Franklin Theatres Enterprises, Inc., a corporation.

" '2. That the purchase price to be paid by second party upon the exercise of the

aforesaid option shall be computed upon the amount of money or other consideration which first party has advanced and paid into the said corporation upon the date that the said option shall be exercised.

" '3. It is distinctly understood and agreed that the aforesaid option shall remain in force for a period of one year from the date of the execution of this agreement, it being understood in this respect, however, that first party shall in no way be precluded from selling or disposing of the said stock to persons other than second party, provided, however, that second party shall share the proceeds from the sale of said stock as is provided hereafter.

" '4. It is distinctly understood that in the event first party shall sell his stock in the aforesaid corporation to any one other than second party prior to the exercise by second party of his option, then and in that event first party agrees to pay unto second party ten per cent (10%) of all monies and other consideration realized by first party over and above the amount of money and other consideration which first party has paid for the aforesaid stock or has advanced to the said corporation.'

"After entering into these contracts, defendant went to the islands and acted as the head of the new venture while plaintiff remained on the mainland and acted as purchasing agent. The corporation was formed, it prospered and defendant finally sold his stock on May 31, 1937, before plaintiff had exercised his option to purchase the stock but during the extended time for the exercise of the option as found by the trial court.

"There was but little conflict in the evidence. Such conflict as there was relating to the sale price of the stock and the amount which defendant had paid into the corporation was resolved by the trial court in favor of defendant. The sale price was found to be $30,000 and the amount paid in by defendant was found to be $3536.61. The trial court gave plaintiff judgment for 10 per cent of the difference between these amounts. On this appeal the findings concerning these amounts are not challenged.

[1] "Defendant first contends that the trial court erred in imposing any liability upon him as the trial court found that plaintiff never exercised his option. The trial court found, however, that the option had been extended from time to time up to and including the time of the sale on May 31, 1937. Assuming for the moment that this latter finding was sustained by the evidence, we find no merit in defendant's contention. The intent and purpose of the parties appears entirely clear and unambiguous from a reading of the option agreement. Plaintiff desired and the agreement granted to him an option to purchase 25 per cent of all stock owned by defendant. Defendant desired to retain and the agreement reserved to him the privilege of selling all of his stock to others at any time. The agreement then provided that in the event defendant sold his stock to others 'prior to exercise by second party of his option,' defendant would pay to plaintiff 10 per cent of the amount received on such sale over and above the amount which defendant had paid into the corporation. It is apparently defendant's claim that plaintiff was not entitled to the benefit of the last mentioned provision upon the sale of the stock but only in the event that plaintiff exercised the option after the sale had taken place. He stresses the words 'prior to the exercise by second party of his option' and claims that those words cannot be construed to mean 'during the life of the option.' In other words, defendant urges a construction under which plaintiff would have been required to have gone through the formality of exercising his option to purchase the stock after defendant had sold all of his stock to others and at a time when defendant was no longer in a position to sell any stock to plaintiff. Such a construction is wholly unreasonable. The law does not require idle acts (Civ.Code, § 3532) and the clear intention of the parties, as evidenced by the terms of the agreement, was that plaintiff was to be entitled to the benefit of the 10 per cent provision immediately upon the sale to others at any time during the life of the option."

[2] Defendant also contends that the court erroneously sustained objections to questions put to plaintiff on cross-examination, claiming that defendant was thus prevented from proving that plaintiff understood that he had to accept his option as a condition precedent to claiming rights in the proceeds from the sale. Objections were sustained to the first and third of the following questions: "You understand, Mr. Citron, that you were to receive ten percent of Mr. Franklin's net profit upon the sale of stock he held in this corporation?" "You knew, did you not, that Mr. Franklin sold 62½ per cent of his stock to Mr.

Rosen?" "What did you understand you were to receive from the balance of the 37½ per cent under your agreement?" These questions were concerned with the proportion of the proceeds that plaintiff understood he was entitled to receive under the contract and had no bearing on the issue whether plaintiff was required to exercise the option. In any event, they were directed, not to the interpretation that the parties placed upon the contract, but simply to the subjective understanding of one of the parties. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13.

"Defendant further contends that the evidence was insufficient to support the trial court's finding 'That the terms of said agreement, Exhibit A, were extended from time to time and up to and including the date of which defendant, J. J. Franklin, sold all of his capital stock in the Franklin Theatrical Enterprises, Ltd., to Adolph Ramish, to wit: May 31, 1937.' The evidence on this issue is quite voluminous and includes both letters and conversations. Neither the writing of the letters nor the making of the oral statements was denied by defendant. We need refer only to some portions of these letters and statements.

"The written agreement was made on July 20, 1934, and, by its terms, the option was to remain in force for one year. After executing the agreement, defendant spent most of his time in the islands while plaintiff spent most of his time on the mainland. At an early date, two men, Ramish and Rosen, had also become financially interested in the venture, Mr. Ramish being made president and Mr. Rosen a vice-president of the corporation. On May 23, 1935, and before the expiration of the one year, plaintiff wrote to defendant, 'I informed him (Rosen) I was ready to put up my end of it and I presume either you or he will call on me shortly to cover my 25% interest. Am glad everything is going along fine. Feel confident the four of us will be on the easy side of the street.' On May 31, 1935, defendant replied: 'Regarding your interest you need not worry about that in the least. Whenever you are ready, you will make the deal wtih me as I suppose you know that my word is as good as a bond even if you didn't have a contract. * * * We all of course, are directors. I am glad that you realize that we are on the way and that we are almost reaching the goal we set out to reach. I am not forgetting for one moment, regardless of what you say I accomplished, the fine work that you did and without which I could not have accomplished what we did so far. A company with four men with experience that we have had must go places. We have everything in our favor.'

"On June 6, 1935, plaintiff again wrote defendant: 'You may be assured that I have the utmost confidence in what you say and when you come to the mainland we can arrange all matters pertaining to my interest with the company.' On July 5, 1935, defendant wrote plaintiff, 'I have been held up here because of the many changes that we have had to make in the plans of the King Theatre but hope to get away very shortly and then we will be able to get together with you on your contract. * * * I cannot forget your loyalty throughout the storm, and I want to say to you that I am happy to have you as one of my partners.'

"Defendant did not come to the mainland as soon as expected and on September 25, 1935, he wrote plaintiff: 'As I told you in previous correspondence that my word is as good as any bond and that I would live up to my agreement with you. * * *' On November 7, 1935, plaintiff wrote defendant: 'I would like to know what amount of your stock and interest you would want me to take and just what it would cost me in round numbers? Of course, you know that I am not a man of means and have very little cash that I can place my fingers on.' On November 14, 1935, defendant wrote plaintiff: 'Regarding the stock, when you are out here (Honolulu) we will discuss that matter further. We had an understanding and when you come here we will discuss it further. When you see what we have here you will realize the opportunity.'

"In December 1935, plaintiff, Rosen and Ramish visited Honolulu and conferred with defendant. Plaintiff's testimony of the conversations then held and subsequently held concerning the option was corroborated by Rosen and was not denied by defendant. Plaintiff said, 'How about my end of it? I want to take up my option.' Defendant said, 'We are too busy. I can't talk now. You don't have to worry. My word is my bond. You can come in any time you want.' When plaintiff asked for the information concerning the amount defendant had invested, defendant told him that he was 'very, very busy,' that it was the 'wrong time' to talk about it but that

he would give him the information in the 'very near future.'

"In 1936, defendant came to the mainland and conferred with plaintiff, Rosen and Ramish. The subject of the option was again discussed. It will be remembered that the unchallenged finding of the trial court shows that defendant had paid into the corporation only $3536.61. In their conversations, plaintiff said: 'Jack, now that you are here from Honolulu, I want to know definitely how much I am to put up for my option of twenty-five per cent. Tell me what it is.' Defendant said 'Listen, I put up $42,000 of my own money.' Both plaintiff and Rosen took exception to this figure, plaintiff saying it was 'ridiculous' and Rosen saying 'You haven't got that kind of money.' Plaintiff asked defendant for a statement of the amounts advanced but defendant 'put it off' saying, 'I am too busy. I have to go back to the islands.'

"The correspondence continued after defendant's return to the islands but the tone of the letters gradually became less cordial. On October 16, 1936, defendant wrote to plaintiff, 'Consolidated are now very anxious to make a deal along the lines we discussed and if our partners will not be thinking only of themselves we will come out with flying colors. Everything points to success.' On the same day, plaintiff wrote to defendant: 'As you must know, had you given me the exact amount you put into the theatre project, as now appears on the books of the company, I certainly would have handed you my check and I feel confident I could have put over a deal you now have in mind. You have always informed me that you had invested. At one time you told me $32,000, at another time $40,000. Both Mr. Ramish and Mr. Rosen on several occasions, informed me that you had been credited with $15,000 on the company's books. So you see, Jack, my reason for hesitating. You assured me many times that I could come in any time I desired. That your word with me was always good and that whenever I was ready I could come in. I have always been ready but the above held me back.'

"Defendant replied on November 11, 1936: 'As to what Ramish says I have invested, he can say what he likes, the books will show I invested over $41,000.00 and not $15,000.00 as he says. The statement I gave you some time ago was made out by Mr. Turner, in that one it was $32,000.00, but I have since shown that it is $41,000.00.' On December 14, 1936, defendant again wrote: 'Regarding Mr. Ramish's statement of what I invested, it does not interest me in the least for it is contemptible falsehood. I showed you my investment, made up by Mr. Turner, from my invoices. Since then other invoices were given to Mr. Turner which made it $42,000, but that is neither here nor there. Our deal was not predicated on what I invested. You have certainly had every opportunity to come in but so far you never took advantage of it. It would be ridiculous to base the business on the amount of money Mr. Ramish suggests. My books speak for themselves.'

"On January 5, 1937, defendant wrote: 'I always told you I would take care of you, meaning that you would not have to take up your stock according to the time limit in your contract, but if we should sell the business and you have not taken up your stock by that time you certainly couldn't expect me to close with you at such time * * * you have the same opportunity today that you had when we signed the contract, but it must be exercised before a sale of the business is made, otherwise same will not be recognized by me.' Plaintiff replied on January 25, 1937: 'For a long time past, Jack, I have been willing and anxious to take up the option according to our agreement. I asked you for a statement of the amount invested by you so that I would know the amount of my prorata, but was unable to get a clear, definite statement. If you will give me an exact statement of the amount invested in the company by you, I will act on the option as soon as I can verify your statement. As you know, I have not access to the books and must depend on the officers of the company to furnish me the figures.' Defendant replied to this letter on February 3, 1937: 'Regarding the stock again I don't know how I could make myself clearer than I have in my last letter, no one in the world could ever accuse me of ever taking advantage of anyone or ever breaking my word. Ramish and Rosen have nothing whatsoever to do with our transaction and again let me advise you that I do not care what either of them say I invested, because whatever they say in this respect is not the facts. However what I invested in the business has nothing whatever to do with our contract, but let me again remind you that I handed you a statement made out by Mr. Turner while he was in L. A. of all expenditures I had made and that amounted to

$38,000.00. I again explained to you that I gave them additional $8000.00 worth of bills when Turner came to Honolulu, but in a thousand years, you, nor anyone else, will be able to make out his books the way he has them set up now. * * * How then, can you ever expect to get any proper figures even if you should want them from him. As per the contract which I made with you, which stated that you could come in on twenty-five per cent of my holdings, none can say that you have offered to take up your option and that I refused it, but circumstances occur where options cannot last forever, because of certain conditions. Therefore, I again say that although your option ran out, you can take advantage of the opportunity providing you take it immediately, otherwise you cannot expect me to feel any further obligation in the matter as I have been more than fair in this entire transaction. You realize that a sale of the business may be made any day or a deal may be made that requires quick action and unless you have made your investment before that time, you can't except me to hold up deals as that is asking too much.' On February 18, 1937, plaintiff replied: 'Note what you say regarding the option. Just as soon as I can get the necessary data be assured Jack I want to take advantage of the option you have extended me.'

"Defendant apparently concedes, at least for the purpose of argument, that the time for the exercise of the option was extended but claims that the evidence was insufficient to support the finding that the time was extended to and including the time of the sale on May 31, 1937. It is argued that the extension was for an unspecified time, that it therefore covered only a reasonable time and that a reasonable time expired prior to May 31, 1937. Defendant further argues under a separate heading that the evidence was insufficient to support the finding that the extension was based upon a good and sufficient consideration. Plaintiff argues that the time provision for the exercise of the option was waived by both written and oral agreements for extensions based upon good and sufficient consideration and that defendant, by his fraudulent conduct, prevented the exercise of the option and was estopped. In the reply brief, defendant argues that as neither prevention of performance nor estoppel was pleaded, plaintiff may not rely thereon.

[3] "As we view the situation, many of these contentions need not be considered here for the reasons hereinafter stated. The action was one upon an option agreement which was admittedly made upon a good and sufficient consideration. It was executed contemporaneously with an agreement for the employment of plaintiff by the corporation as its purchasing agent. Plaintiff served in that capacity with the corporation until the time of the sale and continued to serve thereafter. The option agreement provided that the option price should be computed upon the amount which defendant had paid into the corporation. No method was provided by the express terms of the agreement to enable plaintiff to determine the amount which defendant had so paid. We therefore believe it necessary, in order to make the agreement reasonable, to read into the agreement the implied terms that defendant would furnish plaintiff with accurate information concerning that amount at any time that plaintiff expressed his desire to exercise said option during the life thereof and that any delay on the part of the defendant in furnishing such information would extend the life of the option until a reasonable time after such information had been furnished by defendant. (Civ.Code, § 1655.) If these terms were not implied terms of the agreement, then plaintiff would have had no way of determining (1) whether it was desirable to exercise the option or (2) the amount to be tendered to defendant in the exercise thereof.

[4] "Under the express terms of the option agreement, the life of the option was from July 20, 1934, to July 20, 1935. The evidence shows that plaintiff expressed his desire to exercise the option as early as May 23, 1935, in a letter written to defendant on that date. Thereafter plaintiff reaffirmed his desire to exercise the option on numerous occasions and made repeated requests to defendant to furnish him with the necessary information. No accurate information was furnished to plaintiff by defendant at any time. For some period of time after May 23, 1935, and despite repeated requests by plaintiff, defendant gave no information whatever concerning the amount but gave plaintiff the broadest assurances that his option could be exercised at any time. Thereafter defendant grossly misrepresented the amount which he had paid into the corporation, insisting that he had paid into the corporation approximately ten times the amount which he had actually so paid. Plaintiff took exception to

these misrepresentations and reaffirmed his desire to exercise his option upon the basis specified in the option agreement. In his letters of December 14, 1936, and February 3, 1937, defendant denied that the amount that he had actually invested in the corporation had anything to do with the exercise of the option thereby repudiating the terms of the option agreement. In the first of said letters he stated 'My books speak for themselves' indicating that he considered the parties bound by the figures shown by the books. In the second of said letters, he repudiated the figures shown by said books. The only conclusion that can be drawn from the admitted facts is that defendant, through fraudulent representations, endeavored to gain an unconscionable advantage over plaintiff either by persuading plaintiff to refrain from exercising a valuable option or by obtaining from plaintiff thousands of dollars to which defendant was not entitled in the event that plaintiff did exercise said option. In any event, the uncontradicted evidence shows that defendant wholly failed to furnish plaintiff with accurate information at any time, and under our view of the implied terms of the option agreement, the life of the option was thereby extended at least to and including the time of the sale as found by the trial court."

The judgment is affirmed.



23 Cal.2d 19

GOLD MINING & WATER CO. v. SWINERTON et al.

Sac. 5539.

Supreme Court of California.

Oct. 6, 1943.

Rehearing Denied Nov. 4, 1943.

1. Mines and minerals ⇐68(1)

Where mineral lessees expressly covenanted to enter into possession of property on execution of lease which was September 21, 1937, and they covenanted to have all water facilities fully completed to take advantage of the water run off for season, 1937–1938, the lease justified construction that performance by lessees was required before January 1, 1939.

2. Mines and minerals ⇐68(1)

Where lessees executing mineral lease on September 21, 1937, agreed to enter into immediate possession and to work minimum of 300,000 cubic yards annually, commencing with 1937–1938 water and mining season, purported limitation in sentence reading "however, not later than January 1, 1939," meant only that the first 300,000 cubic yards to be worked annually was to have been mined by January 1, 1939, rather than that date was the time to commence mining.

3. Mines and minerals ⇐68(1)

Mineral lease clause giving lessees right to abandon lease and operations on mining property by giving lessor ninety days' written notice on fifteenth day of any month beginning on July 15, 1938, indicated that mining was to commence prior to January 1, 1939.

4. Mines and minerals ⇐68(2)

Where time was of importance in performance of gold mining lease and one of main objects of lease was to have mineral removed from property as soon as possible and that advantage be taken of 1937–1938 water and mining season, failure of lessees to take possession and commence mining operations constituted a "material breach of contract".

See Words and Phrases, Permanent Edition, for all other definitions of "Material Breach of Contract".

5. Contracts ⇐299(1)

Where time is made the essence of a contract, a failure to perform within the time specified is a "material breach of contract".

6. Mines and minerals ⇐66

In lessor's action for damages, evidence supported trial court's finding that gold mining lease had been repudiated by lessees in November, 1937.

7. Contracts ⇐313(2)

A repudiation of a contract must consist of a present, positive unequivocal refusal to perform the contract, and a mere threat alone to abandon is not a "repudiation".

See Words and Phrases, Permanent Edition, for all other definitions of "Repudiation".

8. Mines and minerals ⇐64

Lessor was under no obligation or duty to consent to lessees' assignment of gold mining lease.

9. Mines and minerals ⇐66

Repudiation of gold mining lease by lessee is ordinarily a question of fact and intent, and must be determined by the facts in the particular case.

10. Contracts ⇐313(1)

An essential element of a true anticipatory breach of contract is that the repudiation by the promisor occur before his performance is due under the contract.

11. Contracts ⇐313(1)

There may be a total breach of contract where there has been a partial breach by the promisor, which means that the time for a portion of performance was due, followed thereafter by repudiation of the contract by him, but there is an exception in case of a contract originally unilateral and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party.

12. Contracts ⇐313(2)

A contract is totally breached and an "anticipatory repudiation" occurs when promisor without justification and before he has committed a breach, makes a positive statement to promisee indicating that he will not or cannot substantially perform his contractual duties.

See Words and Phrases, Permanent Edition, for all other definitions of "Anticipatory Repudiation".

13. Contracts ⇐313(1)

Where there has been a partial breach by promisor accompanied or followed by a repudiation of contract by promisor, the breach is total.

14. Contracts ⇐313(1)

Where there has been a partial breach of contract by promisors followed by a repudiation of contract, the promisee can ordinarily recover all past and prospective damages suffered, in an action which it can bring immediately after the repudiation.

15. Contracts ⇐313(1)

Where acts to be performed by promisor are connected and the thing to be accomplished by contract is an entirety, breach may be total where there is a partial breach coupled with repudiation even though the promisee has fully performed the bilateral contract.

16. Mines and minerals ⇐68(1)

Where lessees were to continuously mine property as rapidly as due diligence required and extract minerals therefrom, and lessees' duties were indivisible and not separable, and where there had been partial breach of lease by lessees followed by repudiation of lease, lessor was entitled to recover prospective damages.

17. Mines and minerals ⇐68(1)

The doctrine of anticipatory breach can be applied to a mineral lease so that lessor is entitled to bring an action for all damages immediately upon lessees' default and repudiation of lease.

18. Mines and minerals ⇐68(1)

The fact that lease under which lessor held part of property was declared forfeited because of lessor's failure to perform did not preclude lessor from recovering damages from its lessees for breach of lease and did not entitle the lessees to damages based on alleged breach of covenant of quiet enjoyment, where forfeiture of lease under which lessor claimed did not occur until after defendant lessees had repudiated their lease.

19. Mines and minerals ⇐68(2)

After total breach of mineral lease by lessees, lessor was excused from performance under the lease.

20. Mines and minerals ⇐68(1)

In lessor's action for breach of mineral lease, lessees' defense that lessees were released from liability and that lease had been terminated by new lease of property made by lessor to another was properly rejected under evidence.

21. Mines and minerals ⇐68(1)

Where mineral lease obligated lessees to improve and repair water system to make it usable for mining and obligated lessees to commence mining operations, lessor could recover damages for loss of royalties for failure to mine and also damages for failure to repair the water facilities.

22. Mines and minerals ⇐68(1)

Evidence sustained award of $25,000 to lessor for mineral lessees' failure to improve and repair water system as required by mineral lease.

23. Mines and minerals ⇐68(1)

Where method of mining property is not specified in mining lease, lessee is ob-

ligated to mine property in a reasonable manner compatible with most expeditious removal of mineral therein, taking into consideration costs involved, contemplation of parties and nature and character of property to be mined.

24. Mines and minerals ⇐69

Where there has been failure to perform and repudiation by lessees of covenant of mineral lease to improve and repair, lessor is entitled to recover reasonable cost of improvements or repairs which lessees agreed to make.

25. Appeal and error ⇐533(1), 717

Memorandum opinion of trial court was not properly a part of record on appeal, but it could be used to assist in determining action of court.

26. Mines and minerals ⇐68(1)

Evidence sustained finding awarding lessor $15,000 damages for loss of royalties for breach of lessees' obligation to conduct mining operation.

27. Mines and minerals ⇐68(1)

Where lessees failed to perform their obligation under mineral lease, lessor was entitled to recover as damages an amount equal to the amount of royalties which lessor would have received had the lessees operated the property in accordance with the lease.

28. Mines and minerals ⇐68(1)

Under proof by lessor of execution of mineral lease, and of lessees' failure to perform and of amount of royalties which lessor would have received had lessees performed, lessor made out a prima facie case for recovery of damages.

29. Mines and minerals ⇐68(1)

Where lessor made out a prima facie case for recovery of damages for lessees' failure to perform mineral lease, lessees had burden of showing that lessor had not in fact suffered amount of damages claimed because property had been either leased to other operators or that lessor had operated property itself and recovered an amount equal to or greater than royalty specified in lease, or other facts diminishing damages.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Gold Mining & Water Company against A. B. Swinerton and others for breach of a mining lease wherein defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 121 P.2d 840.

Hartley F. Peart, Howard Hassard, and Edward R. Solinsky, all of San Francisco, for appellants.

John L. McNab and S. C. Wright, both of San Francisco, and Virgil Airola, of San Andreas, for respondent.

CARTER, Justice.

Defendants appeal from a judgment awarding plaintiff damages in the sum of $25,000 for breach of the terms of a lease in failing to make certain improvements on the mining property covered thereby, and in the sum of $15,000 for breach of a covenant in said lease to develop and mine said property.

The record discloses that on September 21, 1937, plaintiff, as lessor, entered into a mining lease with defendants, Swinerton and Morrison, as lessees, embracing certain real property owned by plaintiff and also certain real property adjacent thereto owned by Emery Gold Mining and Water Company on which plaintiff held a lease and option to purchase. The lease between plaintiff and defendants provided that the lessor leases to the lessees and the latter hired and took from the lessor said property for a term of ten years "subject to payment of royalties and provisions" contained in the lease "on the part of the Lessees to be kept and performed," with an option for a five year renewal; lessees covenanted to pay on the 10th day of each month, a royalty of 10 per cent on gross values of all minerals extracted from the property when the recovery was 50 cents per cubic yard or less and a graduated scale thereafter; lessees covenanted to enter into immediate possession of the property, to install equipment, and commence mining within a certain time, and to work a minimum of 300,000 cubic yards of gravel per year; the lessor warranted all unpatented claims were valid mineral locations; lessor reserved the right to use the surface of the property for agriculture purposes, subordinate however to the rights granted to the lessees; lessor, upon the lessees' consent, could use the excess water and agreed to defend the water rights; les-

sees would maintain the improvements and water facilities on the property, and perform the assessment work necessary to preserve the title to the unpatented claims; that lessees could cut such timber from the property as was necessary for the mining operations; all improvements (not including mining machinery) placed on the property by the lessees should be deemed fixtures; that cessation of operations for a period of not exceeding ninety days would not be a breach of the lease; that the lessors would pay the taxes assessed against the property; that lessees could terminate the lease at any time after July, 15, 1938, by giving ninety days' written notice on the 15th day of any month, provided the work agreed upon had been performed and the royalties had been paid which were due at the time of the termination; that lessor was entitled to terminate the lease for a default of the lessees, if the default was not cured within thirty days after notice thereof; lessor agreed not to enter into any other arrangement abridging the lessees' rights; time was made of the essence of the lease; and the lessees were prohibited from assigning the lease. The trial court found that the defendants never had performed their promises under the lease and that they had repudiated it on November 11, 1937, and refused to perform any of its provisions. Plaintiff's action was commenced in July, 1938.

Plaintiff's complaint was in two counts, the first for damages for an alleged failure of the lessee to make improvements and the second for damages for an alleged breach of the lease by defendants in failing to mine the property during the 1937–1938 water season. Defendants in a cross-complaint claimed damages for an alleged breach of the lease by plaintiff on February 1, 1938, when it lost its rights in the Emery Company property for failure to perform under its lease with that company.

It is asserted by defendants that the proper interpretation of the lease between plaintiff and defendants requires the construction that performance thereunder by defendants was not to commence until January 1, 1939, and that inasmuch as plaintiff's action was commenced in July, 1938, it was premature, that is, that plaintiff could not have a cause of action against defendants for damages for a breach of the lease until after the time for defendants' performance had expired and they had defaulted.

[1-3] The particular clause with reference to time of performance reads: "Lessees agree, upon execution of this Lease Agreement, to enter into immediate possession of leased placer mining properties, and to diligently and constantly operate and develop same, to have all water facilities, improvements from Jesus Maria Creek, (Juri properties) fully completed and all machinery in full operation, to take advantage of water run off for season, 1937–1938, to wash and clean up for such minerals * * * as lessees may be able to discover and mine within limits of said placer mining properties, and to extract, mill and reduce, and to otherwise treat said minerals, * * * lessees agree to work and mine aforesaid placer mining properties continuously from recording of this Lease, as date of entry thereon, and to work a minimum of 300,000 cubic yards of channel material annually, commencing with 1937–1938 water and mining season; however, not later than January 1st, 1939, contingent upon usual emergency clauses and subject to amount of water available from sources owned or controlled by lessor. Nothing in this Lease Agreement shall be construed to limit number of yards which lessees shall have right to work." The trial court found that defendants failed to immediately enter into possession of the property, failed to take advantage of the water run off season of 1937–1938, although the run off was later than the month of November, 1937, and failed to install water and mining facilities in preparation for that run off. Defendants refer to circumstances surrounding the execution of the lease as indicating that it was intended that their performance was not to commence until January 1, 1939. However, the lease on its face justifies the construction that performance by defendants was required before that time. As seen from the clause above quoted, and particularly pursuant to the first sentence thereof, defendants expressly covenanted to "enter into immediate possession of the property," that is, upon the execution of the lease which was September 21, 1937. They never did enter into possession. They expressly covenanted "to *have all water* facilities and improvements" *fully completed* and all *machinery* in *full operation,* to take advantage of water run off for season *1937-1938.* They failed to perform any of those promises which obviously by the very terms of the lease were to be performed prior to January 1, 1939. In the second sentence of the quoted clause

defendants promised to mine the property "continuously from the recording of the lease, (the lease was recorded on September 22, 1937, the day after its date) as date of entry thereon," that is, entry on the property which as we have seen was to be on September 21, 1937; and to work a minimum of 300,000 cubic yards annually commencing with the 1937–1938 water and mining season.

The purported limitation in the last sentence upon those promises, reading "however, not later than January 1, 1939, contingent upon usual emergency clauses and subject to amount of water available from sources owned and controlled by lessor," is not, in any event, applicable to the promises contained in the first sentence hereinabove discussed. But even in connection with the promises contained in t' second sentence, that purported limitation must mean that the first 300,000 cubic yards to be worked annually was to have been mined by January 1, 1939, rather than that that date was the time to commence mining. Another clause of the lease points to that interpretation in that it clearly contemplates that mining would be done prior to January 1, 1939, and that work on the property have been done before that time. It reads: "Lessees shall have right to abandon this Lease Agreement and all operations on said placer mining properties by giving lessor ninety (90) days previous written, registered notice on fifteenth day of any month, *beginning on July 15th, A. D. 1938,* of lessees' intention so to do, *and* by *keeping workings on said placer mining properties in full operation during said* period of time; provided, however, that all *aforesaid royalties,*—or cubic yards guaranteed annually, *due at said termination,* shall be paid or worked in full." (Emphasis added.) It is clear therefore that performance by defendants was to commence at once. The property was to be entered, and repairs and facilities placed in readiness for the 1937–1938 water run off. The property was to be continuously worked and mined from the date of the lease and entry on the property. Defendants failed to perform any of those covenants. Thus, we have a partial breach of the lease by defendants having already occurred on November 11, 1937, the date upon which defendants repudiated the lease according to the findings of the court.

[4, 5] That breach was material inasmuch as one of the main objects of the lease was to have the mineral removed from the property as soon as possible and that advantage be taken of the 1937–1938 water and mining season. That time was of importance in the performance of the lease was expressly agreed by the parties in the following language: "Time and specific performance is of the essence of this Lease Agreement." It has been held that when time is made of the essence of a contract, a failure to perform within the time specified is a material breach of the contract. C. O. Bashaw Co. v. A. U. Pink ham Co., 77 Cal.App. 591, 246 P. 1064; Mappa v. Council of City of Los Angeles, 61 Cal. 309.

[6] The evidence supports the trial court's finding that the lease was repudiated by the lessees in November, 1937. Defendant Swinerton testified with respect to a conversation on November 11, 1937, relating as claimed by defendants to their request for consent to assign the lease, at which he, Morrison and an officer and director of plaintiff were present:

"Q. And in any event when you left the meeting, Mr. Swinerton, you stated to them, did you not, that as far as you were concerned that you would have nothing further to do with the contract, unless they would consent to your assignment? A. I said nothing to do with the property, I think that is what I said.

"Q. Just to refresh your recollection— A. I may have said contract."

He admitted he had testified as follows in his deposition: "Q. But you did not state on that occasion that neither you nor Mr. Morrison would proceed under the lease? A. I could not speak for Mr. Morrison but I said as far as I am concerned, I would have nothing further to do with the contract unless they would assign the contract. That is what I said." The other defendant lessee Morrison testified that he concurred in Swinerton's statement. With respect to that conversation, Schmidt, a representative of the corporation testified that defendant Swinerton "said he was through with it and would not go on and do anything further in it whatsoever." Immediately after that conversation Swinerton left for Europe. In a letter from plaintiff to lessees dated November 15, 1937, apparently relating to the request for permission to assign, the latter were informed that "out of courtesy to" lessees but "without prejudice to" lessor "in any manner" the lessor

was making an investigation "without any assurance of consent, as you must realize your liability in performance" of the lease. On November 24, 1937, plaintiff by letter to the lessees unequivocally advised them that plaintiff would not consent to an assignment of the lease by the lessees. We believe that those circumstances coupled with the facts that defendants never commenced any performance under the lease, and defendant, Swinerton indicated that the equipment to mine the property by dredging would be more expensive than he could afford although he believed that was the best method, justified the trial court in finding a repudiation.

[7-9] While it has been held that a repudiation must consist of a present, positive unequivocal refusal to perform the contract (Hogue-Kellogg Co. v. Petit, 48 Cal.App. 495, 192 P. 113; Wilton v. Clarke, 27 Cal.App.2d 1, 80 P.2d 141; Atkinson v. District Bond Co., 5 Cal.App.2d 738, 43 P. 2d 867), and that a mere threat alone to abandon is not a repudiation, it is clear that here defendants refused to have anything further to do with the lease or property unless plaintiff consented to the assignment. It was under no obligation or duty to consent thereto. Consent to the assignment was refused shortly thereafter. Defendants had not commenced performance of the contract prior thereto nor did they thereafter. Particular reliance is placed by defendants upon Wilton v. Clarke, supra, and Atkinson v. District Bond Co., supra, but repudiation is ordinarily a question of fact and intent, and must be determined by the facts in the particular case. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495. In Wilton v. Clarke, supra, the trial court found that there was no repudiation and the finding was upheld. The purported repudiation by defendant was followed by an explanation showing that his rejection of the attempted performance by plaintiff was proper. In Atkinson v. District Bond Co., supra, the statement claimed to constitute the repudiation was not coupled with a partial failure of performance by defendant or the circumstances present in the instant case, such as, that the defendants were not financially able to mine the property in the manner they thought it should be mined. No endeavor was made by defendants to withdraw their repudiation in the instant case, and plaintiff's consent to the assignment, the only contingency upon which it might be implied that defendants would perform, or rather that their assignee would perform, was refused shortly after the repudiation. In Hall **v.** Augur, 82 Cal.App. 594, 256 P. 232, involving an oil and gas lease, it was held that the lessee had abandoned the lease when he never commenced drilling on the property and stated he was financially unable to do so. Such an abandonment would be equivalent to a repudiation.

[10-13] Strictly speaking, a total breach of a contract may arise in two ways, which although different, have been frequently confused with each other. One is an anticipatory breach, or as it may be termed, a breach by anticipatory repudiation, which is necessarily total and which is of importance both with relation to an excuse for nonperformance by the promisee, the repudiation being by the promisor, and the right of the promisee to recover damages immediately for a total breach of the contract before performance by the promisor is due thereunder. By its very name an essential element of a true anticipatory breach of a contract is that the repudiation by the promisor occur before his performance is due under the contract. On the other hand there may be a total breach of a contract where there has been a partial breach by the promisor, which means of course that the time for a portion of the performance was due, followed thereafter by a repudiation of the contract by him. There is, however, an exception in the case of a contract originally unilateral and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party. A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive statement to the promisee indicating that he will not or cannot substantially perform his contractual duties. Cobb v. Pacific Mut. Life Ins. Co., 4 Cal.2d 565, 51 P.2d 84; Restatement, Contracts, secs. 316, 317, 318. It follows that where there has been a partial breach by the promisor accompanied or followed by a repudiation of the contract by the promisor, the breach is total. Restatement, Contracts, sec. 317.

[14-16] In the instant case we have as heretofore stated a situation in which there has been a partial breach by defendants

followed by a repudiation of the contract which ordinarily under the rules above stated would constitute a total breach for which plaintiff could recover all past and prospective damages suffered, in an action which it could bring immediately after the repudiation. Even if it be assumed in the instant case that the lease was a bilateral contract which had become unilateral by the full performance thereof by the plaintiff-lessor-promisee when it demised the premises to the lessees, and that therefore, under the general rule a partial breach coupled with a repudiation would not constitute a total breach entitling plaintiff to bring an action for prospective damages, the result is the same because that rule does not apply where the acts to be performed by the promisor are connected with one another such as under the circumstances of this case. Where the acts to be performed by the promisor are connected, and the thing to be accomplished by the contract is an entirety, the breach may be total where there is a partial breach coupled with repudiation even though the promisee has fully performed the bilateral contract. Restatement, Contracts, sec. 316. In the case at bar the obligations of defendants, lessees, were indivisible and not separable. They were to continuously mine the property as rapidly as due diligence required and extract the minerals therefrom. Clearly, the lease contemplated the continuous extraction of minerals by lessees as one entire obligation. The mere fact that the royalties were payable monthly and that 300,000 cubic yards were to be worked annually carries no implication that each payment of royalties was severable from the other, or that each year's output of 300,000 cubic yards was severable from every other year. Rather the one was merely a specification of the time for paying whatever the royalties there might be and the other a minimum below which the output should not fall. It is not like the case of money payable in fixed installments.

[17] From the foregoing discussion it further follows that even if defendants' interpretation of the clause with reference to their time to perform under the lease is accepted we still would have a true anticipatory breach on defendants' part by reason of their repudiation of the lease which would entitle plaintiff to recover prospective damages. In this connection defendants urge that the doctrine of anticipatory breach cannot be applied to a lease as distinguished from an ordinary contract; that rental under a lease is paid in installments and the lessor must wait for each installment to fall due before he has a cause of action for a breach of the lease. They rely upon Bradbury v. Higginson, 162 Cal. 602, 123 P. 797. That case involved an ordinary lease in which the property was leased on December 13, 1904, for five years with a rental of $100 per month. The lessee took possession and paid the rental to and including June, 1909, but thereafter defaulted. Plaintiff lessor commenced his action in August, 1909, claiming the full *rent* for July and August and also for the four months remaining in the term of the lease. The court held that a recovery could not be had for the full rent but stated that an action for *damages* was proper where there was a default and repudiation by the lessee. It said at page 604 of 162 Cal., 123 P. at page 798, referring to the right of the lessor where the lessee has failed to pay the rent and has abandoned the lease: "That a landlord may have an action for *damages* for breach of contract when a tenant abandons his lease is not questioned by any of the authorities. His *damages,* however, in that event, are to be ascertained in a particular way. *Where a lease is repudiated and the premises abandoned,* the landlord *may pursue one of two courses:* He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; *or,* he may take possession of the premises and *recover damages,* which damages will be the difference between what he *may* be able to rent the premises for and the price agreed to be paid under the lease. Where he sues for damages, he cannot in advance recover the *full* price to be paid for the unexpired term, but the amount of his recovery is *limited* as just indicated." (Emphasis added.)

Later in the opinion it is recognized that an action for damages, as distinguished from one for rent, will lie for the anticipatory breach of a lease. It was said at page 608 of 162 Cal., 123 P. at page 800: "But it is argued that the plaintiff had the right to recover on the doctrine of 'anticipatory breach.' Alderson v. Houston, 154 Cal. 1, 96 P. 884. That is to say, that the defendant's repudiation of the obligations of his lease gave the plaintiff the right to

treat the entire contract as broken, and to recover at once the damage sustained by such breach. But in an action to recover for such breach, the measure of *damage* would be, not the *total rent* reserved, but the difference between the rent to accrue and the value of the remaining portion of the term. * * * The complaint does not aver that plaintiff has sustained any damage by the defendant's repudiation, nor does it state any facts from which the amount of such damage may be inferred."

It would seem from the foregoing language that the lessor might bring an action for all damages immediately upon the lessee's default and repudiation of the lease. Those damages would consist of the difference between the reasonable rental value of the property and the agreed rental for the remainder of the term of the lease. See 20 Cal.L.Rev. 627. Although it would seem that under the rule in the Higginson case the lessor need not wait until the end of the term to sue for damages, doubt has been cast on that view. See Phillips-Hollman, Inc., v. Peerless Stages, 210 Cal. 253, 291 P. 178; Syrett v. Strickland, 86 Cal.App. 623, 261 P. 484; Strei v. Brooks, 95 Cal. App. 589, 273 P. 145; Treff v. Gulko, 214 Cal. 591, 7 P.2d 697; Pacific States Corp. v. Rosenshine, 113 Cal.App. 266, 298 P. 155. The weight of authority appears to permit an immediate action to recover damages for the entire term where the lessee defaults in the payment of rent and repudiates the lease. See cases collected 137 A.L.R. 432. Whatever may be the correct rule in the case of an ordinary lease, mining leases are in a class by themselves. As we have seen, the lease in the instant case is indivisible. It was not contemplated that certain sums of money were to be paid periodically for the use of the leased premises. The main object was the removal of the minerals from the ground, and the periodic payment of royalties was merely a convenient method for their prompt and orderly payment. As stated in Hall v. Augur, supra, with reference to an oil and gas lease, 82 Cal.App., at page 600, 256 P. at page 235: "The duty to drill and develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere covenant, but in a case like this, where *practically the whole consideration must depend upon the undertaking,* it is to be treated as a condition precedent." (Emphasis added.)

And again at page 601 of 82 Cal.App., 256 P. at page 235: "The main consideration for the execution of these leases was the payment of royalties to the plaintiffs, which *could only be obtained through drilling the oil wells.* Royalties were never paid because no wells were drilled." (Emphasis added.)

In the ordinary lease of real property the lessor is not concerned with a development or operation of the property by the lessee, but only in payment of the rent installments as they become due. If the lessee abandons the lease the lessor has the use of the property. However, in a mining lease, upon abandonment, the lessor, it is true has the use of the property and still has the mineral in the ground, but he *does not have that mineral removed,* the obligation which the lessee assumed. It is only a general rule that mining leases are to be governed by the same rules as ordinary leases, which must give way in certain circumstances when we consider the above discussed persuasive reasons therefor.

[18, 19] Defendants urge that plaintiff lost its rights to the Emery property and therefore breached its covenant of quiet enjoyment by depriving defendants of the opportunity to mine the property. It will be recalled that a portion of the property embraced in the lease here in question was held by plaintiff by virtue of a lease to it from the Emery Company. In February, 1938, plaintiff's rights under the latter lease were declared forfeited by the Emery Company for plaintiff's failure to perform thereunder. In this connection defendants also urge that damages should have been awarded to them under their cross-complaint which was based on the same alleged breach of the covenant of quiet enjoyment. Both contentions are untenable for the same reason. Prior to February, 1938, there was no breach of the covenant. The loss by plaintiff of its rights in the Emery Company property did not occur until *after* the defendants had repudiated the lease. After the total breach by the defendants, plaintiff was excused from performance under the lease. It was said by this court in Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 10, 76 P.2d 663, 666, 115 A.L.R. 476: "Finally, the normal effect of repudiation of a contract and refusal to perform on one side is the excuse of performance on the other side; * * *." Furthermore it

is expressly provided in the lease that its continuance in force was dependent on the performance of its provisions by defendants. The clause reads: "Lessor hereby leases and demises aforesaid placer mining properties to lessees for placer mining purposes for a term of ten (10) years from date hereof, *subject to payment of royalties and provisions herein contained on part of* lessees to be kept and performed. * * *" (Emphasis added.) The cases relied upon by defendants did not involve the situation where because of a total breach the lessor's performance was excused.

[20] Defendants argue that because of dealings with a certain Mr. Johnson, a new lease of the property was made between Johnson and plaintiff, and that the instant lease was thereby terminated and defendants released from liability thereunder. In this connection defendants also assert that the conduct of plaintiff from October, 1937, through January, 1938, induced them to believe that plaintiff would lease the property to Johnson and thereby release defendants. The evidence on the subject is conflicting. Suffice it to say, that Mr. Schmidt, one of the officers of plaintiff, testified that neither he nor his fellow officers ever assented to a new lease with Johnson nor ever gave an assent to the assignment by the defendants of the instant lease to Johnson, and never consented to any change in the instant lease.

[21] The trial court found that plaintiff was damaged in the sum of $25,000 by reason of the failure of defendants to improve and repair the water system to make it usable for mining and to make water available for mining operations. Defendants urge that their obligation to repair and improve the water facilities was inseparably connected with and an incidental part of their main covenant to mine and operate the property and remove the mineral therefrom; and that therefore damages should not have been given for loss of royalties for failure to mine and also damages for failure to repair the water facilities; that one of the items of damages necessarily embraces the other. There are several clauses in the lease which must be considered in this connection. There is a provision that the use of the surface of the property is reserved by plaintiff for agricultural purposes and that: "Lessor shall have right, *upon prior written consent* of lessees, to use all excess water to be mutually agreed upon, not used by lessees in operations; provided, however, that such uses shall not interfere in any manner with lessees' operations hereunder and that said use shall be wholly at risk of lessor. * * * Pursuant to lessees' *consent,* lessor shall have right to use such excess water through and by means of all equipment of water diversion works now on placer mining properties, or any additions, improvements, or repairs made by lessees: provided, however, that if it is necessary to increase aforesaid diversion water works, a mutual Agreement shall be made in writing as to payment by lessor of increased ratio cost for such use of excess water. * * * Expressly mutually understood and agreed, however, that aforesaid water rights, privileges and use of water, shall only be upon lessor's placer mining properties." (Emphasis added.) That term of the lease might imply that the covenant with respect to the repair of the water facilities was separate because the water was to be used by the lessor for agricultural purposes, but it is to be noted that the lessor is entitled to use the excess water *only with the consent* of the lessees. The defendants-lessees were not obligated to give their consent. That clause does not therefore necessarily establish that the covenants were separable. In the clause relating to the obligation of the lessees to mine the property it is said: "Lessees agree * * * to operate and develop same (property), to have all water facilities, improvements from Jesus Maria Creek * * fully completed and all machinery in full operation, to take advantage of water run-off, * * *." It might well be argued from that clause alone that the repair of the water facilities was solely incidental to the mining operations and did not constitute an individual obligation for the breach of which damages might be recovered. But the lease further provides: "Lessees agree to keep, protect and maintain all buildings, flumes, ditches, reservoirs, pipelines and other workings now or hereafter situated upon said placer mining properties, and to deliver up same together with appurtenances and all improvements thereon in good order and condition, ordinary wear and tear, and acts of God and elements, excepted." And also that: "All buildings, improvements and water diversion works that *may be* placed in or upon aforesaid placer mining properties by lessees, during term of this Lease Agreement, shall be deemed affixed to said placer

mining properties and become a part thereof, and upon termination of this Lease Agreement, same will not be removed from said placer mining properties. * * *" (Emphasis added.) Those terms definitely contemplate that the water facilities were to be improved and repaired, and the lessor had a definite interest therein inasmuch as such improvements were to become its property. It is also clear that the improvement of the water system was to be of such a character as to render it adequate and adaptable for mining the property rather than for other uses to which it might be put.

In connection with the award of $25,000 for the failure to improve the water system, defendants further urge that the only evidence of damages was hearsay, that the evidence was insufficient to maintain the award, and that the court applied as the measure of damages the cost of the improvements rather than the lessened value of the lessor's reversion because of the failure to make the improvements.

The court found that defendants were not obligated to construct certain dams as a part of the restoration of the water system and that there is nothing in the lease "setting forth the amount of improvements to be made upon the properties described in said Lease Agreement by the defendants, or the method by which the properties should be worked, or that a storage dam to cost $50,000.00 should be built on Jesus Maria Creek by the defendants, or either of them; that it was not contemplated by the parties to said Lease Agreement that the sum of $167,735.00 should be spent by the defendants upon the water system; but the Court find that a *reasonable sum of money was to be expended* by the defendants upon the water system to bring water to the mining properties and to repair the water system to make it usable for mining; and the Court finds that an expenditure of no greater sum than $25,000.00 was in the minds of the parties to be spent by the defendants to bring the water to said mining properties, and the Court finds that the sum of $25,000.00 was a *reasonable sum* to be expended to put said water facilities in order and to enable said properties to be operated as required by the provisions of the Lease Agreement, and in this connection the Court finds that although $25,000.00 was a reasonable and necessary sum the defendants did not expend any sum whatever and did nothing to fulfill the requirements assumed by the defendants in said Lease Agreement." (Emphasis added.) Defendants assert that the $25,000 referred to as having been contemplated by the parties was based solely upon hearsay evidence consisting of a letter written by plaintiff to the Emery Company prior to the execution of the lease here involved, suggesting leniency in the performance by plaintiff of its lease with that company. It was there stated that plaintiff had a group interested in mining the property, referring to a lease with defendant Morrison alone, and that certain repairs were to be made by the group which was "budgeted by them at $25,000." That letter was introduced by defendants in their cross-examination of one of plaintiff's officers. Whatever may be the validity of that evidence the findings may not be so narrowly interpreted as to be based solely thereon. It is to be noted from the foregoing quoted excerpt from the findings that the court also found that "the sum of $25,000 was a reasonable sum to be expended to put said water facilities in order and to enable said property to be operated as required by provisions of the lease." And later in the findings the court stated "the Court finds that a reasonable sum to be spent for said purpose on said mining properties was $25,000.00 *and* the Court finds that an expenditure of no greater sum than $25,000.00 was in the minds of the parties, and the Court therefore finds that said sum of $25,000.00 was a reasonable sum to be expended *and* was the sum in the contemplation of the parties. * * *" (Emphasis added.) At most the letter was in the mind of the trial court as the maximum the parties expected to expend and is therefore not particularly significant. The same appears to be true of the court's language in its memorandum of opinion.

[22, 23] There is ample evidence other than the letter from which the trial court could have concluded that the sum of $25,000 was a reasonable amount to cover the cost of the improvements contemplated. Plaintiff's witness Scott testified in great detail of the cost of restoring the water system, arriving at a total figure of over $167,000. Evidently the trial court rejected some of his items and accepted others. It is true that Scott based his estimates upon mining the property by the hydraulic method, rather than by mechanical means, such as a power shovel or dredger, and as pointed out by defendants there is nothing

in the lease requiring that such method of mining be used. But there is nothing in the lease as to what method should be employed. Defendants' evidence shows various figures approximating $3,000 as the cost of restoration of the water system based on mechanical mining. Under these circumstances we cannot say that there was no substantial evidence supporting the finding. We have seen that the character of the improvements was to be such as would make the water available for mining as distinguished from other uses. Where the method of mining the property is not specified in a mining lease, it may be fairly said that the lessee is obligated to mine the property in a reasonable manner compatible with the most expeditious removal of the mineral therein, taking into consideration the costs involved, the contemplation of the parties, and the nature and character of the property to be mined.

Various statements have been made with reference to the proper measure of damages for a breach by a lessee of a covenant to improve or repair the property. It is said in 36 C.J. 175: "The general rule is that upon a lessee's breach of covenant to make improvements, a lessor can recover only what it would cost to make them, and the difference in the rental value of the land until they could be made after the expiration of the term. But it is also held that the measure of damages where the lessee removes the improvements he has covenanted to make and leave for the benefit of the lessor is the difference between the value of the premises with and without the improvements. Damages for breach of covenant to make an improvement within a specified time within the term have been measured by the injury to the reversion at the end of the term reduced to its present value, or by such sum as, with interest, will produce the fair cost of improvement at the end of the term." It is said in 32 Am.Jur., Landlord and Tenant, section 801:

"Where, during the continuance of the tenancy, the landlord brings an action for the breach of a covenant to repair by the tenant, the measure of damages is generally held to be the amount by which the reversion is injured on account of the property being out of repair. It would not be fair or just, particularly where the lease has a long time to run, to take the amount necessary to put the premises into repair as the measure of the damages; for in such cases, when the damages are awarded to the landlord, he is not bound to expend them in repairs, nor can he do so without the tenant's permission to enter on the premises. In some cases, however, it has been held that a landlord is entitled to recover the cost of putting the premises in proper repair, although the action is brought by him before the termination of the lease.

"In an action for the breach of a tenant's covenant to keep the premises in repair, brought after the expiration of the term, the plaintiff's measure of damages is the cost of putting the demised premises into the state of repair contemplated by the broken covenant, and if the landlord is himself compelled to do the repairs after the determination of the term, he is entitled also to compensation for the loss of the use of the premises which has presumably been suffered during the time while the repairs were being executed."

[24] In the case of a mining lease such as is here involved, where there has been a failure to perform and a repudiation by the lessees, the rule to be applied should be the same as where the term has expired; that is, the lessor is entitled to recover the reasonable cost of the improvements or repairs which the lessees agreed to make under the terms of the lease. The evidence supports the findings that the reasonable cost of the improvements and repairs contemplated was the sum of $25,000.

[25] In the second count of its complaint plaintiff alleged that there were in excess of 300,000 cubic yards of mineral bearing gravel on the property of an average gross value of 90c per yard. The trial court found that: "the gross average value of said gravel is 50c per cubic yard and that there was a minimum of 300,000 cubic yards of the average gross value of 50c per cubic yard in said properties capable of being mined and removed by the defendants annually." In what it termed its order for judgment but what might be more aptly described as its memorandum opinion, the trial court stated: "However, from all the testimony as to value, I find the value to be 50c per cubic yard. Plaintiff's royalty would amount to $15,000 thereon." Although the memorandum opinion is not properly a part of the record on appeal, it may be used to assist in determining the action of the court. At 50c per cubic yard, the gross value of the mineral in 300,000

cubic yards of gravel would be $150,000. Ten per cent of that figure is $15,000, the amount awarded by the court.

Appellants contend that the trial court applied the wrong rule as to the measure of damages to which plaintiff may be entitled for the failure of the defendants to mine 300,000 cubic yards of gravel during the mining season of 1937–1938. On page 65 of appellants' opening brief counsel state: "As a matter of law, the measure of damages is not as the trial court assumed. In an action for unpaid royalties the lessor is only entitled to recover the agreed upon percentage (in the instant case, 10%) of that sum which is left after deducting from the value of the quantity of ore which lessees were required to mine the value of the ore left in the mine." In support of this proposition they cite the following cases: Lyon v. Miller, 24 Pa. 392; Whiteside v. Rocky Mt. Fuel Co., 10 Cir., 101 F.2d 765; Keating Co. v. Inland Steel Co., 157 Minn. 243, 195 N.W. 1016; Milligan v. Haggerty, 296 Mich. 62, 295 N.W. 560. We have examined these cases, and while the rule announced therein is not very clearly stated, we gather therefrom that it was the intention of the courts to hold that where a lessee has agreed to mine coal on a royalty basis and ceases mining operations before he has mined all of the coal covered by the lease, the lessor is not entitled to recover the full amount of royalty specified in the lease for the unmined coal. But just what rule should be applied for the determination of the amount of damages in such cases is not made clear by the opinions in the above-cited cases.

The problem presented is not simple, and its solution involves a consideration of various rules relating to the measure of damages for breach of a contract providing for the extraction of mineral from land on a royalty basis.

The majority rule relating to oil and gas leases appears to be that where a lessee fails to perform his lease and the lessor suffers damages as a result of the loss of royalty on the oil or gas which the lessee would have extracted from the leased premises had the lease been performed, the lessor may recover the full amount of the royalty to which he would have been entitled had the lessee fully performed. Fallis v. Julian Petroleum Co., 108 Cal.App. 559, 292 P. 168; Julian Petroleum Corp. v. Courtney Petroleum Co., 9 Cir., 22 F.2d 360. This rule is referred to as the "royalty rule."

In 2 Summers Oil and Gas, Permanent Edition, § 435, at pages 433–435, the author states: "While there seem to have been no objections to the application of the so-called royalty rule for the measure of damages where there has been a breach of express or implied covenants of the lessee to drill protection wells, yet it was suggested in a West Virginia case that when this rule is applied to a situation where there has been a failure to drill sufficient additional wells to reasonably develop the property, it results in paying the lessor double damages for the breach of the covenant. It is there pointed out that if the lessor is paid the value of the royalty upon the oil or gas which should have been produced but was not, the oil still remains in the land and when produced by the lessee at a later time the lessor will again receive this royalty. The court suggests that the interest on the value of the royalty more nearly approximates the true measure of damages. This objection to the royalty rule is apparently very similar to that which was urged in the Pennsylvania case of Lyon v. Miller, causing the court to hold that the measure of damages for a breach of a covenant to mine coal was the value of the royalty on the coal that should have been mined, less the value of such mineral in the land. This rule has, however, been disapproved by later cases in the same jurisdiction, as well as by decisions of other courts. There is undoubtedly some merit to the above-mentioned criticism of the royalty rule, particularly where the breach complained of is a cessation of reasonable development for a period of time, and the lessee does continue thereafter to reasonably develop and operate the land. In such a situation the lessee does eventually mine the mineral which should have been mined previously and does again pay the royalty on this mineral which has already been received by the lessor by way of damages. *If the lessee fails or refuses to resume operations under the lease, he cannot complain of the royalty rule as the proper measure of damages, for he never pays the royalty the second time.* On the other hand, if the lessee resumes reasonable operations, or operations expressly required by the lease, he may be able to invoke the aid of a court of equity to relieve him of paying the royalties upon the unmined minerals, which he has paid once in the form of damages."

It is said in Stoddard v. Illinois Improvement & Ballast Co., 275 Ill. 199, 113 N.E.

913, 915 (involving a rock quarry): "Having retained possession of the premises and having failed to surrender the lease or to develop the property, it is liable for the amount of stone it could, by reasonable diligence, have quarried and sold at a profit for the remaining three years of the lease, at 6 cents per cubic yard, the price fixed in the lease."

It has also been held that in an action for damages for failure to develop sulphur lands under a contract, the owner's measure of damages is the amount of royalties he would have received had the mine been operated during the period when operations were unreasonably suspended, with interest from the date the royalties would have accrued. Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 117 Tex. 439, 6 S.W.2d 1039, 60 A.L.R. 890; see, also, Macon v. Trowbridge, 38 Colo. 330, 87 P. 1147; Gilmore v. Ontario Iron Co., 86 N.Y. 455.

It seems clear to us that the correct rule for the measure of damages in a case such as this should be one which would place plaintiff in the same position it would have been in had defendants performed the covenants contained in the lease.

[26, 27] It appears from the record in the case at bar, and the court found, that if the defendants would have operated the mining property covered by the lease in question in accordance with the provisions thereof, they would have extracted the sum of $150,000 from the 300,000 cubic yards of gravel which they agreed to mine during the mining season of 1937–1938. Of this amount plaintiff would have received the sum of $15,000 as royalty. Defendants failed to perform their covenant to mine the property and plaintiff received no royalty. Plaintiff therefore suffered a loss as the result of the failure of the defendants to perform the covenant in question. Defendants breached their lease, abandoned the property and will never operate the property under the lease involved in this action. Plaintiff may not desire to operate the property itself, and may not be able to obtain another lessee to do so. True, plaintiff still has the mining property and may lease it again on a royalty basis, but even if it does so and receives a royalty on all of the gold extracted from the 300,000 cubic yards of gravel which defendants agreed to extract, plaintiff will not thereby recover double damages or receive *as royalty* the amount it is entitled to recover from defendants as damages. In other words, what plaintiff is entitled to recover from defendants under the rule here announced *is damages for the failure of defendants to perform their agreement under the lease to mine the property, extract the mineral therefrom and pay plaintiff a royalty thereon.* Since defendants have failed to perform, plaintiff may recover from them as damages an amount equal the amount of royalty which plaintiff would have received had defendants operated the property in accordance with the provisions of the lease.

[28, 29] Upon proof by plaintiff of the execution of the lease, and of defendants' failure to perform, and of the amount of royalty which plaintiff would have received had defendants performed, plaintiff made out a prima facie case for the recovery of damages against defendants. To meet this prima facie case defendants may have been able to show that plaintiff had not in fact suffered the amount of damages claimed because the property had been either leased to other operators on the same or more favorable terms than those specified in defendants' lease or that plaintiff had operated the property itself and recovered an amount equal to or greater than the royalty specified in defendants' lease; or other facts might have been established which would have the effect of diminishing the amount of damages suffered by plaintiff as the result of being deprived of the royalty which the defendants agreed to pay. That defendant has such burden of proof is held in Milligan v. Haggerty, supra, the court citing as authority therefor Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 111 N.W. 343, 112 N.W. 708, and Flickema v. Henry Kraker Co., 252 Mich. 406, 233 N.W. 362, 72 A.L.R. 1046. In the Tradesman case the claim was for damages by the operator of a newspaper for breach of a contract by one hiring advertising space. It was held that the defendant had the burden of proving that plaintiff could have obtained other advertisers for the same price; that plaintiff made out a prima facie case of damages by proving the contract price. The Flickema case involved an employment contract in which it was held that an employee whose contract of employment had been broken made out a prima facie case by proving the contract price, and the burden was on defendant employer to establish that the employee could have obtained

employment elsewhere. The same rule has been adopted in California. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. No such proof was offered by defendants in the case at bar, as the record discloses that the property covered by the lease was not operated after defendants breached their lease and plaintiff has never received any portion of the royalty which the defendants agreed to pay from the proceeds of the gold which the defendants agreed to extract from the property pursuant to the provisions of the lease. The subject is ably and comprehensively discussed in the case of Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031, 1037, 60 A.L.R. 936, which involved an oil and gas lease.

The trial court found against the defendants on all of the defenses interposed by them, and, as we have heretofore stated, the findings of the trial court find ample support in the evidence.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

Certainly there is substantial evidence to support the finding of the trial court that the appellants repudiated the lease and did not take possession of the property. But assuming that the provision of their agreement requiring repair of the water system is an independent covenant unrelated to the requirement "to work a minimum of 300,000 yards of channel annually" and entitling the lessors to recover separately for its breach, I cannot agree with the conclusion of my associates as to the measure of damages for the breach of the obligation to do the required amount of mining. In my opinion the theory upon which the judgment in this particular is affirmed is contrary to elementary rules of the law relating to contracts.

The appellants agreed to operate certain placer mining properties and the trial court found "that there was a minimum of 300,000 cubic yards [of gravel] of the average gross value of 50¢ per cubic yard in said properties capable of being mined and removed by [them] * * * annually." At the rate fixed by the lease, had the covenant been performed, the lessor would have received $15,000, which is the amount the trial court awarded in the judgment now affirmed.

The vice of allowing a recovery equaling the consideration of the contract is that it gives the lessor the amount of his royalty and, in addition, leaves him with his mineral deposit. To me, such an award clearly violates the legislative prohibition that "no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages * * *." Civ.Code, sec. 3358. This rule is a fundamental principle of contract law. As restated in Corpus Juris Secundum, the "plaintiff is not to be put in a better position by a recovery of damages for the breach of a contract than he would have been in if there had been performance." 25 C.J.S., Damages, § 74, pp. 565, 566. By the decision in this case, the lessor recovers $15,000, the amount which it would have received had the contract been performed and also retains the 300,000 cubic yards of gold-bearing gravel; it gets full payment for the mineral deposit which it still has.

The fugacious qualities of petroleum substances justify courts in allowing the recovery of the full royalty upon them upon the breach of an obligation to produce oil and gas. However, to apply that measure of damages in a case such as the present one gives the landowner much more than he would have received had his contract been fully performed. The Supreme Court of Michigan recently refused to allow such a recovery and approved the rule stated by the trial judge as follows: "The measure of damages for breach of an implied covenant to mine all the coal that may be reasonably mined is the stipulated rate for the quantity which could have reasonably been mined, but was not, deducting its value unmined." Citing as authority Lyon v. Miller, 24 Pa. 392, and the note in 60 A.L.R. 935, it held that the plaintiff could not recover the full amount of rental agreed to be paid under a lease for the purpose of excavating clay. Again adopting the language of the trial judge, it said: "The reason why this rule is fair and equitable is that if the Court should award to plaintiff the value of the brick per thousand which could be manufactured from the remaining portion of the area,

then not only would plaintiff have a judgment for the full amount, but during a normal period he would also be able to realize on re-sale, practically the same amount, and therefore, the harvest would be double, which, in the opinion of the court, would work an injustice on the defendant." Milligan v. Haggerty, 296 Mich. 62, 295 N.W. 560, 564.

The same measure of damages was recently applied by the federal court which held that the value of the deposit of coal not mined must be considered in reduction of the amount agreed to be paid under the contract. "When the lessee ceases to mine, the additional coal which he would have taken out if he had continued reverts to the lessor's benefit to be taken out by him or some other sub-lessee. So the lessor's damage in such case can not be said to be the full amount of the minimum royalties during the remainder of the lessee's term." Whiteside v. Rocky Mountain Fuel Co., 10 Cir., 101 F.2d 765, 768.

The statement in Summers Oil and Gas, quoted and relied upon in the majority opinion, that the leading case of Lyon v. Miller, 24 Pa. 392, has been disapproved by later cases in the same jurisdiction as well as by decisions of other courts, is not supported by authority. The only decision cited by the author to sustain his assertion is Berwind-White Coal Mining Co. v. Martin, 3 Cir., 124 F. 313, 317, 60 C.C.A. 27. But the court in that case observed, "The defendant relies on Lyon v. Miller, 24 Pa. 392, and Kille v. Reading Iron Works, 141 Pa. 440, 21 A. 666; but in neither of these was there any provision for the payment of a definite annual quantity whether mined or not, a most material distinction." Because of such a provision in the contract before it, the stipulated annual installments were considered to be amounts of liquidated damages. In the present case the agreement is to pay a royalty of 10 per cent on the gross values of all minerals extracted from the property on a recovery basis of 50 cents per cubic yard.

The covenant in the contract of Swinerton and Morrison may be construed in either of two ways. If it is an agreement by the mine owner to sell a minimum of 300,000 cubic yards of gravel, the sale price being the stipulated royalty of 10 per cent of the gross recovery value of the gold content, then, under the theory of Lyon v. Miller, supra, the full amount of the royalty may be recovered only if the gravel has no value unmined, or if the lessor, as the seller, had affirmed the sale so as to transfer title to the appellants as the buyers. See Civ.Code, sec. 1783. But the record shows a finding based upon substantial evidence that the value of the gravel was 50 cents per cubic yard, and the respondent's action for damages is inconsistent with a claim based upon a transfer of title.

If, on the other hand, the covenant is considered as one for the performance of services, that is, an agreement to mine a minimum of 300,000 cubic yards of gravel for a consideration of 90 per cent of the gross recovery value, the consideration for the appellants' promise, which the lessor agreed to pay, must be deducted from the value of the services. This rule is illustrated by the American Law Institute in its discussion of section 335 of the Restatement of Contracts as follows: "A contracts to convey land to B in return for B's service for one year. B refuses to do the work. A can get judgment for the value of the service promised less the value of the land retained by him." In the present action, the respondent has retained the gravel from which the consideration for the appellants' covenant to mine was to be obtained, and is allowed to recover the full value of the services agreed to be rendered.

And the rule of damages applied by a majority of the court is that upon proof of the breach of the contract, the mine owner at least established a prima facie case entitling him to a judgment for the full amount of the royalty. This is, in effect, saying that if the owner of an automobile agreed to sell it for a stated amount, upon breach of the contract by the buyer he may sue for the consideration and in the absence of any evidence of value by the defendant, be entitled to retain his automobile and have judgment for the sale price. Such a doctrine is contrary to the elementary principle that in an action for damages, where the title to the subject matter remains in the vendor, the measure of recovery is the *difference* between the contract price and the value of what is retained, and it is a part of the plaintiff's case to establish both factors from which the difference may be computed. Boyles v. Kingsbaker Bros. Co., 5 Cal.2d 68, 53 P.2d 141; Coburn v. California Portland Cement Co., 144 Cal. 81, 77 P. 771; San

Francisco Milling Co., Ltd., v. Frye & Co., 2 Cal.App.2d 563, 38 P.2d 165; Bonan v. Pacific Orient Co., 140 Cal.App. 68, 34 P.2d 1064; Aimo v. Mitchell, 124 Cal.App. 497, 12 P.2d 1059; Hougland v. Roth Blum Packing Co., 99 Cal.App. 631, 279 P. 159; Nye & Nisson v. Weed Lumber Co., 92 Cal.App. 598, 268 P. 659; Gopcevic v. California Packing Corp., 64 Cal.App. 132, 220 P. 1078; Meyer v. McAllister, 24 Cal. App. 16, 140 P. 42; Cuthill v. Peabody, 19 Cal.App. 304, 125 P. 926; and see 22 Cal.Jur., p. 1062, sec. 121.

But even were the rule announced by the majority opinion correct, its conclusion still may not be justified by the facts of the case, for the uncontradicted evidence in the record shows that the gravel could be mined at a cost of 30¢ per cubic yard, thus yielding a profit of 20¢ per cubic yard.

Rehearing denied; EDMONDS, J., dissenting.



60 Cal.App.2d 814

LEET v. UNION PACIFIC R. CO.

Civ. 14123.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1943.

As Amended Oct. 26, 1943.

Rehearing Denied Nov. 4, 1943.

Hearing Denied Dec. 6, 1943.

1. Master and servant ⇐265(6)

Where an inefficient brake causes an injury to employee, the carrier in interstate commerce cannot escape liability under the Safety Appliance Act, and proof of negligence on part of railroad is unnecessary. Federal Safety Appliance Act 1910, § 2, 45 U.S.C.A. § 11.

2. Master and servant ⇐243(1)

The "primary duty" rule was never applied to a case in which the killed employee was engaged at the time of his injury in repairing a safety appliance, though his act was in violation of a company rule. Federal Safety Appliance Act 1910, § 2, 45 U.S.C.A. § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Primary Duty".

3. Master and servant ⇐204(1), 228(1)

The effect of the 1939 amendment to the Employers' Liability Act foreclosed railroad's right to plead either assumption of risk, contributory negligence or the primary duty rule, in an action for injuries or death under the act. Federal Employers' Liability Act, § 4, as amended in 1939, 45 U.S.C.A. § 54.

4. Master and servant ⇐210(2)

Where railroad's negligence in sending out a car with its brake rigging in a defective condition was established, railroad could not be relieved from the consequences of its neglect under Federal Employers' Liability Act by the claim that deceased employee assumed the risk of such negligence. Federal Employers' Liability Act, § 1 et seq., § 4, as amended in 1939, 45 U.S.C.A. § 51 et seq., and § 54; Federal Safety Appliance Act 1910, § 2, 45 U.S.C.A. § 11.

5. Master and servant ⇐273, 274(7)

In death action under Federal Employers' Liability Act, where employee's death resulted when he crawled under a standing train to repair a defective brake rigging, excluding from evidence a rule requiring that engine men and firemen be notified of emergency repair work, was not error, since doctrine of assumed risk or contributory negligence was not involved. Federal Employers' Liability Act, § 1 et seq., § 4, as amended in 1939, 45 U.S.C.A. § 51 et seq., and § 54; Federal Safety Appliance Act 1910, § 2, 45 U.S.C.A. § 11.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action for death under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, by Charlotte E. Leet, administratrix of the estate of Seymour F. Potts, deceased, against the Union Pacific Railroad Company, a corporation. From a judgment for plaintiff, the defendant appeals.

Affirmed.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for appellant.

Martin & Downey, of Los Angeles, Hildebrand, Bills & McLeod, of Oakland, and Louis H. Brownstone, of San Francisco, for respondent.

MOORE, Presiding Justice.

Plaintiff was awarded damages on account of the death of her intestate, Seymour F. Potts, resulting from injuries received by Potts while in the employ of defendant. The action was brought under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51, and alleged that the defective condition of the brake beams constituted a violation of the Federal Safety Appliance Act, 45 U.S.C.A. § 11. Defendant appeals on two grounds, to wit: the insufficiency of the evidence to support the finding that the defective brake rigging was the proximate cause of decedent's death; (2) that the court erred in excluding from the evidence defendant's rule 26 which requires that a brakeman, when emergency repair work is about to be done on the cars of his train and a blue signal is not available, notify the engine crew so that protection may be given those engaged in making the repairs.

On July 12, 1941, the train on which decedent was serving as a brakeman had proceeded westerly from Pocatello, Idaho, to Bliss where it took the siding near the switch pursuant to instructions in order to permit an east bound train to pass. As the rear brakeman on the train, decedent was riding in the caboose while all other members of the crew rode in the engine. When the train stopped at Bliss pursuant to the rules of the defendant Potts inspected the rear portion of the train in order to remedy such defects as he might find "as to running gear, brake and draft rigging, loose doors or other projecting appliances, etc," as required by defendant's rule 824. After the engineer and fireman had completed inspection of the front part of the train they remounted the engine. As soon as the eastbound train had cleared both the head brakeman and the conductor signaled the engineer to go forward. The engineer blew the whistle, started the bell, released the brakes and moved ahead. After the train had moved about 75 feet it was stopped by an application of the emergency brakes by a hobo when he saw the decedent beneath the moving cars. On learning of the tragedy, the crew found the body of the brakeman under the middle of the second car ahead of the caboose. Also, they discovered that the brake head of the third car ahead of the caboose had come out of the hanger and was dragging on the rail; that one of the brake shoes and its key were missing and the brake assembly which operated against the rear wheels of the front truck was on the ground on the south side of the car. Investigation disclosed that at about seven miles east of Bliss the keeper on the back of the brake shoe had broken and the key and shoe had fallen out. Consequently, when the brakes were applied at Bliss, the southerly brake head came out of the brake hanger and fell upon the road bed. It would have been extremely hazardous to start the train with the brake head dragging on the ground. It was the duty of decedent to remedy the defect either by removing the brake assembly or by replacing the brake head in the brake hanger. Upon discovering the defect, in order to make the necessary adjustment he went underneath the car. Although it is a scrupulously regarded practice for the conductor to know where his men are before moving the train, the conductor ordered the engineer to proceed forward without inquiring as to the whereabouts of his missing brakeman.

The Employers' Liability Act, 45 U.S.C.A. § 51, in effect provides that every interstate common carrier shall be liable in damages to the personal representative of an employee for the death resulting to such employee by reason of any defect in its cars or appliances due to the carrier's negligence. Such employee shall be considered as an employee in interstate commerce and entitled to the benefits of the Act.

Section 11 of the Federal Safety Appliance Act, 45 U.S.C.A. § 2, makes it unlawful for a common carrier to permit a car to be used on its line unless all cars are equipped with efficient hand brakes.

[1] Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary. Karberg v. Southern Pacific Company, 10 Cal.App.2d 234, 246, 52 P.2d 285; Newkirk v. Los Angeles Junction Railway Co., 21 Cal.2d 308, 131 P.2d 535.

(1) In support of its contention that the evidence is insufficient to support the implied finding that the defective brake rigging was the proximate cause of the accident defendant has indulged in a lengthy essay to demonstrate that the defect in question was not the proximate cause of decedent's death, and that his act in attempting to adjust the defective brake rigging was "an abnormal, unexpected and

unforseeable reaction to the situation." It is contended that if the defect was the proximate cause of his death, his act was a risk which he assumed by his employment and that he was guilty of contributory negligence; that the defective brake rigging was a static condition when discovered by decedent; that he was under no obligation to go beneath the car to make the "repair"; that in proceeding as he did, he not only scorned the caution that a reasonably prudent man under similar circumstances would have observed but he violated a positive rule (No. 26) that had been adopted to assure his safety and that obedience to the rule was his primary duty; that the taking of such voluntary affirmative action was the sole proximate cause of his injuries.

[2] There are two answers to defendant's contentions. The first is that the primary duty rule was never applied to a case in which the killed employee was engaged at the time of his injury in repairing a safety appliance, even though his act was in violation of a company rule. This is exemplified in a number of decisions, published prior to the 1939 amendment of the Act. In the case of Chicago Great Western Railroad Co. v. Schendel, 1925, 267 U.S. 287, 45 S.Ct. 303, 69 L.Ed. 614, a draw bar had pulled out of a car, whereupon it was chained to another car and the train was pulled onto a siding where the damaged car was to be left. This siding was on a grade. Mr. Ring, the brakeman who was later killed, directed his superior to proceed and then, without advising the crew, contrary to published rule, he went between the two cars to disengage the chain. After the engine was cut off, the crippled car ran slowly down the track, catching Ring in the chain which caused his fatal injuries. In rejecting the claims (1) that the defective drawbar did not contribute to the injuries and (2) that Ring's violation of the rule was a proximate cause of the injury the court held that such an employee does not assume the risks of his employment nor is he guilty of contributory negligence when the violation by the carrier of a statute enacted for the safety of employees has contributed to the injury of such employee. It was similarly held in two subsequent decisions also antedating the 1939 amendment where employees were injured in attempting to repair safety appliances. Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 1926, 269 U.S. 406, 46 S.Ct. 129, 70 L.Ed. 335; Anderson v. Baltimore & O. Railway Co., 2 Cir., 89 F.2d 629.

[3] But regardless of the holdings in the last cited cases the transformation of the law resulting from the 1939 amendment to the Employers' Liability Act necessitates an affirmance of the judgment now before us. A scrutiny of that amendment shows that the defendant is foreclosed of its claim to plead either assumption of risk, contributory negligence, or the "primary duty rule," as held in Unadilla Valley Railroad Co. v. Caldine, 278 U.S. 139, 49 S.Ct. 91, 73 L.Ed. 224. The amendment came subsequent to all of the decisions cited by defendant. See Great Northern R. Co. v. Wiles, 1916, 240 U.S. 444, 36 S.Ct. 406, 60 L.Ed. 732; Lang v. New York Central R. Co., 1920, 255 U.S. 455, 41 S.Ct. 381, 65 L.Ed. 729; McCalmont v. Pennsylvania R. Co., 1922, 260 U.S. 751, 43 S.Ct. 250, 67 L.Ed. 495; Bobango v. Erie R. Co., 6 Cir., 1932, 57 F.2d 667; Pere Marquette Ry. Co. v. Haskins, 6 Cir., 1933, 62 F.2d 806; Frese v. Chicago, B. & Q. R. Co., 1923, 263 U.S. 1, 44 S.Ct. 1, 68 L.Ed. 131; Davis v. Kennedy, 1924, 266 U.S. 147, 45 S.Ct. 33, 69 L.Ed. 212; Unadilla Valley R. Co. v. Caldine, supra; International-Great Northern R. Co. v. Lowry, 1938, 132 Tex. 272, 121 S.W.2d 585; Flack v. Atchison, T. & S. F. Railway Co., 1920, 285 Mo. 28, 224 S.W. 415; Yoakum v. Lusk, Mo.Sup. 1920, 223 S.W. 53; Kern v. Payne, 1922, 65 Mont. 325, 211 P. 767; Hylton v. Southern Ry. Co., 6 Cir., 1937, 87 F.2d 393; Van Derveer v. Delaware, L. & W. R. Co., 2 Cir., 1936, 84 F.2d 979; Bradley v. Northwestern Pac. R. Co., 9 Cir., 1930, 44 F.2d 683, 72 A.L.R. 1341; Paster v. Pennsylvania R. R., 2 Cir., 1930, 43 F.2d 908. The effect of the holdings of the cited decisions is that the interstate commerce carrier may defend upon the grounds of assumption of risk and contributory negligence under circumstances such as those of the instant case. With unusual force and clarity defendant has impressed and fortified the doctrine declared by quotations and illustrations from the several decisions, all of which announced the law correctly as it existed prior to 1939. In that year section 51 of the Employers' Liability Act, 45 U.S.C.A., section 1, was amended by the addition of the following: "Any employee of a carrier, any part of whose duties as such employee shall be the

furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

At the same time section 54 of Title 45, United States Code Annotated, was amended to read as follows: "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The purpose of this amendment was to release the employee from the burden of the assumption of risk and it requires that cases based upon the Employers' Liability Act be tried as though no doctrine of assumption of risk had ever existed. The case of Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 63 S.Ct. 444, 449, 87 L.Ed. 610, 143 A.L.R. 967, is wholly decisive of all issues involved in the case now before us. It arose in a federal court of Virginia. Mr. Tiller was a policeman in the service of the railroad company and was familiar with the premises and with the instructions that he must watch out for the movement of trains. As he stood between two tracks in the switch yards on a dark night inspecting the seals of a slowly moving train on one track, he was suddenly hit and killed by a train backing in the opposite direction on the other track. In answer to Mrs. Tiller's allegation of negligence on the part of the company in failing to provide a reasonably safe place to work, the company denied negligence, pleaded contributory negligence and assumption of all risks normally incident to his employment. The trial court directed a verdict for the defendant on the grounds that there was no actionable negligence and that the cause of the death was speculative and conjectural.

In a ringing decision the Supreme Court reversed the judgment with a learned and elaborate review of the doctrine of the assumption of risk as it had been applied in the English courts as well as in both state and federal courts in actions brought under the Employers' Liability Act after its first enactment in 1906, 34 Stat. 232. The numerous complications arising from the application of assumption of risk, contributory negligence, the "primary duty rule," "promise to repair" and "peremptory order," were all cast in to the discard by the amendment of 1939. The effect of the amendment, said the court, was to release the employee "from the burden of assumption of risk by whatever name it was called * * *. The doctrine of assumption of risk can not be 'abolished in toto' and still remain in partial existence * * *. In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances."

The doctrine of assumption of risk is a vestigial survival of an age widely fraught with human misery. It prevailed during an epoch in the history of industry when statutes were enacted and judicial decisions were made on the theory that master and servant played at a game into which both entered upon an equal basis. It was a time when the interest of society in the fortunes of the toiler had received but scant or no consideration. While Congress has not advanced its humanizing standards as far as have the states in establishing methods whereby to insure the employee against total loss, yet it has by the Federal Employers' Liability Act abolished "assumption of risk" as a defense in all cases where negligence of the carrier has been once established.

[4] Since the negligence of the defendant in sending out a car with its brake rigging in a defective condition was concededly established, it follows that defendant may not be relieved from the consequences of its neglect by the claim that plaintiff assumed the risk of such negligence.

(2) Rule 26, which was excluded from the evidence, reads as follows: "When emergency repair work is to be done under or about the cars in a train, and a blue signal is not available, the engineman and fireman must be notified and protection

must be given those engaged in making the repairs."

[5] In view of the amendment to section 54 and of the Tiller decision Rule 26 was immaterial to the issues and was properly rejected. Chicago, etc., Co. v. Schendel, supra. If there was no assumed risk or contributory negligence to be attributed to the brakeman, no amount of rules adopted by defendant could alter the law if the company was itself negligent.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.



CAMINETTI v. PRUDENCE MUT. LIFE INS. ASS'N.

Civ. 13918.

District Court of Appeal, Second District, Division 3. California.

Oct. 18, 1943.

Rehearing Granted Nov. 16, 1943.

1. Appeal and error ⇐931(1)

Where trial court, after taking evidence and just before entry of judgment, vacated an erroneous ruling on the burden of proof, reviewing court would presume, nothing appearing to the contrary, that the trial court weighed the evidence in the light of the proper rule as to burden of proof.

2. Appeal and error ⇐1047(4)

An error with respect to the order of production of evidence does not ordinarily result in a miscarriage of justice, when all the evidence of both parties is fully presented.

3. Insurance ⇐44

Where insurance commissioner's application for an order directing him to conduct an insurance company's business as conservator is required to be served on the company in the same manner as a summons but no provision is made for an answer to it, the order is to be ex parte on the filing of the application. St.1935, p. 498, § 19; pp. 540–553, §§ 1010–1062, as amended; St.1937, p. 2563, § 1011.

4. Insurance ⇐44

An application by the insurance commissioner for an order directing him to conduct an insurance company's business as conservator is not an ordinary "civil action", but is a special statutory proceeding, and the rules of procedure for civil actions do not apply where they are not made applicable by the statute to the application. St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action".

5. Insurance ⇐44

Where no provision is made for an appearance in response to insurance commissioner's verified application for an order directing him to conduct an insurance company's business as conservator, that application is not a "complaint" to be answered, but the company must present its own application for vacation of the order and may state therein reasons for such vacation, which reasons may include a negation of the grounds of the order. St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Complaint".

6. Insurance ⇐44

When an order is made upon the insurance commissioner's application for an order directing him to conduct an insurance company's business as conservator, the application has served its purpose except as a place of reference to ascertain the grounds of the order. St.1937, p. 2563, § 1011.

7. Insurance ⇐44

Where statute requires order directing insurance commissioner to conduct an insurance company's business as conservator to continue until it shall appear to the court that the order should be set aside for specified reasons, applicant company must fail if at the hearing there is no evidence, or the evidence is insufficient to prove that there are proper reasons for setting the order aside. Code Civ.Proc. § 1981; St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

8. Corporations ⇐298(5)

The statute validating transactions between corporations and their directors modifies rule that a director is disqualified from voting on a matter in which he is directly and personally interested. Civ. Code, § 311.

9. Insurance ⇐64

Under statute validating contracts between corporations and their directors if the contracts are approved by a sufficient vote without counting the director's vote, where spouses were officers and directors of corporate mutual benefit assessment life insurer, wife's vote could not be counted to carry resolution fixing her husband's salary and approving a compromise of her husband's claim for back salary in view of statute under which husband's salary and amount received in compromise of the claim therefor would be community property in which the wife would have an interest. Civ.Code, §§ 161a, 164, 311(a).

10. Corporations ⇐298(5)

The rule that a director is disqualified from voting on any matter in which he is directly and personally interested applies to cases not within statute validating certain transactions between a corporation and its director. Civ.Code, § 311.

11. Insurance ⇐56

Where director of corporate mutual benefit assessment life insurer was secretary and general manager of insurer, and resolutions were passed fixing salary of the secretary and general manager and director ceased to be secretary and became president, the salary fixing resolutions did not cover him.

12. Insurance ⇐56

Where spouses were officers and directors of corporate mutual benefit assessment life insurer, and before meeting at which resolutions came up to compromise their salary claims against insurer, they agreed to both compromises, they were disqualified from voting on either resolution. Civ. Code, § 311.

13. Insurance ⇐56

Under statute validating contracts between a corporation and its director, where spouses were officers and directors of corporate mutual benefit assessment life insurer, husband was not disqualified from voting on original resolution fixing wife's salary, where he was not interested in her salary because the spouses were separated. Civ.Code, §§ 169, 311.

14. Insurance ⇐56

Under statute validating contracts between corporations and their directors, where the contract is approved with knowledge of the directors' interest by a majority of the shareholders, resolutions of corporate mutual benefit assessment life insurer approving compromises of claims for back salary of directors and officers were not valid, where corporation had no shareholders and directors' votes were required to carry resolutions. Civ.Code, § 311(b).

15. Corporations ⇐308(2, 6)

An officer who renders beneficial services to a corporation, without any lawful action of the board of directors fixing his compensation, but under circumstances negativing an intent that they were to be gratuitous, may recover the reasonable value of those services from the corporation.

16. Insurance ⇐56

Where there was no evidence establishing that services rendered to corporate mutual benefit assessment life insurer by officer and director during time to which his claim for back salary related were worth more than he had received for them, resolution approving compromise of the back salary claim was not shown to be valid as just and reasonable as to insurer. Civ.Code, § 311(c).

17. Insurance ⇐56

Where officers and directors, acting as fiduciaries for corporate mutual benefit assessment life insurer, approved compromise of their own claims against insurer for back salary, the approval was not valid on ground that a compromise of a claim asserted in good faith is valid even though the claim is actually without legal foundation.

18. Insurance ⇐64

That officers and directors had agreed with themselves to make to corporate mutual benefit assessment life insurer a "contribution" of amounts received from unauthorized compromise of their back salaries did not prevent the compromise payments from being a wrongful diversion of the insurer's assets authorizing the insurance commissioner to conduct its business as conservator, where the contribution was not a gift but an advancement, to be repaid. St.1935, p. 667, §§ 10745, 10748; St.1937, p. 2563, § 1011.

19. Statutes ⇐206

Meaning must be given to every word and clause of a statute, if that is reasonably possible.

20. Insurance ⇐44

Where statute, in describing acts subjecting an insurer to seizure by the insurance commissioner, uses words "embezzled" and "sequestered" and "wrongfully diverted" in provision authorizing seizure on ground that an officer of such insurer has embezzled, sequestered or wrongfully diverted its assets, reviewing court was required to seek some meaning other than embezzlement for words "wrongfully diverted" and ordinary meaning of the words was sufficient. St.1937, p. 2563, § 1011(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Wrongfully Divert".

21. Insurance ⇐64

Where funds of corporate mutual benefit assessment life insurer were paid to directors and officers in unauthorized compromise of their claims against insurer for back salary, the diversion of the insurer's assets was "wrongful" and seizure of the insurer by the insurance commissioner was authorized under the statute. St.1937, p. 2563, § 1011(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Wrongful Diversion".

22. Insurance ⇐64

Under statute, corporate mutual benefit assessment life insurer seized by the insurance commissioner had burden of proof on issue whether it could properly resume title and possession of its property and the conduct of its business. St.1935, p. 541, § 1012.

23. Insurance ⇐44

Whether a seized insurer can properly resume the conduct of its business so as to authorize cancellation of order directing the insurance commissioner to conduct the insurer's business as conservator is a matter primarily for the trial court, whose decision is binding on appeal unless without any support in the evidence. St. 1935, p. 541, § 1012.

24. Insurance ⇐44

Where statute requires, as a prerequisite to an order canceling an order directing the insurance commissioner to conduct an insurer's business as conservator, a showing in the alternative that the ground on which the commissioner was made conservator does not exist or has been removed, the first alternative refers to the time when the order appointing the conservator was made where there would be no use for the second alternative, if the first alternative were not so construed. St. 1935, p. 541, § 1012.

25. Insurance ⇐64

Where order was made directing the insurance commissioner to conduct corporate mutual benefit assessment life insurer's business as conservator on ground that insurer's officers and directors had wrongfully diverted its assets and there was no showing that the ground for the order had been removed, judgment terminating the order was reversed. St.1935, p. 541, § 1012.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Application by A. Caminetti, Jr., as Insurance Commissioner of the State of California, for an order appointing applicant as conservator of the business of the Prudence Mutual Life Insurance Association. From a judgment terminating the order, canceling the conservatorship and directing restoration to defendant of its property and business, the applicant appeals.

Reversed.

See, also, 142 P.2d 48.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, and Ralph H. Lewis, of Sacramento, for respondent.

SHAW, Justice pro tem.

Appellant, as Insurance Commissioner of the State of California, obtained from the Superior Court of Sacramento County an order under section 1011 of the Insurance Code, St. 1937, p. 2563, appointing him as conservator of the business of the respondent, Prudence Mutual Life Insurance Association, and pursuant to this order took over its property and business. The respondent is a corporation organized to do life insurance business on the mutual benefit assessment plan. Corporations of this class are usually referred to in the Insurance Code as "associations." As soon as this order was made, the proceeding was transferred to Los Angeles County. Later, on application of respondent, a hearing

was had under section 1012 of the Insurance Code, St. 1935, p. 541, at the conclusion of which the Superior Court of Los Angeles County entered a judgment cancelling and terminating the former order, dissolving the conservatorship and directing the restoration to respondent of its property and business. From this judgment the Insurance Commissioner appeals.

[1, 2] At the outset of the hearing the trial court was asked to rule upon the question where lay the burden of proof, and after extended argument it announced its opinion that the burden rested on the Insurance Commissioner. Appellant now complains of this as reversible error. The court's declaration of law, although erroneous, as will presently appear, does not in itself afford ground for a reversal, under the circumstances of this case. As a result of this declaration the commissioner's evidence was produced first, but it does not appear that either party was prevented by it from producing all available evidence, or desired to or could obtain or present anything further. The hearing appears to have been a "full hearing," as required by section 1012 of the Insurance Code. After the taking of evidence, and just before the entry of judgment, the trial court made an order vacating the submission of the case and reopening it for the purpose of making and did make a further order vacating its ruling on the burden of proof and declaring that it had heard, considered and weighed all of the evidence of both parties and that "regardless of where the burden of proof lay, the decision of this court would not be affected." This order was made seven days after the filing of the first of the decisions on burden of proof hereinafter cited and we are informed by the briefs that it was made by reason of that decision. However that may be, it shows that the court vacated its ruling on the burden of proof. We must therefore presume, nothing now appearing to the contrary, that the court weighed and considered the evidence in the light of the proper rule as to the burden of proof. The only remaining effect of its former ruling is that the appellant was required to proceed first with the production of evidence. But an error in that respect does not ordinarily result in a miscarriage of justice, where all the evidence of both parties is fully presented, and we think it did not here.

[3] In spite of this conclusion it is necessary for us to deal with the question of the burden of proof, for appellant contends that there is no proof of various facts essential to the support of the judgment, that respondent had the burden of proving those facts, and that the lack of proof of them requires a reversal. The Insurance Code contains, in Article 14 of Chapter 1, Part 2, Division 1, comprising sections 1010 to 1062, St.1935, pp. 540–553, as amended, elaborate provisions for proceedings in case of insolvency or delinquency of "persons" (defined by section 19, St.1935, p. 498, to include associations and corporations) doing insurance business. Section 1011 provides that the superior court "shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist" make an order vesting in the commissioner title to all the assets of an insurance company and directing him to take possession of its records and assets, and to conduct, as conservator, its business. This application must be served on the company ("person") in the same manner as a summons (section 1040, St.1935, p. 547), but no provision is made for an answer to it, and the order mentioned in section 1011 is obviously to be made ex parte on the filing and presentation of the application. Section 1012 provides as follows: "Said order shall continue in force and effect until, on the application either of the commissioner or of such person [company], it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

[4-6] It is clear that what we have here is not an ordinary civil action, but a special statutory proceeding. None of the rules of procedure for such actions are made applicable to it by the statute (except as already noted) and they do not apply to it of their own force. (Carpenter v. Pacific Mut. Life Ins. Co., (1937) 10 Cal.2d 307, 327, 328, 74 P.2d 761; Carpenter v. Pacific Mut. L. Ins. Co., (1939) 13 Cal.2d 306, 311, 89 P.2d 637.) No provision is made for an appearance in response to the verified application filed by the commissioner under section 1011, and that application is evidently not a complaint to be answered.

The company, if it desires a vacation of the order, must present its own application therefor. While the statute does not require it to state in such application any reasons for vacation of the order no doubt it may do so. Such reasons may or may not include a negation of the grounds of the order, but if they do it comes as the claim or contention of the company so applying. The original application of the commissioner has served its purpose when an order has been made upon it, except as a place of reference to ascertain the grounds of the order.

Nor is the proceeding at all like that in case of an order to show cause and restraining order issued to one seeking an injunction. Such a party is the actor and must proceed with his proof or lose his restraining order. Here the commissioner need do nothing after obtaining the order appointing him as conservator; and if the company does nothing the order continues in force indefinitely.

[7] Even if the company obtains a hearing, the order, by the terms of section 1012, "shall continue in force and effect until * * * it shall, after a full hearing, appear to said court" that for the reasons stated in this section it should be set aside. If at the hearing there is no evidence at all, or the evidence presented is insufficient to prove, that is, make it "appear to the court," that there are proper reasons for setting aside the order made under section 1011, the company, if it is the applicant for such relief, must fail. A statutory provision with this effect places the burden of proof on the party who must meet its requirements to succeed. This is in conformity to the provisions of section 1981, Code of Civil Procedure, that "the burden of proof lies on the party who would be defeated if no evidence were given on either side." The same conclusion has been reached, for somewhat different reasons, with which, also, we agree, in Caminetti v. Guaranty Union L. Ins. Co., (1942) 52 Cal.App.2d 330, 337, 126 P.2d 159, and Caminetti v. Imperial Mut. L. Ins. Co., (1943) 59 Cal.App.2d 476, 139 P.2d 681.

Section 1011 of the Insurance Code enumerates among the conditions, the existence of which affords ground for an order appointing the Insurance Commissioner as conservator of an insurance company, the following: "(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public. * * (h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person." The word "person" here, as elsewhere in the code, by definition includes corporations and associations. The commissioner's application for the order in this case stated as a ground therefor that two of the officers of respondent, Charles E. Fielder and his wife, Eunice H. Fielder, had wrongfully diverted assets of the association to themselves. This charge is based on the compromise and payment of claims for back salary made against the association by them. During the whole time covered by the inquiry Charles E. Fielder was a director and general manager of the association and also held either the office of president or that of secretary and his wife, Mrs. Eunice H. Fielder, was office manager and vice president and also a director. In February of 1931, 1932, 1933, and 1934, the Board of Directors of the association consisted of three persons, of whom Mr. and Mrs. Fielder were two, and in each of these months the board adopted a resolution fixing the salary of the "secretary and general manager" at $400 per month and another resolution fixing the salary of the "vice president and assistant secretary" at $200 per month. Apparently all the directors voted for all of these resolutions. The next action taken by the Board of Directors on officers' salaries was a resolution adopted on September 7, 1935, fixing the salaries of the officers at a maximum of $200 per month "during the existing emergency." In August, 1935, Mr. and Mrs. Fielder signed waivers of all unpaid salaries up to July 31, 1935. No further action regarding officers' salaries was taken up to the time of the compromises hereinafter mentioned. From July 31, 1936, to August 1, 1939, C. E. Fielder drew a salary of $200 per month and Mrs. Fielder drew a salary of $75 per month. On September 5, 1939, Mr. and Mrs. Fielder presented to the Board of Directors claims for back salaries, Mr. Fielder's for $5,000, and Mrs. Fielder's for $4,775, each of them also making an offer to compromise for $2,550. On September 13, 1939, the board of directors, at a meeting at which Mr. and Mrs. Fielder and one other director were present, adopted separate resolutions, for which all the

directors voted, authorizing the acceptance of these offers of compromise and the compromise of each of these claims for $2,550. Following these resolutions the amounts of the compromises were paid to Mr. and Mrs. Fielder.

[8] The law in California formerly was that a director was disqualified from voting on any matter in which he was directly and personally interested and could not be one of a majority essential to the adoption of such a resolution. (6A Cal.Jur. 1107; Angelus Securities Corp. v. Ball, (1937) 20 Cal.App.2d 423, 432, 67 P.2d 152.) That rule was somewhat modified by the adoption of section 311 of the Civil Code, which as it now stands declares that no contract or other transaction between a corporation and one of its directors, or between a corporation and any corporation, firm on association in which one of its directors is financially interested, shall be void or voidable by reason of the fact that such director is present at the meeting at which the contract or transaction is authorized or approved or that his vote is counted for that purpose, if (a) the fact of his interest is known to the board and the contract or transaction is authorized or approved by a vote sufficient without counting that of such director, or (b) the contract or transaction is approved or ratified, with knowledge of the director's interest, by a majority of the shareholders, or (c) the "contract or transaction be just and reasonable as to the corporation at the time it was authorized or approved."

[9, 10] It is clear that, as far as Mr. Fielder is concerned, the original resolutions fixing his salary and the resolution authorizing the compromise were not passed by a majority sufficient for that purpose without his vote, and hence the transaction cannot be upheld under subdivision (a) of section 311, above referred to. His salary, as well as any amount received in compromise of a claim therefor, would be community property (Civ.Code, sec. 164), and by virtue of section 161a of the Civil Code, adopted in 1927, his wife would have a present, existing and equal interest therein. Possibly Mrs. Fielder's vote on her husband's salary is not within the letter of section 311 of the Civil Code, since he is neither a corporation, a firm nor an association; but if not, it is within the rule which governed prior to the adoption of that code provision and there is nothing in section 311 to prevent the continuing application of the former rule to cases not within the purview of this section. In either case Mrs. Fielder's vote could not be counted to carry the resolution fixing her husband's salary. Cuneo v. Giannini, (1919) 40 Cal. App. 348, 180 P. 633, which appears to hold to the contrary, was decided before the adoption of section 161a of the Civil Code.

[11] It is to be noted also that while the salary fixing resolutions under which Mr. Fielder made his claim fixed the salary of the "secretary and general manager," which positions he held when the resolutions were passed, he ceased to be secretary and became president on November 3, 1937, and so remained until August 3, 1939. This interregnum extended over nearly the whole period of time for which he claimed back salary, and during it the salary fixing resolutions above mentioned did not cover him. Apparently there was no resolution fixing a salary for the president alone or for the general manager alone, or for both officers together.

[12] Mrs. Fielder's vote for the compromise of her husband's claim also fails for another reason. The resolutions compromising her salary claim and that of Mr. Fielder came up for action at the same meeting. Before this meeting they talked the matter over and agreed to both compromises. They thus became interested, if they were not before, in the common object of obtaining more salary for each of them and were both disqualified to vote on either resolution. (Angelus Securities Corp. v. Ball, supra, (1937) 20 Cal.App.2d 423, 433, 67 P.2d 152.)

[13] For the reason last stated Mr. Fielder was also disqualified from voting on the resolution compromising Mrs. Fielder's claim. Apparently he was not interested in her salary as community property, and hence was not disqualified to vote on the original resolutions fixing her salary. Both parties state in their briefs that Mr. and Mrs. Fielder were living separate and apart and while they give us no record reference for that fact and we have found none, we are disposed to accept the fact thus agreed on. Her earnings while she is living separate from her husband being her separate property (Civ.Code, sec. 169), he would not be disqualified from voting upon them.

[14-16] The compromise was not submitted to the shareholders—indeed, this corporation had no shareholders—and hence is not affected by subdivision (b) of

section 311 of the Civil Code. Respondent contends that it may be upheld under subdivision (c) on the ground that it was just and reasonable as to the corporation. As to that, we begin with the fact that there was no valid resolution fixing the salary of Mr. Fielder. However it is held that an officer who renders beneficial services to a corporation, without any lawful action of the board of directors fixing his compensation, but under circumstances negativing an intent that they were to be gratuitous, may recover the reasonable value of those services. (Bassett v. Fairchild, (1901) 132 Cal. 637, 64 P. 1082, 52 L.R.A. 611; Andrews v. Glick, 1928, 205 Cal. 699, 272 P. 587.) Respondent seeks to support the judgment here under this rule. However, we can find no evidence which would support a finding that the services rendered to the corporation by Mr. Fielder during the time to which his claim for back salary relates were worth more than he had received for them. Since the burden of proof was upon respondent in this proceeding, a defect of proof in this respect would require a finding against respondent. While the respondent states in its brief that the record "is replete with testimony of what duties they [the Fielders] performed," no reference is made to any such testimony and we have discovered none. There is testimony showing that respondent was in bad condition financially at the beginning of this period and in greatly improved condition at the end of it. But this is not enough. We find nothing showing how much time, effort and attention on the part of the officers were necessary or applied to produce such a result. The association was a small one and its administration may have been a part-time job. It does appear that the salaries claimed by the two officers would, for most of the period covered by their claims, amount to 20 percent or more of the income of the association. It further appears that no liability for these back salaries was set up on the books of the association or mentioned in any of its published statements of condition; and that Mr. and Mrs. Fielder received and accepted the salaries paid them without manifesting any objections to them.

[17] Respondent also attempts to support the compromises by reference to the rule that a compromise of a claim asserted in good faith is valid even though the claim is actually without legal foundation. That rule can have no application in a case like this where the claimants, acting as fiduciaries for the adverse party, approve the compromise of their own claims and the approval fails for that reason.

[18] Respondent further claims that the payment of these sums to Mr. and Mrs. Fielder did not constitute a diversion of the association's assets because they had agreed [with each other] to make a "contribution" of the amounts received (less $50 each) to the association under section 10745 of the Insurance Code, St.1935, p. 667. However, this arrangement for a "contribution" did not prevent any part of the payments on the compromise from being a diversion. The "contribution" was not a gift, but an advancement, to be repaid to the contributor when the condition of the association should warrant. Section 10745, under which the contributions would be made, while it provides that the "obligation to return such money shall not be a liability or claim * * * against the association" also provides that the "return of such money * * shall be payable only out of surplus remaining after providing for all required reserves, surplus, or minimum funds and other liabilities, whether required by the laws of this State or any other State in which the association does business," and section 10748, St.1935, p. 667, relating to the same subject, provides that when such an association discontinues business, after all claims and liabilities are paid or provided for "any surplus shall be returned to the person who advanced it."

[19-21] Respondent also argues that these payments to officers of the association upon the unauthorized compromise of their claims, which in the case of at least one of them appear to be without any legal foundation, do not constitute a wrongful diversion of the assets of the association within the meaning of subdivisior (h) of 1011 of the Insurance Code, the contention being that "the wrongful diversion would have to be akin to embezzlement and be of a deliberate fraudulent or felonious nature." One answer to this argument is, that the statute, in describing the acts which subject an insurer to seizure, uses the words "embezzled" and "sequestered" in addition to "wrongfully diverted". Since the word "embezzlement" thus appears in the statute, we must, following the rule of statutory construction that meaning and effect are to be given to every word and clause of a statute, if that is reasonably possible (23 Cal.Jur. 758, 759), seek some

meaning other than that of embezzlement for the words "wrongfully diverted". The ordinary meaning of the words is sufficient for that purpose. The payment of funds of the association to the two officers constituted a diversion of those funds to them, and since there was no legal authority for the payment, the diversion was wrongful. Nothing further was needed to bring the case within the statutory provision in question. See Wickersham v. Crittenden, (1892) 93 Cal. 17, 32, 28 P. 788; Id., (1895) 106 Cal. 327, 39 P. 602; also People v. Talbot, (1934) 220 Cal. 3, 15, 28 P.2d 1057.

[22-25] Finally, section 1012 of the Insurance Code, requires that before an order such as that here appealed from can be made it shall appear that the insurer "can properly resume title and possession of its property and the conduct of its business." On this issue, also, the respondent had the burden of proof, and appellant insists that there is no evidence justifying a finding in respondent's favor thereon. This is a matter primarily for the consideration and discretion of the trial court, whose decision is binding on appeal unless without any support in the evidence. (Caminetti v. Guaranty Union L. Ins. Co., supra, (1942) 52 Cal. App.2d 330, 336, 126 P.2d 159; Caminetti v. Imperial Mut. L. Ins. Co., supra, (1943) 59 Cal.App.2d 476, 139 P.2d 681.) While there is evidence here which would have supported a finding against the respondent on this issue, we cannot say there is no reasonable view of the evidence which would support the trial court's implied finding in its favor. However, this conclusion does not require us to affirm the judgment. Section 1012 of the Insurance Code further requires, as a prerequisite to such an order as we have here, a showing, in the alternative, that the ground on which the commissioner was made conservator "does not exist or has been removed." The first of these alternatives, "does not exist," although couched in the present tense, undoubtedly refers to the time when the order appointing the conservator was made. If it were not so construed, there would be no use in this provision for the other alternative, "or has been removed," for a condition that has been removed necessarily does not exist. This would again run counter to the rule of construction above mentioned, that meaning and effect shall be given every word of a statute. As we have already shown, the ground of action existed here when the order was made; and there is no showing that it has been removed, for the diverted funds appear to be still diverted. We are not undertaking here to decide whether such an act of diversion, once done, can be undone so as to remove the ground of such an order. We merely suggest the question as one which may require future consideration.

The judgment appealed from is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



PRUDENCE MUT. LIFE INS. ASS'N v. CAMINETTI.

Civ. 13890.

District Court of Appeal, Second District, Division 3, California.

Oct. 18, 1943.

Rehearing Granted Nov. 16, 1943.

1. Insurance ⇐64

Where state insurance commissioner, after issue of one or two temporary certificates to company organized under chapter 8 of the Insurance Code to transact life insurance business under mutual assessment plan, obtained an order appointing himself as conservator of company's business and took over the business, company was not entitled either to a renewal certificate of authority to do business under chapter 8, or of approval of proceedings taken by it to transform itself into a mutual life and disability insurer operating under chapter 9. St.1935, p. 657 et seq., § 10640 et seq., and p. 671 et seq., § 10810 et seq.

2. Insurance ⇐64

A company organized under chapter 8 of Insurance Code to transact life insurance business under mutual assessment plan was not entitled to an approval of its proposed transformation into a mutual life and disability insurer operating under chapter 9, where company did not make required deposit with state insurance commissioner. St.1935, p. 657 et seq., § 10640 et seq.; p. 671 et seq., § 10810 et seq.; p. 666, § 10739; p. 672, § 10830.

3. Insurance ⇐64

Under provision of Insurance Code requiring deposits to be made with state insurance commissioner on or before a certain date in order to authorize a company organized under chapter 8 of the Insurance Code to transact life insurance business under mutual assessment plan to transform itself into a mutual life and disability insurer operating under chapter 9, commissioner could not extend time for making deposit, either expressly or by merely failing to object to default in such respect. St.1935, p. 657 et seq., § 10640 et seq.; p. 671 et seq., § 10810 et seq.; p. 666, § 10739; p. 672, § 10830.

4. Insurance ⇐64

Even if offer of company organized under chapter 8 of Insurance Code to transact life insurance business under mutual assessment plan, to make required deposit with state insurance commissioner in order to secure approval of its proposed transformation into a mutual life and disability insurer operating under chapter 9 would be deemed equivalent to a deposit, evidence failed to establish an offer on part of company to make the deposit. St.1935, p. 657 et seq., § 10640 et seq.; p. 671 et seq., § 10810 et seq.; p. 666, § 10739; p. 672, § 10830.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding by the Prudence Mutual Life Insurance Association for a writ of mandate to compel A. Caminetti, Jr., Insurance Commissioner of the State of California, to issue a renewal certificate of authority for petitioner to do business under Chapter 8 of the Insurance Code, St.1935, p. 657 et seq., § 10640 et seq., and to approve proceedings taken by petitioner to transform itself into a mutual life and disability insurer operating under Chapter 9 of the Insurance Code, St.1935, p. 671 et seq., § 10810 et seq. From a judgment awarding the writ, the insurance commissioner appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for appellant.

Chas. H. Thompson and Sherman & Sherman, all of Los Angeles, and Ralph H. Lewis, of Sacramento, for respondent.

SHAW, Justice pro tem.

This is a proceeding in mandate, brought by petitioner, which is a corporation organized to transact the business of life insurance under the mutual benefit assessment plan provided for by Chapter 8 of Part 2, Division 2, of the Insurance Code, St.1935, p. 657 et seq., to compel the defendant Insurance Commissioner to issue to it a renewal certificate of authority to do business under that chapter and also to approve proceedings taken by it to transform itself into a mutual life and disability insurer operating under Chapter 9 of said Part of the Insurance Code and issue it a certificate of authority to do business under Chapter 9. By the judgment the petitioner was awarded the writ which it sought, and the Insurance Commissioner appeals.

[1] This case was tried with Caminetti v. Prudence Mutual Life Insurance Association, Cal.App., 142 P.2d 41, this day decided by us, and was submitted to and decided by the superior court on the evidence in that case. Both cases have been submitted here upon the same briefs and argument. The record shows that after issuing to petitioner one or two temporary certificates to continue in business under Chapter 8 of the Insurance Code, the Insurance Commissioner obtained an order appointing him conservator of its business and took over the business. This order was considered in Caminetti v. Prudence Mutual Life Insurance Association, supra, which is referred to for further details regarding it. If this order stands, the petitioner is not entitled to a certificate of authority to do business, under either Chapter 8 or Chapter 9, for by it petitioner's business was turned over to the Insurance Commissioner as conservator, and in consequence it can do no business. By the order appealed from in Caminetti v. Prudence Mutual Life Insurance Association, supra, the order appointing the conservator was "cancelled and terminated" and if that order were affirmed, doubtless the judgment here would be proper, so far as the certificate of authority under Chapter 8 is concerned. (Imperial Mut. L. Ins. Co. v. Caminetti, (1943), 59 Cal.App.2d 494, 139 P.2d 693.) But by our decision on that appeal the order of cancellation is reversed and the situation becomes the same as before it was made, that is, the order appointing a conservator is in force and petitioner is not entitled to the certificate it seeks.

[2-4] The judgment, so far as it directs a writ to compel the Commissioner to approve the transformation and issue to petitioner a certificate of authority to do business under Chapter 9 is erroneous for a further reason. Such a transformation is authorized and provided for by Article 10 of Chapter 8 above mentioned. Section 10739 of this Article provides that when an association "has accumulated a fund of twenty-five thousand dollars or more in excess of all liabilities for undisputed claims or expenses incurred and taxes" it may transform itself so as to do business under Chapter 9. Section 10740 of the same Article provides that "Any such association, at its option, instead of depositing twenty-five thousand dollars as provided for in section 10739 of this chapter, may, on or before August 1, 1941, deposit five thousand dollars at the time of transformation, and the balance of twenty thousand dollars" over a period of four years. Section 10740 is manifestly in error in referring to section 10739 as providing for a deposit of twenty-five thousand dollars. A deposit of that sum with the Commissioner is required by section 10830, a part of Chapter 9, before an insurer operating under Chapter 9 can issue policies. Although petitioner never did deposit or have a fund of twenty-five thousand dollars, we forbear to decide what is the effect of this misreference in section 10740. Section 10740 clearly limits the option granted by it so that it must be exercised by making the first five thousand dollar deposit "on or before August 1, 1941." It is undisputed that petitioner did not make such a deposit on or before that date. Hence it is not entitled to a writ requiring an approval of its transformation or the issuing of a certificate to do business under Chapter 9. To escape this conclusion it claims, and the court found, that before that date it offered to deposit with the commissioner the sum of five thousand dollars and that the defendant's refusal to approve the transformation or issue a certificate therefor was not based on failure to make such deposit. The latter point clearly has no force. The Insurance Code definitely requires the deposit to be made before the date stated, and the Commissioner cannot extend the time, either expressly or by merely failing to object to a default in that respect. Assuming, for the purpose of this case only, but not deciding, that petitioner is correct in arguing that an offer of the deposit, made in time and when its transformation proceedings are tendered for approval, must be deemed equivalent to a deposit and petitioner does not lose its rights by the commissioner's delay or refusal to act, the defendant contends that no such offer was made. There is a finding of such an offer but we can find no support for it in the evidence. The only testimony cited by petitioner in its support is this testimony of Mr. Fielder, the general manager of petitioner: "Q. * * * was the Association at all times ready, willing and able to deposit with the Commissioner the sum of $5000.00 cash? A. Yes." We have made some search of the transcript and can find nothing coming nearer to support of the finding than this. It is insufficient. It shows no offer at all, but only a state of mind of the Association plus financial ability to pay. As far as appears, this state of mind was entirely undisclosed and it did not constitute an offer.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



KULAWITZ v. PACIFIC WOODENWARE & PAPER CO.

Civ. 12395.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1943.

Hearing Granted Dec. 16, 1943.

1. Landlord and tenant ⇐110(1, 2)

Evidence that lessee conducting furniture business attempted to sublease premises after an auction sale advertised as a quitting business sale, and that lessor leased adjoining premises to a third party for the purpose of selling linoleum products, although lease contained provision prohibiting leasing premises for any competitive business, did not establish that lessee abandoned the lease nor that lessor had accepted such abandonment.

2. Landlord and tenant ⇐48

Where lessor's alleged violation of lease, by which lessor agreed not to lease any space in same building for the purpose of conducting a competitive business, consists, not in permitting another lessee to engage in the same general business, but in permitting such lessee to sell one or two of the numerous articles sometimes sold by persons conducting such general business, the burden is on lessee to point out to lessor the specific articles so handled and give lessor an opportunity to correct condition.

3. Landlord and tenant ⇐34(3)

Where a lease authorizing lessee to conduct furniture business contained provision whereby lessor agreed not to lease any space in same building to another for purpose of conducting furniture business, lessee seeking to rescind lease, because of alleged violation of such provision by leasing space to another for purpose of selling linoleum products, was not entitled to rescission in absence of showing that specific articles so sold had been pointed out to lessor and opportunity given to correct condition.

4. Appeal and error ⇐1172(5)

In lessee's action to cancel lease, where lessor counterclaimed for rent and for counsel fees, and counsel fees of $300 were allowed upon erroneous assumption that only $1,050 was due for rent and judgment was reversed for failure to allow rent for full term, the judgment for attorney's fees would be likewise reversed.

5. Landlord and tenant ⇐238

The filing by lessor of a cross-complaint for rent and attorney's fees, in lessee's action for rescission of lease, constituted the "bringing of an action" within provision of lease relating to recovery of fees in event of bringing an action for rent.

See Words and Phrases, Permanent Edition, for all other definitions of "Bringing an Action".

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by S. Kulawitz against the Pacific Woodenware & Paper Company seeking rescission of a lease, wherein defendant filed an answer and cross-complaint seeking to recover rental and counsel fees. From those portions of the judgment determining that lease had been terminated on a certain date and denying to defendant the recovery of rent accruing after that date and denying counsel fees in excess of a certain amount, defendant appeals.

Portions of judgment appealed from reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

George P. Marshall and Alfred Nelson, both of Oakland, for respondent.

SPENCE, Justice.

Plaintiff, as lessee, sued defendant, as lessor, seeking rescission of a lease entered into by the parties on June 20, 1938. Said lease was for the term of four years commencing on July 1, 1938. Defendant filed an answer and cross-complaint seeking to recover the amount provided as rental in said lease and also to recover counsel fees. By its findings of fact and conclusions of law, the trial court determined that plaintiff should take nothing by his complaint; that defendant should have judgment for rental in the total sum of $1,050, being rental at $350 per month for the months of February, March and April, 1941; that defendant should have judgment for counsel fees in the sum of $300; and that the lease had been "terminated" on May 1, 1941. Judgment was entered accordingly. Defendant appeals from those portions of the judgment adjudging that the lease had been terminated on May 1, 1941; denying to defendant the recovery of rent accruing after that date; and denying to defendant counsel fees in excess of $300.

The lease covered a large store on East 14th Street in Oakland, which store constituted only a portion of the building owned by the lessor. A pertinent portion of the lease read as follows: "Said Lessee agrees not to underlet said premises as a whole or in part or to assign this lease or to allow any sale of property by auction, except upon retiring from business, on said premises * * * or to use said premises for any purpose other than conducting a General Furniture Business without written consent of the Lessor first had and obtained. And the Lessor agrees that he will not during the term of this lease * * * permit any space or store room in the same building wherein the premises demised are located, to be used or occupied for the purpose of conducting therein a furniture

store without the consent in writing of the Lessee first had and obtained."

Plaintiff went into possession of said premises in 1938 and conducted a furniture store therein until January 1941. In that month plaintiff conducted a "Public auction" extending over several days in which he sold his entire stock after advertising extensively that he was: "Quitting Business—Everything Must Go to the Bare Walls—We're closing out our entire stock with a whirlwind finish." Plaintiff paid no rent thereafter but he endeavored to sublet the premises through the agent of defendant who had negotiated the original lease with plaintiff. Plaintiff offered to accept $250 per month but was apparently unsuccessful in his efforts to sublet. In April 1941, defendant had an opportunity to rent the adjoining store in the same building and on April 2, agreed by letter to rent said adjoining store to one Smith on a month to month basis at a rental of $75 per month. Said letter stated that the store was rented "for the purpose of conducting therein the sale of linoleum and kindred products". It further stated that possession would be given to Smith immediately for the purpose "of preparing said store room for business to start on May 1st, 1941, on which date the rent shall commence". The evidence shows that defendant did not know that plaintiff had previously sold linoleum in connection with his furniture business. Upon plaintiff's learning of the renting of the adjoining store and of the preparation by Smith to start business there, plaintiff's counsel phoned to defendant on April 21 and wrote to defendant under date of April 24 claiming that defendant had committed a breach of the lease by renting to Smith for the purpose of conducting a "furniture store" in the adjoining store and giving notice that plaintiff would "no longer be bound to the provisions of the lease on his part to be performed." Defendant's counsel replied by letter to plaintiff's counsel on April 29 denying that any breach of the lease had been committed by defendant; denying the right of plaintiff to declare a breach for the reasons stated or otherwise; and insisting that plaintiff was bound by the terms of the lease and was obligated to pay the rent as therein provided. Said letter stated that the new tenancy "does not in fact authorize the new tenant to conduct therein a furniture store or to conduct any business therein except the business of selling linoleum. In this connection we are also advised that even while your client was in business in the leased premises he did not handle linoleum. We are advised further that your client wholly discontinued business at the leased premises before the new tenancy was created and that as very persuasive evidence of said discontinuance your client conducted an auction on the premises—something that your client expressly agreed by the terms of his lease not to do, 'except upon retiring from business'. Under all the circumstances, it appears obvious that the new tenancy is merely an excuse and not the reason for your client's denial of obligation under the lease. The lessor is unwilling to accept any such excuse." It does not appear that there was any further communication between the parties or their counsel prior to the filing of plaintiff's complaint herein on October 18, 1941.

Upon the trial, several amended and supplemental pleadings were filed by the parties. The trial court denied plaintiff any relief upon his complaint for rescission but nevertheless adjudged that the lease had been terminated on May 1, 1941, upon the theory that plaintiff had abandoned the lease and that defendant had accepted the abandonment. The trial court found "that in the month of January, 1941 plaintiff did retire from said furniture business on said premises and plaintiff did in and during said month of January, 1941 hold a public auction in said premises at which auction plaintiff sold and disposed of all plaintiff's furniture and personal property connected with the plaintiff's said furniture business on said premises and thereafter plaintiff discontinued his said furniture business on said premises: * * * that after holding said auction and on the first day of February, 1941 plaintiff abandoned said leasehold and the premises described in said lease." The trial court further found "that by conducting an auction in January of 1941 plaintiff did give notice to the defendant that plaintiff was retiring from business and discontinuing the conduct of a furniture store in the leased premises" but that prior to the time defendant rented the adjoining store to Smith and during the latter part of the month of March 1941, "plaintiff was engaged in reestablishing the furniture business of plaintiff in the premises described in said lease to plaintiff". The trial court further found that the covenant against the use of any other part of the building for conducting a furniture store was "a material and essential part of

the lease, and was a material part of the inducement and consideration of said lease"; that defendant rented the adjoining store to Smith on May 1, 1941, for the purpose of selling linoleum and kindred products; that Smith entered said store on May 1, 1941, and commenced to sell and thereafter continued to sell linoleum and kindred products; that plaintiff had sold linoleum and kindred products in conducting his furniture business on the premises during the time he occupied the same; that on the 18th day of April, 1941, plaintiff did "abandon said premises leased to plaintiff upon receiving information that Smith was to use said adjoining store in said building for the sale of linoleum and kindred products as aforesaid"; and "that by said renting to said Smith said defendant on the first day of May 1941, accepted the abandonment by plaintiff of the premises leased to plaintiff under the terms of the lease and evicted plaintiff therefrom." It was further found "that said lease was terminated May 1, 1941 and it is true that defendant violated the covenant of quiet enjoyment and evicted plaintiff on said first day of May 1941 and did on said first day of May, 1941 accept the abandonment by plaintiff of the premises described in said lease".

[1] Defendant's main contention is that the material portions of said findings are not supported by the evidence and that the trial court erred in adjudging that the lease had been terminated on May 1, 1941, and in denying to defendant recovery of rent after that date. Defendant also calls attention to a claimed inconsistency in the findings in that the trial court found an abandonment by plaintiff on February 1, 1941, and also an abandonment by plaintiff on April 18, 1941. In view of the conclusions we have reached, we may assume, in discussing defendant's main contention, that the covenant against permitting the use of any other portion of the premises for conducting a furniture business was a material inducement and consideration to plaintiff in executing said lease; that said restrictive covenant was valid and that it remained operative when the Smith tenancy began despite the fact that the trial court found that plaintiff had previously retired from business and had "abandoned said leasehold and the premises" (see, however, Ullman & Co. v. Levy, 172 La. 79, 133 So. 369; 17 C.J.S., Contracts, p. 630, § 246; 6 Cal.Juris., p. 134; Gregory v. Spieker, 110 Cal. 150, 42 P. 576, 52 Am.St.Rep. 70); and that the act of defendant in renting the adjoining store to Smith for the purpose of selling linoleum and kindred products constituted a breach of said restrictive covenant. We find no evidence, however, to sustain the finding that plaintiff abandoned the leasehold on February 1, 1941, or to show any attempted abandonment by plaintiff until plaintiff sought to rescind after learning of the renting of the adjoining store to Smith. Nor do we find any evidence to show that defendant ever intended to accept any alleged abandonment, all of the evidence being to the contrary. While the evidence shows that plaintiff did retire from business on or before February 1, 1941, it further shows that plaintiff did not then abandon the leasehold but, on the contrary, he first attempted to sublet the premises and later started preparations to reestablish his furniture business in the premises in the latter part of March, 1941, as found by the trial court. And as the only evidence in the record tending to show any attempted abandonment by plaintiff is the evidence showing that plaintiff claimed a breach of the restrictive covenant and a right to rescind after defendant had rented to Smith and as the only evidence in the record claimed by plaintiff to sustain the findings relating to an acceptance of the alleged abandonment, or the findings relating to eviction, or the findings relating to the breach of the covenant of quiet enjoyment, is the evidence showing that defendant rented the adjoining store to Smith in April, 1941, for the purpose of selling linoleum and kindred products, we come to a discussion of the rights and duties of the parties arising out of such alleged breach by defendant of the restrictive covenant of the lease.

We believe that these right and duties are clearly indicated in Strong v. Morrison, 87 Cal.App. 169, 261 P. 1051, 1052. In that case, which involved the lease of space in a public market, the lease provided that the lessee should have "the exclusive grocery privilege". In an action brought by the lessor to recover rent, the lessee sought rescission and damages because of the alleged infringement of this restrictive covenant. It was not claimed that the lessors had entered into any other lease permitting any other lessee to engage in the general grocery business but it was claimed that certain other lessees were per-

mitted to sell and were selling a few of the many articles falling in the general category of groceries. The lessee had complained to the lessors but had failed to furnish the lessors with any specific statement showing the nature and extent of the claimed infringement. It was held that it was the lessee's "duty to point out to the lessors the specific articles and give them an opportunity to correct the condition". As the lessee had failed to do so, it was held that he was not entitled to either rescission or damages.

[2, 3] In our opinion, the rule of the cited case is sound and should be applied at least in cases such as the present one where the alleged infringement by the lessor consists not in permitting another lessee to engage in the same general business as that specified in the restrictive covenant but merely in permitting another lessee to sell one, or perhaps a few, of the numerous articles which are sometimes but not invariably sold by persons conducting such general business. This rule imposes no undue burden upon the lessee and any other rule would impose an undue burden on the lessor. As the lessee in the present case failed to perform this duty of pointing out to the lessor the "specific articles" and of giving the lessor an opportunity to correct the condition, he was not entitled to rescind or to repudiate his obligations under the lease or to have the lease declared terminated or to recover damages by reason of the alleged breach. We are further of the opinion that as there was no evidence to show that the lessor ever intended to accept any alleged abandonment by the lessee, the mere act of the lessor in renting the adjoining store to Smith cannot be relied upon to sustain the finding that the lessor accepted any alleged abandonment.

Plaintiff states that all questions involved on this appeal have been determined in Medico-Dental Bldg., etc., Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457, and Pappadatos v. Market St. Bldg. Corp., 130 Cal.App. 62, 19 P.2d 517. In fact, plaintiff claims that Strong v. Morrison, supra, is inapplicable in the light of these more recent cases. We find nothing in the cases cited by plaintiff which is inconsistent with or which renders inapplicable the rule enunciated in Strong v. Morrison, supra. In the Medico-Dental Co. Building case [21 Cal.2d 411, 132 P.2d 468], no question was involved concerning any failure of the lessee to give the lessor notice and a reasonable opportunity to remedy the condition of which the lessee complained. On the contrary, ample notice was there given and the parties met and discussed the situation at length. It was only after some time had elapsed and after the lessor had advised the lessee "that negotiations were ended, and that nothing could be done with Dr. Boonshaft, and that it could use its own judgment about moving from the building", that the lessee rescinded, vacated the premises and ceased to pay rent. In the Pappadatos case, the lessee sought an injunction to prevent the lessor from entering into another lease which he claimed would infringe the restrictive covenant in his own lease. These cases are clearly distinguishable as the lessee in the Medico-Dental Building Co. case had fully performed the duty imposed upon him before attempting to rescind and in the Pappadatos case, the lessee did not attempt to rescind but stood upon his rights under his lease and sought to prevent by injunction the infringement by the restrictive clause.

[4, 5] In view of the conclusions which we have reached, we deem it unnecessary to discuss the other points raised by defendant except the point with respect to counsel fees. By the terms of the lease, the lessee agreed to pay counsel fees "in the event that said Lessor shall bring an action at law against said Lessee to enforce the payment of any rent due * * *". The trial court allowed counsel fees but fixed the amount at $300 upon the assumption that the total rent due was $1,050. As the portions of the judgment declaring that the lease had been terminated on May 1, 1941, and denying to defendant rent after that date must be reversed, we are of the view that the portion denying counsel fees in excess of $300 must likewise be reversed. In this connection, plaintiff takes the position that as plaintiff brought the action and defendant merely cross-complained in the action brought by plaintiff, he should not have been awarded any counsel fees. We are of the opinion that plaintiff's position is untenable as it places an unreasonable interpretation upon the provision of the lease relating to counsel fees. While we find no authorities directly in point, it has been said that where a cross-complaint is filed, "for all practical purposes * * * the situation involves the consolidation of two independent actions arising out of, or relating to, the same transaction" (Millar v. Millar,

51 Cal.App. 718, 722, 197 P. 811, 813; see also Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384), and it has been held in other jurisdictions that where a mortgage provides for the payment by the mortgagor of counsel fees in an action brought by the mortgagor to foreclose, the mortgagee is entitled to such counsel fees when foreclosure is obtained through a cross-bill. Shaffner v. Appleman, 170 Ill. 281, 48 N.E. 978; Town v. Alexander, 185 Ill. 254, 56 N.E. 1111; Building & Loan Ass'n v. Griffin, 90 Tex. 480, 39 S.W. 656. We conclude that the filing by defendant of the cross-complaint in this action to enforce the payment of the rent due from the lessee, constituted the bringing of an action at law to enforce the payment of such rent within the meaning of the provisions of the lease relating to counsel fees.

The portions of the judgment from which defendant has appealed are reversed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.



PEOPLE v. NEWMAN.

Cr. 3720.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1943.

Hearing Granted Nov. 8, 1943.

1. Criminal law ⇐260(11)

An appellate court will not weigh evidence, but will decide whether trier of facts could have found sufficient facts on face of evidence to warrant inference of guilt, and such trier's finding will not be set aside for insufficiency of evidence to sustain it, unless it clearly appears that there is no substantial evidence to support trier's conclusion on any hypothesis.

2. Criminal law ⇐351(1), 391

Defendant's failure to contradict, explain, or deny evidence of incriminating facts by his own testimony or otherwise may be considered by trier of facts in determining defendant's guilt. Const. art. 1, § 13, amended in 1934.

3. Gaming ⇐98(3)

Evidence sustained conviction of recording a bet. Pen.Code, § 337a, subd. 4.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Herbert Joseph Newman was convicted of recording a bet, and he appeals.

Affirmed.

Robert E. Ford, of Hollywood, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Dep. Atty. Gen., for plaintiff and respondent.

Robert E. Ford, of Hollywood, for defendant and appellant.

McCOMB, Justice.

From a judgment of guilty of violating section 337a, subdivision 4, of the Penal Code after trial before the court without a jury, defendant appeals.

There is also an appeal from the order denying his motion for a new trial.

The evidence being viewed in the light most favorable to the prosecution, the essential facts are:

On February 17, 1943, defendant was arrested in Room 17 of a hotel building in Los Angeles. At the time there were two other persons in the room with defendant. When defendant was arrested he was searched and a National Scratch Sheet dated February 17, 1943, was found under defendant's coat near his shoulder. In the same room was also found a Metropolitan Scratch Sheet dated February 17, 1943. In Room 18, across the hall from Room 17, the officer found several pieces of paper, apparently torn from a tablet or notebook, stuck to the underside of the top of a dresser in the room. When defendant was booked at the police station, he turned in a notebook with the word "Memorandum" on it. This notebook contained entries in his handwriting, such as, "W.X.X. 4720", and the slips of paper known as betting markers found in Room 18 also contained entries in defendant's handwriting. The notebook which defendant possessed was

commonly known by book makers in Los Angeles County as an "Owe Sheet." It was the custom of book makers in Los Angeles County to record in code and by means of signs, symbols and letters their betting operations.

Defendant did not testify in the case.

Defendant relies for reversal of the judgment on this proposition:

There was not any substantial evidence to sustain the trial court's implied finding that defendant had recorded an actual bet contrary to the provisions of Section 337a, subdivision 4, of the Penal Code.

This proposition is untenable and is governed by the following pertinent rules of law:

[1] (1) An appellate court will not attempt to determine the weight of the evidence, but will decide whether on the face of the evidence it can be held that sufficient facts could have been found by the trier of fact to warrant an inference of guilt, and before the finding of the trier of fact will be set aside on appeal on the ground of insufficiency of the evidence to sustain it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trier of fact. (People v. Abrams, 58 Cal.App.2d 157, 136 P.2d 46; People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685; see also People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.)

[2] (2) In a criminal trial where defendant does not by his own testimony or otherwise attempt to contradict, explain or deny evidence of incriminating facts which has been received against him the trier of fact is entitled to consider such circumstance in determining his guilt. (Art. I, sec. 13, Constitution of the State of Calif.; People v. Wiezel, 39 Cal.App.2d 657, 663 et seq., 104 P.2d 70, and cases cited in the footnote.*)

[3] Applying the foregoing rules to the facts in the instant case, it is evident that there was substantial evidence to sustain the trial court's implied finding that defendant had recorded a bet contrary to the provisions of section 337a, subdivision 4, of the Penal Code.

The evidence discloses that when defendant was arrested, he had under his coat near his shoulder a National Scratch Sheet; that stuck to the under-side of a dresser in an adjoining room were pieces of paper upon which were notes in the handwriting of defendant (such pieces of paper were known as betting markers); that defendant had a notebook in his possession commonly known as an "Owe Sheet" in which were also entries in his handwriting; and that it was the custom of book makers in Los Angeles County to record in code and by means of symbols their betting operations.

These facts clearly constituted incriminating evidence and when taken in connection with the circumstance that defendant did not testify in his own behalf or otherwise attempt to contradict, explain or deny, such incriminating facts, constituted substantial evidence to sustain the trial court's implied finding.

For the foregoing reasons, the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

* November 6, 1934, by an initiative measure, the people of the State of California amended article I, section 13, of the state Constitution to read in part as follows: "* * * but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

In a number of cases construing the foregoing amendment, the appellate courts have in varying phraseology, emphasized what seems to be the purpose of the amendment, to wit, the failure of a defendant to deny or explain incriminating evidence presented against him shall constitute a substantial factor in determining his guilt. The amendment places no limitation upon the extent to which such conduct of the accused shall be considered. In the absence of such restriction, no valid reason appears why one who remains silent in the presence of incriminatory evidence shall not be adjudged guilty if the corpus delicti has been proven. (See People v. Perry, (1939), 14 Cal.2d 387, 395, 94 P.2d 559, 124 A.L.R. 1123; People v. Waller, (1939) 14 Cal.2d 693, 702, 96 P.2d 344; People v. Murray, (1940), 42 Cal.App.2d 209, 214, 108 P.2d 748; People v. King, (1940), 40 Cal.App.2d 137, 141, 104 P.2d 521; People v. Dozier, (1939), 35 Cal.App. 2d 49, 59, 94 P.2d 598; and People v. Dukes, (1936), 16 Cal.App.2d 105, 109, 60 P.2d 197.)

61 Cal.App.2d 25

LILLEY v. LEGGETT et al.

Civ. 12491.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1943.

1. Courts ⇐489(1)

A California superior court had jurisdiction to quiet title to a United States Mint receipt for plaintiff's gold coins deposited by defendants, notwithstanding that the Gold Reserve Act of 1934 vested title in gold coins in the United States, where a credit was required to be given therefor in other legal tender. Executive Order No. 6102, April 5, 1933; Executive Order No. 6260 as amended by No. 6556, 12 U.S.C.A. § 95 note; 12 U.S.C.A. § 95; 31 U.S.C.A. §§ 311, 441 to 443; Civ.Code § 655; Code Civ.Proc. § 738.

2. Quieting title ⇐35(2)

Complaint to quiet title to a United States Mint receipt for plaintiff's gold coins deposited by defendants was not required to allege compliance with statutes dealing with the method by which finders may acquire title to lost property. Pol. Code, §§ 3136 to 3142.

3. Finding lost goods ⇐6

Where complaint to quiet title to a United States Mint receipt for plaintiff's gold coins deposited by defendants alleged ownership in plaintiff and a demand upon, and refusal by, defendants, plaintiff complied with statute relating to recovery of lost property. Pol.Code, § 3140.

4. Finding lost goods ⇐6

Where defendants received a United States Mint receipt for plaintiff's gold coins deposited by defendants and there was no allegation or finding that defendants, as the finders, had complied with statutes providing the method by which finders may acquire title to lost property, statute providing that the proof required of the owner is to be made before the clerk where the finder's claim is recorded was inapplicable. Pol.Code, §§ 3136 to 3142.

5. Finding lost goods ⇐6

The statute providing that the proof required of the owner of lost property is to be made before the clerk where the finder's claim is recorded applies only where finder has filed a list of such property with the clerk, and, in absence of compliance by the finder, the owner is not precluded from having his title determined by normal processes in a court of law. Pol.Code, § 3142.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Sarah A. Lilley against George W. Leggett and another to quiet title to a receipt issued by the United States Mint for deposited gold coins. From an order appointing a receiver to carry out a final judgment for plaintiff, defendants appeal.

Affirmed.

J. Maurice, of Oakland, for appellants.

Arthur G. Potter, Jr., of Oakland, for respondent.

PETERS, Presiding Justice.

Upon petition of plaintiff, the trial court appointed a receiver to carry out the terms of a final judgment that had been rendered in favor of plaintiff. From this order defendants appeal.

The original action was one to quiet title to a certain receipt issued by the United States Mint for gold coins deposited with it. The complaint alleged that prior to 1934 the plaintiff was the owner and entitled to possession of certain gold coins which were then, and until 1940, in the possession of certain unknown persons; that under the terms of the Gold Reserve Act of 1934 (31 U.S.C.A. § 311, et seq.) plaintiff, as owner, was required to turn such gold over to the government, and was entitled to receive back the value therefor; that these coins came into the possession of defendants in 1940; that defendants turned the coins over to the Mint and obtained a receipt therefor in their names; that plaintiff is the equitable owner of the receipt; that prior to filing the action, demand was made upon defendants for delivery of the receipt, which demand was in writing and offered to compensate defendants for all expenses incurred and for all services necessarily performed by them in connection with the property; that defendants refused to deliver the receipt to plaintiff. The prayer was to quiet title to the receipt, and for an order directing the assignment of the receipt to plaintiff.

The answer denied most of the allegations of the complaint and, particularly al-

leged that the gold found by defendants did not belong to plaintiff. It was also alleged that the state courts had no jurisdiction to try the question, and that plaintiff was without legal capacity to sue because the Gold Reserve Act made the United States government the owner of all gold. The prayer asked that title to the receipt be quieted in defendants.

The trial court found, in substance, that all the allegations of the complaint were true; that the plaintiff was entitled to the receipt and had offered to reimburse the defendants for expenses incurred and services rendered; that the complaint did state a cause of action; that the court did have jurisdiction; and that the plaintiff did have the legal capacity to bring this action. Judgment was rendered for the plaintiff, quieting plaintiff's title to the receipt, and ordering the defendants to endorse the receipt over to the plaintiff, and ordering the plaintiff to pay to the defendants any expenses incurred by them. This judgment was rendered on February 16, 1942.

No direct appeal was taken from that judgment, but an abortive appeal was attempted to be taken from an order denying the motion for a new trial, and from what was alleged to be an order denying a motion to vacate the judgment, but which order apparently had never been made. This appeal, on motion, was dismissed by this court on July 27, 1942.

After the judgment had become final, upon petition of plaintiff, the trial court made its order appointing a receiver with power to take custody of the receipt and to endorse it to plaintiff. It is from this last order that this present appeal has been taken.

Appellants contend that the original judgment is void, either because the state courts have no jurisdiction over controversies dealing with gold coins, or because the plaintiff did not allege in the original complaint, nor did the trial court find, compliance with §§ 3136 to 3142 of the Political Code. Inasmuch as the original judgment is final and cannot be reviewed on this appeal, to prevail, appellants must establish that the original judgment is void on its face for either, or both, of the two reasons above stated.

[1] The judgment is not void on its face. Appellants urge that the Gold Reserve Act of 1934, supra, vested ownership of all gold coins in the Federal government, and contend that the Federal courts have exclusive jurisdiction in an action in which the subject matter is gold coins. The obvious answer to this contention is that the subject matter of this action is not gold coins. The plaintiff did not seek to gain control of gold coins, but sought to obtain title to the receipt for such gold coins. Such receipt is capable of ownership under § 655 of the Civil Code, to which title can be quieted under § 738 of the Code of Civil Procedure. While the Gold Reserve Act of 1934, supra, does vest title in gold coins in the United States, that, and related acts, and the regulations passed pursuant thereto, 31 U.S.C.A. § 311 and §§ 441 to 443; 12 U.S.C.A. § 95; Executive Order 6260 as amended by Executive Order 6556, 12 U.S.C.A. § 95 note; Executive Order 6102, provide that a credit must be given in other forms of legal tender. That is just what was done here, and it is the receipt for this credit, not the gold coins deposited, that is the object of this proceeding. The gold has been turned over to the government. The government of the United States has no interest in the matter except to pay the money called for by the receipt to the proper owner. The question as to who is the owner of the receipt is obviously a matter within the jurisdiction of the state courts.

[2–5] The appellants also urge that the judgment is void on its face because the complaint upon which the judgment was secured does not allege compliance with §§ 3136 to 3142 of the Political Code. Even if it be assumed that the complaint was demurrable for this reason, it would be doubtful whether this point could be urged after the judgment has become final. Moreover, under the facts here involved, such compliance was not necessary. The sections in question deal with lost money and goods, and deal with a method by which finders of lost property may protect themselves and acquire title to lost property. The sections have but little to do with the rights of owners of lost property. Section 3140 provides, in fact, that when the owner of lost property appears and pays all reasonable charges incurred by the finder "the finder must restore the same to him," and that if the finder refuses, "the owner may recover the same or the value thereof by civil action." The complaint alleged ownership in plaintiff and a demand upon, and refusal by, defendants. The plaintiff complied exactly with this section.

It is true that § 3142 of the Political Code provides that the proof required is to be made before the clerk where the finder's claim is recorded. Even if this section provided the exclusive method of proof in those cases falling within its operation, a point we do not decide, the present case is not covered by that section. There is no allegation or finding that the defendants, as the finders, ever complied with §§ 3136, 3137, 3138, 3139 or 3141 of the Political Code. Section 3142 has application only where the finder has filed a list of such property with the clerk. In the absence of compliance by the finder, the owner is not precluded from having his title determined by normal processes in a court of law.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



61 Cal.App.2d 46

In re MURPHY'S ESTATE.

MURPHY v. KENDALL.
Civ. 12404.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1943.

As Modified on Denial of Rehearing Nov. 18, 1943.

Hearing Denied Dec. 16, 1943.

1. Appeal and error ⇐715(1)

It is not good practice to propound questions to litigants after appeal has been submitted for decision unless it appears that answers will be of assistance in determining the issues. Rules on Appeal, rule 17b.

2. Judges ⇐49(1)

Record supported finding that judge was not disqualified on ground of bias and prejudice to determine proceedings wherein judgment creditor sought to enforce the judgment against estate of judgment debtor's widow.

3. Judgment ⇐710

Prior decisions of the appellate court that judgment debtor's property was free from liens, and that transfer of property of judgment debtor to his wife was free from fraud, precluded judgment creditor from participating in property of estate of judgment debtor's wife.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, B. C. Hawkins pro tem., and George H. Thompson pro tem., Judges.

In the matter of the estate of Alice K. Murphy, deceased, wherein Lulu Mignon Murphy filed a petition objecting to the sale of property by W. S. Kendall, executor, etc., of the estate of Alice K. Murphy, deceased. From judgments, orders, and decrees, petitioner appeals, and also moves for a decree of reversal on default, and that the appellate court submit questions.

Motions denied, and judgments, orders, and decrees affirmed.

Lulu Mignon Murphy, of Stockton, in pro. per.

H. W. Coale, of Stockton, for respondent.

WARD, Justice.

Petitioner and appellant is the daughter of S. S. Murphy, against whom it may be assumed she obtained a judgment about thirty years ago. The judgment has not been made part of the record herein. Respondent, executor of the estate of the widow of S. S. Murphy, has failed to file a brief.

Appellant was permitted to file a transcript on appeal without payment of the established fee, and to file a "typed and hand printed opening brief." Subsequently she filed a document entitled "Motion for Entry of Reversal upon Default of Respondent." This was followed by a "Petition for Ruling upon Default of Executor, and deny Respondent Brief." About one month later there was filed a "Petition to Submit upon Records with Directions to the Clerk of Court to forward to Appellant such Questions as the Court Desires to have answered."

[1] With reference to the last motion, it is not good practice to propound questions to the litigants after an appeal has been submitted for decision unless it appears that the answers will be of assist-

ance in determining the issues. Unfortunately for appellant, the record indicates that further answers would result in complicating the questions already before the court. The other two motions may be determined in accordance with the present "Rules on Appeal" (Rule 17b), which provide merely that if respondent's brief is not filed, the case may be submitted for decision on the record.

The present appeal is presented by way of a bill of exceptions. However, the record is in such a state of confusion in many essential respects that this court is unable to follow the attempt of appellant as "protestant," "claimant," "petitioner," or "litigant," represented sometimes by counsel and at other times appearing "in propria persona" and "in forma pauperis," to present her grounds of appeal.

The first document forming part of the record on appeal, entitled "Appellant's Bill of Exceptions," contains certifications by three judges who took part in the proceedings, Judge M. G. Woodward stating in his certificate: "I am signing the foregoing merely in order that appellant may get her appeal. I cannot certify that it is a 'fair summary' or that it is a bill of exceptions." The next document, the "Clerk's Transcript on Appeal," filed six months after the bill of exceptions, has been certified by the clerk of the court. Instead of the usual certification by the court, the following, signed by the trial judge, appears: "The foregoing is apparently offered as a judgment roll. It is merely a copy of certain files, involving matters from which no appeal can be taken. Much of the material had no bearing on an appeal from the decree of distribution." There is also a "Clerks Transcript on Appeal" "stricken out by Judge M. G. Woodward." Most of the papers stricken from the files are documents offered to the court but not signed. Some of the record is typed; some hand lettered in pen or pencil. Some of the motions herein are accompanied by citations. One motion supported by affidavit is followed by a "Plea for Equity" containing prose and poetry. Its purpose, as stated, is to enable appellant not only to "secure her own," but so that she may blaze "a more rightful way for those who follow."

Appellant's opening brief contains an appendix claimed to include all matter from the clerk's transcript which is referred to in the brief and not set forth in the bill of exceptions.

The appeal in its disordered form might be dismissed for non-conformance with statutory provisions, rules, etc., but it is our conclusion that the ends of justice will be best served if it be considered upon its merits.

Appellant's claim in its origin is apparently based upon a judgment against her father for support. Several proceedings to enforce the judgment were instituted. In Murphy v. Riecks, 40 Cal.App. 1, page 8, 180 P. 15, 18, wherein petitioner and appellant herein appeared as defendant and appellant, in an action to restrain the sale of certain real property, the court, referring to the present petitioner, said: "She has filed herein a voluminous brief, prepared, as we are informed, by herself, unaided by a lawyer, and while therein, for one who has not been an habitual student of the law, she has presented her side of this case with singular clearness and force, it is plainly manifest that (as above declared), so far as this particular case is concerned, the law is against her, and therefore her appeal cannot be sustained." The decision denied that appellant herein had a lien against the property. Later she filed another action against her father and stepmother in an attempt to enforce the original judgment. The facts of that case, Murphy v. Murphy, 57 Cal.App. 182, on page 183, 207 P. 43, are stated as follows: "From the complaint it appears that plaintiff is the daughter of S. S. Murphy by a former marriage; that on April 26, 1911, she obtained a judgment against him for her maintenance and support in the sum of $15 per month, and that the amount due under said judgment is $930, as principal, and $179.91 interest. The complaint then proceeds." Thereafter appear references to the transfer to and acquiring of properties by Alice K. Murphy, the wife of S. S. Murphy, as shown by official records, including the family home particularly involved in the present controversy. The court, commenting in that regard, said (page 185 of 57 Cal.App., page 44 of 207 P.): "Nor is any fact alleged from which it can be inferred that any transfer to said Alice K. Murphy was fraudulent." In a later decision, Murphy v. Murphy, 71 Cal.App. 389, 235 P. 653, an action to renew a judgment for the maintenance of an alleged dependent

daughter to be a lien upon property standing in the name of the wife of the judgment debtor, it was expressly declared that there was no lien against property of the stepmother. This appears to be a final adjudication that the property in dispute is free from any judgment lien on the part of this appellant.

The father, S. S. Murphy, died in 1936. From the various records on this appeal it may be gleaned that appellant appeared in some capacity as contestant to the granting of letters of administration or otherwise, and that her claims were denied. On the present appeal, despite the confused condition of the record, it may be said that appellant is attempting to enforce her judgment against property, by whomsoever held, which she claims belonged to her father.

Alice Murphy, the wife of S. S. Murphy, died testate in May, 1939. The executor of her estate was empowered to sell certain property. From the entire record it appears that appellant herein, as an heir at law of S. S. Murphy, filed a claim in the matter of the estate of Alice Murphy. Subsequently a protest against the sale of the property was filed. However, at the sale appellant herein entered a bid, evidently upon the theory of setting off her alleged claim against the purchase price. Subsequently she protested the confirmation of the sale and also renewed her bid and her creditor's demand as an heir at law of the estate of S. S. Murphy, in the matter of the estate of Alice Murphy, upon the theory that the estate of the former was still pending. Subsequently an amendment to the protest of sale of the real property was filed, in which it appears that an action had been commenced "against W. S. Kendall, Administrator of above Estate [Alice Murphy]; said action being founded upon his rejection of petitioner's demand as creditor set forth in said protest and his rejection of her claim as heir to the Estate of S. S. Murphy, Deceased." On November 22, 1939, the sale of the property to a third party was confirmed.

Thereafter a motion to vacate the previous order confirming sale of real property was made, the ground alleged being that the court had been informed that the property had been cleared of any claim of petitioner, whereas it appeared that the claim had not been adjudicated. This may be the legal crux of the case; but in view of previous decisions that the property was free from the judgment lien in that the transfer of property from S. S. Murphy to his wife was free from fraud, it does not seem to be necessary to consider the question. In Murphy v. Riecks, supra, the court said (pages 7, 8 of 40 Cal.App., page 18 of 180 P.): "* * * the law, both substantive and remedial, must be applied according to a well-defined plan to secure that uniformity of operation so necessary to a well-poised system of jurisprudence and the courts can do no more or no less than to administer the first in the manner prescribed by the latter." Murphy v. Murphy, 71 Cal.App. 389, 235 P. 653; Murphy v. Murphy, 57 Cal.App. 182, 207 P. 43.

The main purpose in the present appeal may be reasonably construed to be an effort to demonstrate that at least one of the judges who participated in recent litigation involving petitioner's claim was biased and prejudiced against her.

It appears in a "Motion to Transfer" the cause that in the estate of S. S. Murphy an appeal had been taken. The purpose of the motion was to secure "the designation of an outside judge for polemical matters pending appeal" which appellant designates as "ex party and controversial." A petition also was presented "to secure unbiased judge for ruling upon motion to vacate order of court confirming sale of real property." Petitioner set forth that she deemed it "equivalent to throwing away her said motion to bring the same before said judge [Honorable M. G. Woodward] in said department." Therein she reiterated a waiver of "any disqualification which might appear against Honorable D. M. Young." It is alleged that in the hearing before Judge Woodward "once only has [petitioner] said anything in a personal way to which said Judge has visibly taken offense and that was at the filing of her first action in 1936, Petitioner referring to the time and a circumstance when said Judge was a reporter upon a local News Paper, Petitioner requested said reporter to omit items concerning her matter involving her maintenance action against her father, as the publicity was a severe trial to her, And at said time said reporter informed petitioner that furnishing readable copy for the press was his living.

"That at one hearing in said No. 14417, wherein the attorney for above Executor, namely John R. Cronin misstated a matter

which transpired long before petitioner's Counsel was associated herewith and upon which he apparently was not informed, petitioner undertook to set the facts according to record before said Court. Said Judge informed petitioner in undertaking to secure permission to speak on said ground she was in contempt of Court and ruled against her. [Note that at this time petitioner was represented by counsel.]

"That, said Judge, before hearing upon her motion for rehearing upon contest of will, ridiculed the same in petitioner's face."

The affidavit of petitioner, answered under oath by Judge Woodward, denied the incidents referred to and further denied that "he is at present, or ever has been, in a prejudiced state of mind toward said petitioner or her above-entitled matter or any other of her matters, whether now pending or already determined by said Judge." Petitioner thereupon filed an answer to the answer of Judge Woodward in which she characterized the Judge's actions as playing "with her like a cat with a mouse," and referred to "his long record of adverse rulings in her matters as set forth" previously. Thereafter it was stipulated that the question of the disqualification of Judge Woodward could be heard and determined by Honorable B. C. Hawkins, a judge of another county, who determined that the charges of bias and prejudice were untrue and unfounded. Thereafter a motion for rehearing of the previous motions connected with the bias and prejudice charge and a "Bill of Errors" were filed, in which Judge Hawkins was attacked upon the ground that he filed a written "determination"of the question on the same day the hearing occurred, and that she had not been able to call his attention to certain previous records. The motion for rehearing was denied by Judge Hawkins and petitioner filed a notice of appeal from the order denying "bias and prejudice" and from the order denying rehearing. This was followed by a "Supplemental Motion Disqualifying Judge M. G. Woodward" based upon a motion for rehearing of an order confirming sale of certain property in the estate of S. S. Murphy. Judge Woodward filed a verified answer, and appellant herein followed with an "Amendment to Supplemental Motion." Motions to strike certain papers from the files appear in the record and a memorandum opinion by Judge Woodward relating the history of the litigation. Petitioner filed an affidavit replying to the "memorandum opinion" in which in substance the allegations of bias and prejudice are repeated. Thereupon a notice of appeal was filed from the order "denying motion to vacate a certain order of Court confirming sale of real property on the 22nd day of November, 1939, and appeals from all orders and findings of Court herein determining that the said Judge M. G. Woodward is not disqualified by reason of bias or prejudice to sit in above matter." The affidavit in reply to the memorandum opinion contains, as the court held, certain contemptuous language, was stricken from the files and an order made denying petitioner the right to appear "in forma pauperis." Appellant filed a lengthy reply and an appeal from an "order served upon her the 12" day of June, 1940, wherein her second petition to pursue appeal in forma pauperis was denied. (Said appeal being from an order by said Judge denying motion to set aside confirmation of sale of certain real property herein.) And from all orders, determinations or memorandums of Court finding said Judge not disqualified by reason of bias or prejudice to sit on polemical matters herein or such matters relative hereunto."

Petitioner requested appointment by the Judicial Council of a judge to sit on motions to disqualify Judge Woodward for alleged further bias. Evidently the selection had been given consideration, whereupon petitioner filed an affidavit containing the following: "* * * it becomes necessary for petitioner to file matter disqualifying each of said Judges i. e. the Honorable B. C. Hawkins of Stanislaus County, the Honorable G. B. Hjelm, Stanislaus County the Honorable A. L. Pierovich of Amador County, the Honorable T. A. Smith of Calaveras County, and pray that each of said Judges be found disqualified to preside at said hearing." Other affidavits were filed and a request made that the four judges should not appear. This was in the form of a proposed waiver. Judge Hawkins replied in part as follows: "At my last appearance in Stockton you insulted and abused me in open court and I do not intend to sit in any more cases in which you are interested unless I am compelled to do so."

Eventually Honorable George H. Thompson, a judge of El Dorado County, was assigned by the Judicial Council to

hear the issues raised in the charges and the answer. After a lengthy hearing Judge Thompson decided "that said Hon. M. G. Woodward is not biased or prejudiced in any matter against said Lulu Mignon Murphy, either personally or as a litigant in his court." A petition for rehearing was filed. Therein it appeared that, including the original proceeding, seven judges from outside counties had been called to San Joaquin County to hear various phases of the litigation. Judge Thompson denied the motion and petitioner filed a "motion to vacate" the order denying a rehearing based upon the claim that through mistake in dates she did not appear at the time set for the rehearing. The motion was denied. Thereupon appellant filed a "Motion to Open Records and Hearing upon Supplemental Matter Disqualifying Judge M. G. Woodward." This caused the executor of the estate of Alice K. Murphy, through his attorney, to file a notice of motion to strike pleadings from the files and adjudge pleader guilty of contempt of court. This was followed by a "Notice of Motion to Strike Executor's 'Motion to Strike Pleadings, Adjudge Pleader in Contempt of Court', and Find Authors Thereof Answerable to Petitioner." Judge Thompson denied the motion "to open record," all motions to strike and the motion to adjudge appellant guilty of contempt.

Appellant filed "Objections to issue of Order of Distribution in Estate" of Alice K. Murphy. An order settling the first and final account and decree of distribution was signed September 26, 1941, and the last notice of appeal appearing in the record was filed. The appeal is from the "final order of distribution" and from specified orders, denials of motions to vacate orders, rulings and judgments growing out of the claimed disqualification of Judge Woodward.

[2, 3] As heretofore stated, the appeals, under whatever designation, are directed to alleged error in the orders finding Judge Woodward to be free from bias and prejudice in his conduct of the proceedings. Certainly as a matter of law upon the record presented, we are unable to hold to the contrary. From the facts recited in the affidavits of Judge Woodward, also from evidence, part of which appears in the record introduced, the orders of Judges Hawkins and Thompson must be upheld. In addition it appears that prior decisions of the appellate courts, previously referred to, and failure to adjudicate rejected claims, preclude appellant from participation in the property of the estate of Alice K. Murphy.

The motion for entry of reversal upon default of respondent is denied. The second motion previously referred to, insofar as it requests this court to submit questions which it may desire to have answered, is denied. The judgments, orders and decrees appealed from, so far as the present record is concerned, on the grounds stated in the notices of appeal and in the brief, are affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.



In re RULE'S ESTATE.

McCLUSKEY REALTY CO. v. WARE et al.
Civ. 12551.

District Court of Appeal, First District, Division 2, California.
Oct. 21, 1943.
Hearing Granted Dec. 16, 1943.

1. Executors and administrators ⇐97

Executors were without power to bind estate to payment of broker's commission on sale of realty of the estate to a purchaser whose bid had already been filed and returned to the court for confirmation. Probate Code, § 760.

2. Executors and administrators ⇐97

The full measure of an executor's powers to bind estate to pay a broker's commission for sale of real or personal property must be found in statute pertaining thereto, and provisions of statute become a part of any such contract. Probate Code, § 760.

3. Executors and administrators ⇐97

Probate Code provision pertaining to authority of fiduciary to bind estate to pay broker's commissions for sale of property of the estate is prospective and does not authorize a fiduciary to contract to pay a commission for having secured a purchaser

whose bid has already been made. Probate Code, § 760.

4. Executors and administrators ⇐91
Trusts ⇐171

When powers and duties of fiduciary are fixed by statute, there is no inherent right to exercise any power not conferred, or to depart from procedure outlined.

5. Executors and administrators ⇐97

Probate Code provision pertaining to contracts between fiduciaries and brokers to pay commission for sale of property belonging to estate is a grant of power to a statutory fiduciary, not a limitation on the rights of private persons, as is statute of frauds, hence requirement that contract be in writing cannot be satisfied by a note or memorandum thereof executed after services have been fully performed. Probate Code, § 760.

6. Executors and administrators ⇐97

Where contract between executor and broker relating to payment of commission for sale of property of estate was limited to property described in petition for confirmation of suit previously filed, contract could not support allowance of commissions on sale made on a return filed subsequent to date of contract. Probate Code, § 760.

Appeal from Superior Court, Sonoma County; Hillard Comstock, Judge.

Proceedings in the matter of the estate of Charles Henry Stone Rule, sometimes known as and called Charles H. S. Rule, deceased, and petition of McCluskey Realty Company for allowance of commissions in connection with sale of realty, opposed by Wallace L. Ware and William P. Wobber, executors. From an order directing payment of such commission, the executors appeal.

Reversed.

Young, Hudson & Rabinowitz, of San Francisco, for appellants.

Barrett & McConnell, of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for respondent.

DOOLING, Justice pro tem.

Appellants as executors of the last will of decedent Rule appeal from an order of the probate court determining that respondent is entitled to a commission on three sales of real and personal property of the estate and directing its payment.

The property of the estate which was sold in the probate proceeding was a cattle ranch, and animals, equipment and other personal property located on the ranch. The claim for the commissions allowed by the court is grounded on the following facts: On January 16, 1942, Mr. Alex McCluskey acting for respondent wrote to Mr. Young, one of the executors' attorneys, asking if the Rule ranch was for sale. Through correspondence with Young extending from January to August, 1942, McCluskey was furnished with a prospectus of the ranch and an inventory of its stock and equipment. During all of his negotiations McCluskey dealt exclusively with Young and never at any time with either of the executors. McCluskey interested Willig, the purchaser at all three sales, in the property and aided him in obtaining financial assistance to purchase it. Ultimately, however, Willig filed his bids with the executors directly, and on September 2, 1942, McCluskey wrote to Young asserting a claim to a commission on any sale by the estate to Willig. On September 5, 1942, Young replied that as Willig's bid "came directly from the purchaser and not through any broker * * * as the attorney for the estate there is nothing that I can do concerning your commission." In fairness to Young it seems proper to say that in none of his correspondence with Young in evidence had McCluskey at any time prior to his letter of September 2 suggested that he would expect a commission from the estate in the event of his producing a purchaser.

Thereafter, and on September 12, 1942, the executors filed two returns of sale and petitions for confirmation to Willig as bidder, one of the real property and the other of certain personal property.

On September 22, 1942, one Brownscombe, an attorney-at-law, wrote Young a letter stating that McCluskey "has one or more prospective purchasers for the Rule ranch and personal property. I have advised him that for his protection he should have a formal listing from the executor before making a bid in court. Accordingly I enclose herewith a form of contract to be signed by the executor." The enclosed form was signed by the executor under date of September 23, 1942 and reads: "This will authorize you to procure a purchaser for the real and personal property of the estate of Charles H. S. Rule, deceased, a petition for the confirmation of the sale of which has been heretofore filed in the Superior Court of Sonoma County. A commission

will be paid you out of the proceeds of a sale to any purchaser secured by you in an amount to be fixed and allowed by the court upon confirmation of the sale."

No new bidder was produced on the return day and the sales of the real and personal property to Willig were confirmed.

[1] A great part of the argument of counsel on this appeal has been directed to the question of the proper construction of the authorization of September 23 as to whether or not it is ambiguous so as to permit Brownscombe's letter of transmittal to be looked to in aid of its interpretation. We do not find it necessary to follow counsel into this field because we are convinced that, as also urged by appellants, under the express language of sec. 760, Prob.Code, the executors were without power to bind the estate to the payment of any commission on a sale to a purchaser whose bid had already been filed and returned to the court for confirmation. That section reads: "The executor or administrator may enter into a written contract with any bona fide agent to secure a purchaser for any real or personal property of the estate, which contract shall provide for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale; and when said sale is confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so allowed by the court. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court."

[2] In construing this section it is to be borne in mind that it is based upon, and took the place of, sec. 1559, Code Civ.Proc., first adopted in 1909, St.1902, p. 251; that prior to the adoption of sec. 1559, Code Civ.Proc., an executor or administrator had no power to bind the estate by any contract to pay a commission for the sale of property real or personal belonging to the estate (Danielwitz v. Sheppard, 62 Cal. 339; Hickman-Coleman Co. v. Leggett, 10 Cal.App. 29, 100 P. 1072; In re Estate of Shaw, 85 Cal.App. 518, 260 P. 351; In re Estate of Mitchell, 20 Cal.2d 48, 51, 123 P.2d 503); and that the full measure of an executor's powers to bind the estate in this regard must therefore be found in the language of sec. 760, Prob. Code, above quoted, the provisions of sec. 760 entering into and becoming a part of any such contract. In re Estate of Mitchell, supra, 20 Cal.2d at page 52, 123 P.2d 503; Wilson v. Fleming, 106 Cal.App. 542, 289 P. 658.

[3, 4] The language of sec. 760 is clearly prospective and not retrospective. It authorizes an executor or administrator to "enter into a written contract with any bona fide agent to secure a purchaser for any real or personal property of the estate." It just as clearly does not authorize an executor or administrator to enter into a contract to pay a commission for having secured a purchaser whose bid has already been made. The estate was not liable to pay any commission to respondent for securing Willig's bids before the execution of the authorization of September 23, and the executors had no authority or power to decrease the assets of the estate by agreeing on September 23 to pay respondent a commission for something already done and as to which no legal liability upon the estate then existed. "When the powers and duties of the administrator are fixed by statute there is no inherent right to assume or exercise any power not conferred, or to depart from the procedure outlined." Perry v. Superior Court, 29 Cal.App.2d 114, 116, 84 P.2d 250, 252.

[5] Such cases as Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225, being between private parties and construing sec. 1624, Civ.Code, which requires the contract "or some note or memorandum thereof" to be in writing, cannot be looked to in an effort to enlarge the powers of an executor under sec. 760, Prob.Code. Sec. 760 is a grant of power to a statutory fiduciary, not a limitation on the rights of private persons as is the statute of frauds, and it requires the contract to be in writing and cannot be satisfied by some note or memorandum thereof executed after the services have been fully performed.

[6] The third sale to Willig was made on a return filed on November 9, 1942. The contract of September 23 cannot support the allowance of the commission on that sale because by its express terms it was limited to the property "a petition for the confirmation of the sale of which has been heretofore filed."

The order appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concur.

METCALF et al. v. LOS ANGELES COUNTY.

Civ. 14213.

District Court of Appeal, Second District, Division 2, California.

Oct. 13, 1943.

Hearing Granted Dec. 6, 1943.

1. Equity ⇐43

Equity will not assume jurisdiction when complainant has a complete legal remedy.

2. Mandamus ⇐72

"Mandamus" is a legal remedy, and it may compel a reasonable exercise of discretionary powers of an administrative board.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandamus".

3. Injunction ⇐16

Where mandamus is available, it is an adequate remedy and defeats a suit for injunction.

4. Mandamus ⇐87, 172

If plaintiffs had been denied by regional planning commission a variance under county zoning ordinance and a license to operate on their lands a rock crushing plant, such denials would have afforded plaintiffs occasion to institute a proceeding for a writ of mandate, and by such an action they could have tested constitutionality of the ordinance.

5. Counties ⇐21½

A property owner must show that a valid county zoning ordinance under attack is arbitrary, oppressive, and discriminatory as applied to his property in order to be entitled to an exception.

6. Injunction ⇐85(2), 108

If zoning ordinance is wholly void, it may be attacked by injunctive proceeding without first seeking redress at law; but, if the ordinance is valid yet is discriminatory as to a particular parcel within zoned area, legal relief must first be sought from all sources available to petitioner before equitable cognizance will be taken of his plea.

7. Injunction ⇐108

Property owners were not entitled to an injunction restraining enforcement of county zoning ordinance as against their properties, without first seeking redress at law by mandamus, where ordinance was valid.

8. Injunction ⇐108

Property owners were not entitled to an injunction restraining enforcement of county zoning ordinance as against their properties, without first allowing administrative board pursuant to the ordinance to determine whether an exception should be granted.

9. Injunction ⇐108

The general rule requiring a litigant to exhaust his legal remedies before seeking equitable relief is to be applied to those who have been provided a procedure for relief by terms of very ordinance of which they complain and which created the acting administrative board.

10. Evidence ⇐83(1)

It will be presumed that public officials will perform their duties.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Paul Metcalf and another against County of Los Angeles for an injunction restraining the enforcement by the county of a zoning ordinance. From a judgment dismissing the action, the plaintiffs appeal.

Affirmed.

Anderson & Anderson, of Los Angeles, for plaintiffs, and appellants.

J. H. O'Connor, Co. Counsel, and Edward H. Gaylord, Deputy Co. Counsel, both of Los Angeles, for defendant and respondent.

MOORE, Presiding Justice.

The question for decision is whether a land owner who purposes to establish a rock crusher in an area zoned for residential and agricultural uses may procure an injunction to be issued restraining the enforcement by the county of the zoning ordinance where the county has an effective ordinance regulating the issuance of permits to maintain rock crushers, without having first exhausted his remedies before the administrative board.

The chancellor below denied plaintiffs an injunction against the enforcement of

certain zoning ordinances in so far as those ordinances prohibit the use of the lands of plaintiffs for the purpose of maintaining a rock crusher thereon or prohibit their use for excavating rock, sand, or gravel therefrom, or for maintaining other business incidental to the rock crusher. Plaintiffs alleged that such ordinances inhibit the only use for which their lands have any value, to wit, excavation, crushing and sale of rock, sand and gravel. The case was tried principally upon a stipulation of facts, and findings having been waived the decree dismissed the action with the preamble (1) that it had been "prematurely brought in that none of the plaintiffs applied for an exception to the zoning ordinance attacked and (2) none of the plaintiffs applied for a permit pursuant to ordinance No. 1454, new series, to establish or maintain a rock quarry." On this appeal the controversy rages primarily about the question as to (1) whether appellants have an adequate remedy at law and (2) whether, in failing to exhaust their administrative remedy, they are now entitled to equitable relief.

There are four separate plaintiffs, each owning a parcel of land aggregating in all about 83½ acres. Plaintiff company is organized primarily to engage in the rock crushing business and other business incident thereto. It has obtained options to purchase the several parcels from its co-plaintiffs, and it will exercise such options "if only, and when the same can be legally used for such rock development and rock crushing purposes * * * and rock crushing * * * can be legally * * * carried on upon * * * each of such parcels without interference * * * by defendant".

This action was brought for the purpose of preventing by injunction the enforcement of ordinance 1494, new series, of Los Angeles County. By section 21 of this ordinance the unincorporated area of Los Angeles County is divided into 16 zones. It makes provision for any property owner to petition the Regional Planning Commission to have his property excepted from any particular restriction applicable to the zone in which his property is located; provides for the hearing of such petition, for the filing of its report with the Board of Supervisors, for the Board to except such property from a specified restriction if satisfied that the exception is necessary for the preservation and enjoyment of any substantial property right of the petitioner, and is not materially detrimental to the public welfare or injurious to any neighboring property. No one of the plaintiffs ever applied for any exception under section 21.

All of the property belonging to the plaintiffs is confined to Zone A 1 which excludes it from the uses of maintaining a rock crushing plant. Unless restrained by injunction the county will compel the owner of such property to restrict its use solely to agricultural and residential uses. Every portion of each of the parcels discussed in the complaint is within and adjacent to a wash and is within one-half mile of more than one public highway. To operate a rock crusher in such location would be to violate the ordinance.

In addition to the zoning ordinance, there is another ordinance, 1454, new series, regulating the maintenance of rock quarries, gravel pits and rock crushing plants. That ordinance forbids the operation of any rock quarry, gravel pit or rock crushing plant in any portion of the unincorporated area of the county adjacent to or within a mile of any stream or wash or public road or within a half mile of any bona fide human habitation unless licensed to do so by the supervisors. However, the ordinance provides that any person may apply to the chief engineer of the Regional Planning Commission for a license to establish such business; that the application shall be referred to the Regional Planning Commission; that it shall hold a public hearing on the application, after publishing notice of such hearing in the manner prescribed. After such hearing the Commission must report its findings and recommendations to the Board of Supervisors and deliver therewith a transcript of the testimony received at the public hearing. Upon such report and evidence, the Supervisors must determine whether or not the maintenance of such proposed rock crusher will be likely to become a public nuisance or dangerous or detrimental to the public peace.

The same ordinance also provides that, upon the determination by the Board of Supervisors that quarrying of any material in a particular area would create a flood hazard or would be otherwise dangerous to the public safety, then the applicant for a license must first obtain from the Chief Engineer of Los Angeles County Flood Control District a permit to excavate in

such area. Such permit may be issued upon certain conditions prescribed in the ordinance requiring the erection of dikes for the adequate protection against the flow of flood waters. No one may make an excavation within such area except after receiving such permit and conforming therewith.

As a part of the ordinance (Sec. 5.2) the Supervisors found that the quarrying of rock in a vast area which includes the lands of plaintiffs creates a flood hazard and in other ways may be dangerous to the public safety. The ordinance proscribes other acts in the Los Angeles County Flood Control District such as would necessarily occur at a rock crushing plant.

[1-4] (1) A review of the ordinances in the light of the location and character of the lands of plaintiffs induces the conclusion that plaintiffs had an adequate remedy at law. It is fundamental that equity will not assume jurisdiction when the complainant has a complete legal remedy. Mandamus is a legal remedy and it may compel a reasonable exercise of the discretionary powers of an administrative board. In re McDonough, 27 Cal.App.2d 155, 163, 165, 80 P.2d 485. When mandamus is available it is an adequate remedy and defeats a suit for injunction. City of South Pasadena v. Pasadena Land & Water Company, 152 Cal. 579, 595, 93 P. 490; Moore v. Superior Court of Contra Costa County, 6 Cal.2d 421, 57 P.2d 1314. Had appellants been by the administrative board denied a variance under the zoning ordinance and a license to operate on their lands a rock crushing plant, such denials would have afforded them the right and occasion to institute a proceeding for a writ of mandate. By their action then for such writ in the Superior Court they could have tested the constitutionality of the zoning ordinance. The writ would have issued under either of two conditions, viz.: (1) The total nullity of the zoning ordinance or (2) its invalidity with respect to the lands of plaintiffs because of an unfair discrimination against those lands. Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29. In the Reynolds case the mandate was granted because the court found that the zoning ordinance was void and also that it was unreasonable and arbitrary as applied to the Reynolds property.

The propriety and efficacy of mandamus as a method of attacking an oppressive law was demonstrated when a dairy company sued to restrain a municipality from enforcing its ordinance requiring all vendors of pasteurized milk to have the milk pasteurized within the city limits. It was held that the plaintiff could not question the validity of the ordinance because it had not first applied to the local authorities for a license to sell its milk products. A refusal of its application would have placed it in a position to invoke the "remedy through mandamus to right the wrong that it has suffered." Lang's Creamery, Inc., v. City of Niagara Falls, 251 N.Y. 343, 167 N.E. 464, 465.

Even though the enforcement of the zoning ordinance had been enjoined a license to operate the rock crusher could still have been denied for the reason that the supervisors must determine upon a consideration of the facts whether the establishment of a rock crusher in a proposed location will be likely to become a public nuisance or will be dangerous or detrimental to the public peace. The validity of the zoning ordinance and the sufficiency of the evidence offered by the plaintiffs upon their application for a license to operate a rock crusher could both have been determined in a mandamus proceeding. Had the court determined that a denial of a permit to operate the rock crusher was justified the validity of the zoning ordinance would have been immaterial. On the other hand upon the application for both the license and the exception, the Regional Planning Commission might have concluded that plaintiffs were entitled to the exception and that their proposed rock crusher would not be a public nuisance or detrimental to the public peace, and thereby plaintiffs would have gained both the exception and the license from the Board of Supervisors. The situation of plaintiffs is not unlike that of the minority stockholder who seeks the restoration of some right of which he conceives the corporation to have been illegally divested. Before he can sue the directors and the other wrong doers he must make demand upon the officers to institute the appropriate action and after their refusal to proceed he must appeal for redress to the stockholders at large. Unless he shows that he has exhausted such legal remedies, his action will not prevail. Fornaseri v. Cosmosart Realty Corp., 96 Cal.App. 549, 556, 274 P. 597; Hawes v. Oakland, 104 U.S. 459, 26 L.Ed. 827; 14 C.J. 944, sec. 1466; 18 C.J.S., Corporations, § 574; 6 Fletcher Ency. of Corporations 6934, sec. 4067.

[5] Appellants argue that they could not mandamus the Supervisors to grant something which that board may in the exercise of a reasonable discretion deny. It is true that if reasonable minds might differ as to the reasonableness of the restriction, the decision of the administrative board must prevail. A complainant must show that a valid ordinance under attack is arbitrary, oppressive and discriminatory as applied to his property. Otherwise he is not entitled to an exception. In support of their proposition that the ordinance is void as it applies to their properties plaintiffs cite the cases of Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308; People v. Hawley, 207 Cal. 395, 279 P. 136; Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29; In re Kelso, 147 Cal. 609, 82 P. 241, 242, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178. In the Hurst case it was found by the court that the ordinance was not legally adopted, hence was void; also that, as applied to the Hurst property, it was arbitrary, oppressive and discriminatory. The Supreme Court specifically approved of that finding. The Hawley case was three appeals. In the first action, brought by the People, the nuisance created by the defendants and abated by the judgment resulted from the operation of a rock crusher. The other two actions, brought by Los Angeles Rock and Gravel Company, attacked (1) the validity of an ordinance regulating excavations near abutting streets and (2) a zoning ordinance which placed the Hawley rock quarry in a residential zone. In those cases the establishment or maintenance of a rock crusher was not involved. The enforcement of the ordinances was enjoined because they forbade excavations for rock which may be done without distress to anyone. In the Kelso case, also, the ordinance prohibited the mere excavations for rock in the prescribed area. It was there held, in enjoining the enforcement of a penal ordinance which inhibited rock quarries, that rock or gravel may "be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize." In the Reynolds case the building inspector having denied a permit to erect a business structure, a writ of mandate was issued based upon a finding that the zoning ordinance unfairly discriminated against the parcel of plaintiff. Reasonable minds could not have differed as to the discriminatory nature of the ordinance as applied to the Reynolds lot. Page 251 of 12 Cal.2d, 83 P.2d 29.

[6] Appellants urge the applicability of the recent case of Bank of America N. T. & S. Ass'n v. Town of Atherton, 60 Cal.App. 2d 268, 140 P.2d 678. That holding resulted from sustaining a demurrer without leave to amend. The allegations are that the town's zoning ordinance is "unconstitutional and void," and follow this with a declaration of facts showing that the city council in the very enactment of the ordinance arbitrarily discriminated against the plaintiff's land. For the purposes of the demurrer those allegations were deemed to be true. The decision is in harmony with the conclusion we have derived from a consideration of the authorities herein cited. It may be stated as a rule that if an ordinance is wholly void it may be attacked by injunctive proceeding without first seeking redress at law; but if a zoning ordinance is valid yet is discriminatory as to a particular parcel within the zoned area, legal relief must first be sought from all sources available to the petitioner before equitable cognizance will be taken of his plea.

[7] The question of an available remedy did not arise in the Atherton case because the facts established by the complaint were, on the trial of the demurrer, final; the ordinance was void. In the instant case the ordinance was valid and the court, basing its act upon defensive pleadings and competent proof, found the availability of legal remedies that had not been applied for. From our inspection of the record it appears that a finding could have been made that the ordinances were not unreasonable as to the lands of plaintiffs.

[8] (2) In addition to the handicap of plaintiffs' obligation to exhaust their legal remedies before they may, by means of injunctive process, defeat the effect of a zoning ordinance, they are faced with a line of authorities which require petitioners in equity similarly situated first to allow the administrative board itself to determine whether under the zoning ordinance an exception should be granted. That such course is the law is established by numerous decisions. San Joaquin & K. R. Canal & Irr. Co. v. County of Stanislaus, 155 Cal. 21, 99 P. 365; San Diego, etc., Co. v. Jasper, 189 U.S. 439, 441, 23 S.Ct. 571, 47 L. Ed. 892; In re Kehr, 190 Cal. 401, 212 P. 913; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 289, 292, 109 P.2d 942, 132 A.L.R. 715; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; Al-

exander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; Teeter v. City of Los Angeles, 209 Cal. 685, 687, 290 P. 11; Gantner & Mattern Co. v. California Emp. Comm., 17 Cal.2d 314, 317, 109 P.2d 932; Louis Eckert Brewing Co. v. Unemployment Reserves Comm., 47 Cal.App.2d 844, 847, 119 P.2d 227; Weaver v. State Board of Medical Examiners, 54 Cal.App.2d 777, 129 P.2d 730.

The rule announced in the cited authorities is one of procedure long established and enriched by repetitious holdings. It is a fundamental rule binding upon all courts as declared by the Chief Justice in Abelleira v. District Court of Appeal, supra. In that decision it is held that remedy by the administrative body must be "exhausted before the courts will act." Page 292 of 17 Cal.2d, page 949 of 109 P.2d, 132 A.L.R. 715. The rule is there aptly illustrated by numerous pertinent authorities. Some of their antecedents may with profit be reviewed. In the San Joaquin & Kings River Canal & Irrigation Company case, decided in 1908, the Supreme Court could see "no good reason why the general principle [requiring a party to an action in equity to exhaust his legal remedies] may not be extended so as to require parties who are afforded by statute an opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like the board of supervisors, with reference to the very matter of which they complain in an action in equity, to seek that relief from such body before being permitted to maintain an equitable action for the purpose." Page 27 of 155 Cal., page 367 of 99 P. In San Diego, etc., Co. v. Jasper [189 U.S. 439, 23 S.Ct. 572, 47 L.Ed. 892], the question was raised where, under the ordinance complained of, the "appellant was free to apply for a modification of the rates" but failed to do so, and no allegation was made that the board administering the ordinance was corrupt or that it intended, in spite of the evidence, to adhere to unjust rates so as to destroy the value of the appellant's works. The doctrine there announced has been uniformly followed by both state and federal courts. In the Gantner & Mattern Company case the Supreme Court denied a writ of mandate because the plaintiff had not exhausted its statutory remedies. Citing In re Kehr, supra.

[9] It is thus established that the general rule requiring a litigant to exhaust his legal remedies before seeking equitable relief, is to be applied to those who have been provided a procedure for relief by the terms of the very ordinance of which he complains and which created the acting administrative board. San Joaquin & King's River Canal & Irrigation Co. v. County of Stanislaus, supra, 155 Cal. 21, 27, 99 P. 365. As a result equity may now jealously guard her domain by reason of the increase in the number of tribunals created for the purpose of making factual determinations and of avoiding the hardships of oppressive statutes as applied to the facts related by each complainant. To avoid the arbitrary refusal of a variance by the administrative boards, safeguards have been placed about the hearings authorized, namely, sufficient notice of the application and of the hearing, of its being open to the public, and the right of judicial review.

Plaintiffs contend that before seeking an injunction to restrain the enforcement of an invalid ordinance they are not obliged to ask a favor; that the order of the Board of Supervisors is not an adequate, plain and complete remedy. They cite Rubin v. Board of Directors of Pasadena, 16 Cal.2d 119, 104 P.2d 1041, to the effect that the board could only have "granted a favor." The use of that language by the Supreme Court came about by virtue of an attempt to distinguish the nature of the act of the city's board of trustees in denying a variance under a zoning ordinance from the nature of the act of the Board of Funeral Directors. Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848. It was there held that Drummey's license to engage in business as a funeral director is property and "may not be revoked by an administrative body without the right of review by a trial court exercising an independent judgment upon the evidence introduced." [16 Cal.2d 119, 104 P.2d 1044.] But in the Pasadena Board's rejection of Rubin's petition for a variance he was deprived of no right. His lot was zoned as were all other lots in the zoned area according to a valid zoning ordinance. He had as much after his variance was denied as he had before. If the board had granted his petition it might have improved the earning power of his lot—granted him a favor—but its rejection deprived him of nothing. His lot had by a valid ordinance been incorporated into a residential zone. No circumstances were there proved to warrant the holding that the ordinance imposed an arbitrary and

unreasonable restriction upon the Rubin lot. Rubin followed the accredited and traditional route to bring his cause to a final determination. He first applied to the administrative board for a variance. Upon its rejection of his petition he sought by mandamus to compel its favorable action. On appeal by the city the Supreme Court agreed with the board of trustees that the facts did not entitle Rubin to a variance and held that the grant of a dispensation is a matter of grace and that to deny it is not the denial of a statutory right but merely leaves in operation the ordinance adopted by the trustees of the city for the common good.

[10] Plaintiffs' thrust that the judgment of the Regional Planning Commission upon their petition would be governed by a branch of the county government, falls short of its mark. There is a presumption that public officials will perform their duties, not that they will be corrupt or endeavor for ulterior reasons to deny legal rights and defeat justice. The official obligation of members of the Regional Planning Commission as well as of the Supervisors is to support the constitution and the laws of the State.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.



61 Cal.App.2d 78

GORDON et ux. v. VUCINICH et al.
KEBELJICH v. VUCINICH.
Civ. 13921.

District Court of Appeal, Second District, Division 3, California.
Oct. 20, 1943.

1. Guardian and ward ⇐159

A finding, in order settling final account of guardian, that one ward had received more than his share of guardianship estate and that he owed specified sum to another ward, followed by formal judgment providing for equal distribution of estate without taking account of such debt, did not constitute a "judgment" against overpaid ward in favor of the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

2. Guardian and ward ⇐159

Where probate court in settling final account of guardian found that one ward had received more than his share of guardianship estate but did not enter judgment against overpaid ward in favor of the other, deputy county clerk's certificate in abstract of judgment that such judgment had been entered in guardianship proceeding did not create a "judgment".

3. Judgment ⇐768(1)

The filing of abstract of judgment erroneously certifying that a judgment had been entered in guardianship proceeding against one ward in favor of another, though it created a cloud on first ward's interest in guardianship realty, did not create a lien thereon.

4. Partition ⇐111(3)

Finding, in order settling final account of guardian, that one ward had received more than his share of estate and owed another ward specified sum, and recording of abstract of judgment erroneously certifying that judgment for such sum was entered in guardianship proceeding, did not create a lien on overpaid ward's interest in guardianship realty so as to warrant impounding sufficient of proceeds of partition sale of realty payable to overpaid ward to satisfy such claim against him.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Joseph H. Gordon and wife against Voislav Vucinich, also known as Voislav Vicinich, etc., and others, for partition of certain realty, wherein Desanka Kebeljick, formerly Desanka Vucinich, filed a cross-complaint alleging that she had recovered a judgment against Voislav Vucinich in 1939, and that an abstract of the judgment had been recorded. From that portion of judgment directing that from the proceeds of partition sale payable to Voislav Vucinich there should be impounded sufficient money to satisfy the claim of Desanka Kebeljich, Voislav Vucinich appeals.

Portion of judgment appealed from reversed.

See, also, 51 Cal.App.2d 434, 124 P.2d 868.

Marion Vecki, of San Francisco, and Lester E. Hardy, of Los Angeles, for appellant.

Lee J. Myers, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

In August of 1939, Vladimir Vucinich, as the guardian of the estate of Voislav, Alexander and Desanka Vucinich, filed his second and final account and report of administration. Some money and some real estate, including lots 6 and 7 of the Sones Resubdivision of Block 8, Range 8, Wilmington, were reported as among the assets of the estate. In due course a hearing was had on the account and on September 18, 1939, an "Order Settling Final Account of Guardian and Distribution" was filed. After the usual preliminary recitals of appearances and the giving of notice, the order continues:

"The Court after hearing the evidence settles said Account and orders distribution of said estate as follows:

"It is decreed that notice to creditors has been duly given as required by law.

"It is further decreed that each of said minors is now of full age.

"It is further decreed that the following items alleged to have been paid to Desanka Vucinich, one of said minors, to-wit: June 17, 1938, $40.00, October 3, 1938, $15.00, and December 19, 1938, $20.00, be disallowed.

"The Court finds that Voislav Vucinich has been paid the sum of $1,306.88 in excess of his share of said estate heretofore disbursed by said guardian, and that of said amount there is due and owing by the said Voislav Vucinich to Alexander Vucinich the sum of $550.59, and to Desanka Vucinich the sum of $756.29.

"It is ordered, adjudged and decreed by the Court that, after disallowing said items set forth in the preceeding paragraph, totaling $75.00, said Guardian has in his possession belonging to said estate, after deducting the credits to which he is entitled, a balance of $24,988.78 of which $998.78 is in cash, and the remainder consists of the property hereinafter described at the value of the appraisement; that there is also in the hands of said Guardian, as an asset of said estate, an obligation due said estate from Bozo Angelich, former Guardian herein, amounting to $13,847.11 with interest at seven per cent upon $8,904.51 from June 1, 1939, and interest at seven per cent upon $4,000, from the third day of December, 1935, that there is also in the hands of said guardian an obligation due to said estate from one Joseph H. Gordon for back rent amounting to $1,022.14; that the said Voislav Vucinich, Alexander Vucinich, and Desanka Vucinich, are each entitled to an undivided one-third interest in and to the assets remaining in the hands of said Guardian, including cash on hand, after the payment of fees as hereinafter provided.

"It is further ordered and adjudged and decreed by the Court that said account be allowed and settled and that said Guardian, out of the residue of cash in his hands pay the following items which are hereby allowed by the Court as fees, to-wit:

"To Joseph McInerney, Attorney for said Guardian, $50.00.

"To Vladimir Vucinich, Guardian, $500.00.

"To Lee J. Myers, Attorney for Desanka Vucinich, $50.00.

"It is further ordered, adjudged and decreed by the Court that the remainder of the said property belonging to said estate including balance of cash on hand be distributed to Voislav Vucinich, Alexander Vucinich, and Desanka Vucinich, as follows:

"To Voislav Vucinich a one-third interest thereof;

"To Alexander Vucinich a one-third interest thereof;

"To Desanka Vucinich a one-third interest thereof.

"The property of said estate hereby distributed so far as the same is known is described as follows:

"Real Estate:

"Parcel No. 1.

"Lots 6 and 7, Sones Resubdivision of Block 8, Range 8, Wilmington, Appraised at . . . $20,000.00"

The description of some further properties, in which we have no interest, followed.

[1] We need not determine on this appeal whether or not the probate court, in the guardianship proceeding, could have entered a judgment that Desanka recover of Voislav the sum of $756.29, or that Voislav should pay that sum to Desanka. It suffices for our purposes to note that the

probate court made no such judgment. It did not even order that the share of the estate to be distributed to Desanka should be increased beyond a third, the increase to be taken from Voislav's third, in order to equalize the unequal distribution theretofore made by the guardian. Certainly the mere finding that A owes B money is not a judgment in B's favor, particularly where it is followed by a formal judgment which takes no account of the debt.

[2, 3] Sometime after the order of distribution was entered an "abstract of judgment" was made by a deputy county clerk in which it was certified that in the guardianship matter "on the 18th day of September, 1939, Judgment was entered in favor of * * * Desanka Vucinich and against Voislav Vucinich for the sum of $756.29." No such judgment had been rendered and the clerk's certificate did not operate to create a judgment where none had been. The filing of the abstract, therefore, created a cloud, but no lien, upon Voislav's one-third interest in lots 6 and 7.

Desanka transferred to Joseph H. Gordon and Katie A. Gordon her one-third interest in lots 6 and 7, and they brought the action under review for a partition of the two lots. As the property was in use as a service station, that which was really sought was an order for the sale of the property and a division of the proceeds. Voislav and Alexander were made parties defendant because they were tenants in common with the plaintiffs, and Desanka was added because she claimed some interest or estate in the property. After demurrers had been sustained to Desanka's answer and cross-complaint, and to an amended answer and cross-complaint, the abstract of judgment already referred to was recorded, and Desanka filed her second amended answer and cross-complaint, in which she alleged that she had recovered a judgment against Voislav on the 18th of September, 1939, and that an abstract of the judgment had been recorded. Voislav denied the existence of any judgment against him.

At the trial no evidence of a judgment other than the order in the guardianship matter was claimed to exist. The trial court made no finding that a judgment had been recovered by Desanka, but by recitals made it is clear that it intended to so find. In any event, the judgment which was entered provided for a sale of lots 6 and 7 and that the balance of the proceeds remaining after certain deductions should be distributed one-third to the plaintiffs and one-third each to Alexander and Vosslav [sic]. Then this paragraph appears: "That from the money payable to Voislav Vucinich there shall be impounded sufficient money to satisfy in full the claim of Desanka Kebeljich, formerly Desanka Vucinich, amounting to $756.29, with interest from September 15, 1939, at 7% per annum, in the event such claim shall be upheld in the Final Judgment on Appeal in this action."

[4] Voislav has appealed from that portion of the judgment which we have quoted. Because Desanka had no lien on Voislav's interest, having had no judgment against him, that portion of the judgment appealed from was erroneous, and it is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.



BIANCO v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 12465.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1943.

Hearing Granted Dec. 16, 1943.

1. Workmen's compensation ⇐1274

A widow's claim for compensation is barred if not filed within two years of the date of the injury to the husband, even if the two years have elapsed at the time of his death. St.1937, p. 295, § 5406.

2. Courts ⇐90(7)

The district court of appeal is bound by decision rendered by another district court of appeal where the Supreme Court denied a hearing.

3. Workmen's compensation ⇐1280

Where employee is suffering from occupational disease such as silicosis, the "date of injury" that starts the statute of limitations is when the employee first learns or should have learned that he has such

disease and that it was caused by his employment and when he knows or should know that he has suffered a total or partial compensable disability. St.1937, p. 295, § 5406.

See Words and Phrases, Permanent Edition, for all other definitions of "Date of Injury".

4. Workmen's compensation ⇐1758

Finding by Industrial Accident Commission that employee was informed in April, 1939, that he was suffering from silicosis caused by his employment and that at the time the employee was temporarily totally disabled for a period of approximately two weeks and thereafter was partially disabled until the time of his death was insufficient to show that employee knew or had reason to know not only that he was suffering from an occupational disease but also knew or had reason to know that the occupational disease had resulted in a compensable disability, so as to start statute of limitations running. St.1937, p. 295, § 5406.

5. Workmen's compensation ⇐1279

A "compensable injury" sufficient to start the statute of limitations running against injured employee is a substantial compensable injury or an injury for which a reasonable man would seek compensation. St.1937, p. 295, § 5406.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensable Injury".

6. Workmen's compensation ⇐1280

A mere partial disability independent of any wage loss is not sufficient to start statute of limitations running in cases involving occupational and progressive diseases. St.1937, p. 295, § 5406.

7. Workmen's compensation ⇐1279

A two-week wage loss suffered by employee who returned to work at the same scale of pay at the same job would be insufficient to start statute of limitations against compensation claimant. St.1937, p. 295, § 5406.

8. Workmen's compensation ⇐1279

It is not the fact that a decedent may have been technically entitled to compensation that starts the statute of limitations running even if decedent knew that he was so entitled but injury must have culminated in a real and material disability to perform normal work and have resulted in a material wage loss. St.1937, p. 295, § 5406.

WARD, J., dissenting.

Petition by Adelina Bianco for writ of review of an award made by the Industrial Accident Commission of the state of California denying petitioner's claim for compensation for the death of her husband, Domenic Emile Bianco, opposed by Gladding, McBean & Co., employer, Pacific Indemnity Company, State Compensation Insurance Fund, New Amsterdam Casualty Company, Ætna Casualty Company, Indemnity Insurance Company, Union Indemnity Company and Ætna Life Insurance Company.

Award annulled and cause remanded to Industrial Accident Commission for further proceedings.

Seibert L. Sefton, of San Francisco, for petitioner.

Everett A. Corten, Atty. for Industrial Accident Commission, and Fred G. Goldsworthy, Asst. Atty., Industrial Accident Commission, both of San Francisco, for respondent Industrial Accident Commission.

W. N. Mullen, of San Francisco, for respondent New Amsterdam Casualty Co.

Keith & Creede, of San Francisco, for respondent Pacific Indemnity Co.

PETERS, Presiding Justice.

Petitioner, as the surviving wife of Domenic Emile Bianco, filed a claim with the Industrial Accident Commission on the ground that her husband had died from silicosis contracted while employed as a terra cotta presser for Gladding, McBean & Company at Lincoln, California. The Commission found that in April, 1939, the deceased employee was informed by his physician that he was suffering from silicosis, caused by his employment, and that "at said time the employee was temporarily totally disabled for a period of approximately two weeks, and thereafter was partially disabled until the time of his death. April, 1939, therefore constitutes the date of injury herein. No disability payments had been made or agreed to be made, or medical treatment furnished or agreed to be furnished, by the defendants or any of them subsequent to April, 1939, and no proceedings for their collection or

for adjustment of compensation had been filed by the employee during his lifetime. The application, filed herein by the widow, Adelina Bianco, on December 1, 1941 [the employee having died June 11, 1941] not having been filed within two years from the date of injury, is barred by limitation of time as provided by the Workmen's Compensation provisions of the Labor Code of California." Based on this finding an award was denied the applicant whereupon this writ of review was filed. The sole question presented is whether legally or factually the record supports the finding that the claim is barred by the statute of limitations.

Domenic was born in France in 1881. He married the petitioner in 1905. At that time, and until 1912, he worked in a pottery plant in France. In 1912 he and petitioner came to California, and took up their residence at Lincoln. In that year he was employed by Gladding, McBean & Company, a tile and pottery firm, as a clay presser. He worked for no other employer until the day of his death, June 11, 1941. During all of that period he worked at the same general job, although occasionally working in other departments of the plant when there was not sufficient work in the pressing department. From about 1935 on he refrained from doing heavy work, and did not do as much piece-work as formerly.

The record shows that some years after starting to work for Gladding, McBean & Company Domenic began to complain of pains in the chest and shortness of breath. He coughed a great deal. About 1924 he visited a doctor for these complaints. The record is silent as to whether the deceased or his doctor then knew the cause of the condition, or that it was connected with the employment. There is no evidence that at that time he was in fact disabled. He visited a Dr. Gundrum in August of 1932. The doctor testified that at that time his examination showed that the lungs of the deceased were clear, and that he was suffering only from diarrhea. Domenic next visted Dr. Gundrum on April 8, 1937. At that time, according to Dr. Gundrum, the deceased had bronchial pneumonia that "wasn't very active." On April 17, 1937, Domenic returned and was better. On April 24, 1937, he again visited the doctor, at which time "his lungs were clear." This doctor did not see Domenic again until December 3, 1938. At that time the deceased tired easily and coughed a good deal, and he had "a patch of fine rales. That is the usual signs of bronchial pneumonia" and he had "a little wheeze." The doctor further testified that he gave Domenic some medicine "expecting him to clear up like he did the first time but he didn't come back." At that time this doctor did not know that Domenic had silicosis.

The first doctor to diagnose the disease as silicosis was Dr. von Geldern. Domenic first visited this doctor as a private patient on April 22, 1939. He complained of a cough and shortness of breath. The doctor had X-rays of the chest taken, and from these diagnosed Domenic's trouble as silicosis. He testified that on May 9, 1939, Domenic again visited him and at that time he fully informed Domenic of the disclosures in the X-rays. The doctor testified that he told the deceased that he was afflicted with silicosis, and that the disease was caused by breathing silica dust. He warned the deceased to keep out of dust and to be careful of colds. He did not tell Domenic to stop work or that he was partially disabled, nor did he prescribe any medical treatment.

After Domenic saw Dr. von Geldern he continued at his same employment with Gladding, McBean & Company doing substantially the same type of work that he had performed for many years, but refraining from heavy work with his employer's consent. His wages were substantially the same after 1939 as they were before. In August, 1940, he broke his leg in a hunting accident. He remained off work until February of 1941 when he returned to work for a few days, and then quit because of his health. He then came to San Francisco and consulted a doctor who sent him to the hospital where he died June 11, 1941. A few days before his death his wife consulted the then compensation insurance carrier of Gladding, McBean & Company about filing a claim, but no claim was filed with the Commission. Admittedly, Domenic died from silicosis. The claim here involved was filed by the widow on December 1, 1941.

There is some dispute in the briefs as to what the record shows as to what happened after Domenic visited Dr. von Geldern in 1939. The petitioner testified that her husband visited the doctor "about April," 1939; that it was then that she and her husband learned that his condition was

caused by his work; that "about" that time her husband "stayed away from work * * * about a couple of weeks." It was apparently based on this evidence that the Commission found that in April, 1939, the petitioner became aware of the nature of his illness and that at said time became totally disabled for two weeks and was thereafter partially disabled until the time of his death. It should be here mentioned that there was introduced into evidence on behalf of the employer the complete pay roll record of this employee. That record shows no loss of income for April of 1939, in fact that month was one of his best earning months in that year. Nor does that record show any substantial wage loss for May, 1939. Although petitioner testified that her husband did not work for this two-week period, there is a total lack of evidence as to any material wage loss during this time. Petitioner did state that her husband gave up heavy work and did not do piecework, but the record does not show that this resulted in any material wage loss.

There are two basic questions presented on this appeal. The first has to do with the proper interpretation of § 5406 of the Labor Code, St.1937, p. 295, and the second has to do with the application of that section to the facts here involved.

Section 5406 provides that the periods within which an action for death benefits may be commenced are as follows:

"(a) One year from the date of death, and in any event within—

"(1) Two years from the date of injury, except as otherwise provided in this section.

"(2) 240 weeks from the date of injury, where the injury causing death also caused disability which continued to the date of death and for which a disability payment has been made, or agreed to be made, or proceedings for its collection had been instituted within the time limits set forth in section 5405.

"(b) Two years from the date of injury, in cases described in section 5405(b)."

The respondents take the position that, where no claim has been filed by the employee during his lifetime, under sub. (a) (1), supra, the death benefit claim must be filed within two years from the date of injury, and if that time has elapsed before the death of the employee, the death benefit claim is barred before it ever arose. The Commission so held. The petitioner contends that if the claim is filed within one year after the employee's death the statute is satisfied, and that it is not necessary that it also be presented within two years of the date of injury. Were the question an open one, there are strong arguments in support of petitioner's position. It can be logically argued that the legislature never intended that the widow's independent and constitutional right should depend upon whether or not the injured employee files a claim prior to his death. The result of the rule contended for by the Commission is that not only in some cases will the widow's claim be barred before it arose, but it means that a widow whose husband dies immediately from an industrial injury has a longer period to file a claim than the widow whose husband lives for some time after the injury. Other states with substantially similar statutes have had no difficulty in reaching the interpretation contended for by petitioner. See cases collected Burke v. Industrial Comm., 368 Ill. 554, 15 N.E.2d 305, 119 A.L.R. 1158. The following two cases are illustrative. In Hoy v. T. S. Grayson Lumber Co., 15 La.App. 176, 130 So. 651, the statute provided that a claim for a death benefit had to be presented within one year "after the accident or death" or unless compensation was sought within one year after the accident. Act La. No. 20 of 1914, § 31, as amended by Act No. 85 of 1926. The claim was filed more than one year after the accident, but in less than one year after death. The court held that it was not barred, saying that, although the "letter" of the statute so provided, on principle the statute of limitations does not run until death because it is then that the cause of action first accrues. In Burke v. Industrial Commission, 368 Ill. 554, 15 N.E.2d 305, 119 A.L.R. 1152, the statute provided that the claim was barred (after specifying several minor, inconsequential requirements), "in any case, unless application for compensation is filed with the industrial commission within one year after the date of the injury or within one year after the date of the last payment of compensation." Ill.Rev.Stat.1937, c. 48, § 161. The widow filed for death benefits within one year after death, but more than one year after the accident. The court held that she was not barred, saying that the "injury" to the widow did not occur until the death of her husband, and that any other interpretation would

render the death benefit a nullity in many cases.

[1, 2] However, the question is not an open one in this state. The precise point was presented to, and decided by, the appellate court in Glavich v. Industrial Acc. Comm., 44 Cal.App.2d 517, 112 P.2d 774. It was held in that case (without mention of the cases from other states where the same problem has been discussed) that a widow's claim is barred if not filed within two years of the date of the injury to the husband, even if the two years have elapsed at the time of death. The Supreme Court denied a hearing. This court, as an intermediate appellate court, is bound by that decision.

The next question is whether there is any support for the Commission's conclusion that the date of injury to the husband was April of 1939.

[3] Where an employee suffers the loss of a limb or other distinct injury there is no difficulty in ascertaining the exact date of the injury that will start the statute of limitations running. But a different situation exists as to progressive occupational diseases such as silicosis. As to such diseases there is no precise point of time that can be determined to be the exact date of injury. It is obvious that in such cases there is usually a long period during which the employee may be partially incapacitated, but during which he continues in his employment without material wage loss. During this period the constant exposure to the factors that caused his condition aggravates the condition. As to such cases the courts of this state have determined that the date of injury so as to start the statute of limitations shall be when the employee first learns, or should have learned, that he has the disease in question and that it was caused by his employment, and when he knows, or should know, that he has suffered a total or partial compensable disability. This rule was first announced in this state in silicosis cases in Marsh v. Industrial Acc. Comm. 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. In that case there are several quotations worth repeating. At page 343 of 217 Cal., 18 P.2d at page 935, the court stated: "In such an occupational disease, the specific date of origin is impossible of determination. It is the cumulative effect of exposure day after day that produces the injurious results; and because of the very fact that 'injury,' in the statutory sense, is referable to a period of time rather than a point in time, some rational norm must be adopted for determining the 'date of the injury' in the practical application of the statute of limitations embodied in the act."

At page 344 of 217 Cal., 18 P.2d at page 936, it is said: "The law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn. The object is to make amends for a disability attributable to the employment, and the test is whether there is an incapacity causing loss of earning power in whole or in part. Hustus' Case, 123 Me. 428, 123 A. 514. In order to be compensable, disability need not be limited to incapacity of a workman to pursue his ordinary occupation, but embraces impairment of earning power generally. Gordon v. Evans, 1 Cal. Ind. Acc. Comm. (pt. 2) 94; Savich v. Industrial Comm., 39 Ariz. 266, 5 P.2d 779. The term 'injury' then is to be understood as connoting a compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. Dombrowski v. Jennings & Griffen Co., 103 Conn. 720, 131 A. 745. Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident."

At page 345 of 217 Cal., 18 P.2d at page 936, it is said: "An injury, then, may arise out of, and in the course of, the employment, when there is a causal connection between the employment and the injury; but for purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before. [Citing cases.] When a disease is latent and progressive, it may not culminate until a considerable time after the employment has terminated. So, if the disabling result is delayed, then the injury is correspondingly delayed, and the right to compensation does not accrue until the incapacity occurs."

At page 351 of 217 Cal., 18 P.2d at page 938, the rule was announced in the following language: "From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis [silicosis], it cannot reasonably be said that the injury

dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment."

The rule of this case has been reaffirmed in Price v. Industrial Acc. Comm., 9 Cal.App.2d 213, 49 P.2d 294; Argonaut M. Co. v. Industrial Acc. Comm., 21 Cal.App. 2d 492, 70 P.2d 216; Morrison v. Industrial Acc. Comm., 29 Cal.App.2d 528, 85 P.2d 186; Travelers Ins. Co. v. Industrial Acc. Comm., 32 Cal.App.2d 643, 90 P.2d 327; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151.

[4, 5] It will be noted that to start the statute running the employee must know, or have reason to know, not only that he is suffering from an occupational disease, but also he must know, or have reason to know, that the occupational disease has resulted in a compensable disability. In the present case the finding of the Commission is insufficient. It is that Domenic was informed he was suffering from silicosis caused by his employment in April, 1939. It is then found "at said time the employee was temporarily totally disabled for a period of approximately two weeks, and thereafter was partially disabled until the time of his death." There is no finding that the employee had knowledge that he had suffered a compensable disability. The respondent commission argues that if the employee remained off work two weeks in April, 1939, after he knew he had silicosis caused by his employment, he suffered such compensable injury under § 4650 of the Labor Code, St.1937, p. 282. It is true that if he in fact did lay off two weeks because of the occupational disease, and if in fact he was not paid during that period, that he did at that time suffer a technical compensable disability. But to hold that such a technical disability starts the statute running is not within the spirit of the rule. What the court meant in the Marsh and other cases cited, supra, by a "compensable injury" sufficient to start the statute running, was that the employee must suffer a substantial compensable injury, or an injury for which a reasonable man would seek compensation. Any other rule would be unjust and inequitable.

Before directly discussing the compelling arguments that support the above conclusion it should first be noted that there is no finding and no showing in the record that Domenic did not receive his regular wages from his employer during April and May, 1939. There is no evidence at all that he ever suffered a material wage loss because of his health. It is true that petitioner testified that early in the 1930's her husband refrained from heavy work and did not do as much piecework as formerly, but there is no evidence at all that this materially affected his earnings. According to the table of earnings introduced by one of respondents, Domenic was paid $44.30 during the first half of April, 1939, and $60.61 for the second half. If the Commission incorrectly designated April as the proper month in which Domenic is supposed to have laid off two weeks, and should have designated May of that year as the proper month, that being the month in which Dr. von Geldern testified he told Domenic he had silicosis, the record shows that in the first half of May he received $49.07, and for the second half $36. These figures compare favorably with the normal earnings of deceased over many years. The record shows that from 1936 to 1940 he averaged about $100 per month. From 1932 through 1935, depression years, his income averaged between $45 and $50 per month, while in 1930 and 1931 it was about $100 per month. During the prosperity years of 1922 through 1929 he averaged about $150 per month. From 1912 to 1922 he averaged from under $50 to about $100 per month. During the seven months he worked in 1940 he averaged $100 a month. From this record it will be noted that there is not only no evidence that he suffered a wage loss in April or May, 1939, but there is no evidence that he ever suffered any material wage loss at any time because of his condition. In Chain Belt Co. v. Industrial Commission, 220 Wis. 116, 264 N.W. 502, it was held in a silicosis case, under a statute slightly different from that here existing, that the claimant was not entitled to compensation unless he suffered disability manifested by a wage loss. The reasoning of that case seems sound.

[6] The contention made by respondents that Domenic suffered a partial disability independent of any wage loss that

entitled him to a partial disability rating, and that this form of disability starts the statute of limitations running is entitled to but little serious consideration. No case has ever indicated that such type of disability unconnected with a wage loss starts the statute running in cases involving occupational and progressive diseases. If this were the law it would effectually bar an action by an employee or his dependents in most of such cases. It is obvious that in most of such cases the employee is in fact partially disabled long before he suffers a direct and material wage loss. The Marsh and other cases cited, supra, placed no such harsh and rigid limit on the rule there announced.

It should also be mentioned that the uncontradicted evidence shows that Domenic worked continuously until August of 1940, when he broke his leg. He worked at the same job at which he had worked for many years except that he avoided working on heavy pieces. Obviously, whatever disability he had in April, 1939, continued to grow worse until he died in June, 1941. During the period April, 1939, to August, 1940, he must have continued to breathe the dusty air that continuously aggravated the existing condition.

[7] However, even if Domenic did suffer a two-week wage loss, which the record does not show, such minor financial loss cannot operate to start the statute of limitations in such a case. When Domenic returned to work, if he ever did remain off for two weeks, it was at the same scale of pay at his same old job. The cessation was temporary and insignificant.

Other jurisdictions have considered this problem, and have had no difficulty in dispensing with arguments similar to those advanced by the Commission and the insurance carriers in this case. In Romaniec v. Collins Co., 107 Conn. 63, 139 A. 503, cited and relied upon in the Marsh case, 217 Cal. 338, 349, 18 P.2d 933, 86 A.L.R. 563, in a silicosis situation, the court held the action not barred although the employee had ceased work for a four-year period, and said (139 A. at page 505): "The pneumoconiosis from which the claimant suffered was contracted in defendant's factory; and, after an absence from work, upon his physician's advice, of 4 years, in attempting to effect a cure, upon his re-entering defendant's employment the disease progressed until claimant suffered a compensable injury which later developed into an injury causing total disability." To the same effect is Jadovich v. Collins Co., 109 Conn. 62, 145 A. 25, also cited and relied upon in the Marsh case, 217 Cal. 338, 349, 18 A.2d 933, 86 A.L.R. 563.

In Zurich General Acc. & L. Ins. Co. v. Industrial Comm., 203 Wis. 135, 233 N.W. 772, the decedent suffered from silicosis as far back as January, 1920. Apparently he knew his lungs were being affected. He stopped work for two years for treatment. He worked thereafter only spasmodically, the exact extent of his absences being unknown. He then took an outside job at 20% less wage. He worked there for four years. Then he became totally disabled and died one and one-half years later in January, 1929. Claim was filed in June, 1929. The court held that the claim was not barred by a statute that began to run from the date of the injury.

Similar results may be found in Hunt v. F. R. Patterson Const. Co., 253 Mich. 273, 235 N.W. 207, at page 208 where the length of absence was not stated and the court said: "Many persons afflicted with a slight ailment causing pain and distress do not regard it seriously. They expect that it will soon pass away. Such action on the part of an employee inures to the benefit of his employer. It is apparent that plaintiff felt that he had no ground for complaint against his employer until his condition necessitated his quitting work * * *." See, also, Texas Employers' Ins. Ass'n v. Fricker, Tex. Civ. App., 16 S.W.2d 390, where the absence was only seven days but the inference is that he could have filed for compensation at that time. See, also, Fidelity & Casualty Co. of New York v. McKay, 5 Cir., 73 F.2d 828.

[8] It appears from these cases, and the rule seems eminently sound and just, that it is not the fact that the decedent may have been technically entitled to compensation that starts the statute running, even if he knew that he was so entitled, but that to have this result the injury must have culminated in a real and material disability to perform his normal work and must have resulted in a material wage loss. There is no evidence of such a condition in the instant case. For these reasons the finding that the claim is barred by the statute of limitations is totally unsupported by any evidence, and the award based thereon cannot stand.

There was some medical evidence produced by respondents that Domenic's condition was caused by exposure to silica dust in Paris prior to 1912. This was contradicted by petitioner's medical witnesses. There was also evidence that at least in 1941 and 1942 the dust content of the air at Domenic's place of work was not sufficient to cause silicosis. There was a conflict on these issues. The Commission made no findings on these issues, basing its award denying compensation solely on the statute of limitations. In view of our holding that the claim is not barred, all concerned are entitled to findings on these controverted matters.

The award is annulled and the cause remanded to the Commission for further proceedings.

KNIGHT, J., concurs.

WARD, Justice.

I dissent.

Two questions are presented—one of law and one of fact. The first—the interpretation of Labor Code sections—may be disposed of by reference to their language and to the decision in Glavich v. Industrial Acc. Comm., 44 Cal.App.2d 517, 112 P.2d 774.

The period within which a proceeding may be commenced for the collection of a death benefit as applied to the facts of the present case is "One year from the date of death" but "in any event within—(1) Two years from the date of injury * * * (2) 240 weeks from the date of injury" if a "disability payment has been made, or agreed to be made, or proceedings for its collection had been instituted within the time limits set forth in section 5405." Labor Code, sec. 5406. There is no contention that petitioner herein may maintain this proceeding under the latter portion of the section. "In any event" may be defined as synonymous with the expression "under all or any circumstances," and, as said in Edwards v. Laird, 22 Cal.App. 398, 400, 401, 134 P. 365, 366, means "no matter what else may be" or "whatever may happen." In brief, it means that the commencement of a proceeding for the collection of a death benefit such as is here presented may not be delayed beyond the period specified. 26 A.L.R. 788.

The phraseology of the section is definite. Hence it was not necessary in Glavich v. Industrial Acc. Comm., supra, to consider cases from other jurisdictions wherein the statute or the facts are different, and for that reason not applicable. The majority opinion recognizes this fact, when after citing from other jurisdictions it is stated "the question is not an open one in this state" and held "that a widow's claim is barred if not filed within two years of the date of the injury to the husband, even if the two years have elapsed at the time of death." I agree with the conclusion reached in the majority opinion on the legal question. It is my opinion that the language of the statute, and the Glavich case, control, without reference to decisions from other jurisdictions. In the Glavich case it is said (44 Cal.App.2d at page 520, 112 P.2d at page 777): "Applying the preceding section to the facts of this case, it appears that the claim for death benefit was filed within one year from the date of death. However, it was not filed within two years from the date of injury, which was found by the Commission in the first proceeding to have been on April 22, 1936. In fact, John Glavich did not die until more than two years thereafter. We assume from subdivision (a) of the foregoing section that it is not ordinarily timely to file a claim for death benefit within one year from the date of death *unless it is also within two years from the date of injury,* for the clause reads that 'in any event' the claim must be filed within two years from the date of injury. Subdivision (a) (2) has no application to this case because it provides that the claim may be filed within 240 weeks from the date of injury, only when the disability continues to the time of death, and then only *when disability benefits have been actually paid,* or agreed to be paid. No compensation was paid to Mr. Glavich. Neither does subdivision (b) of the foregoing section have any application to this case. That subdivision is based on conditions which do not exist in the present proceeding."

The question of fact may be stated as follows: When did the employee know, or should he have known, that a partial disability had occurred? In determining this question from the evidence we may not draw an inference, though reasonable, inconsistent with that of the Industrial Accident Commission if the conclusion of that body is supported by evidence. That a partial disability had occurred is demonstrated by testimony of the petitioner and of a physician. The record shows that Mrs. Bianco testified as follows:

"Q. When did your husband first tell you he thought that his work caused this trouble? A. A couple of years ago.

"Q. When was the first time? A. Two or three years ago.

"Q. Was it in 1939 when he went to Dr. von Geldern? A. Yes, when they take the X-rays.

"Q. When he went to Dr. von Geldern in 1939, that was about April, wasn't it? A. Something like that.

"Q. And it was then, was it, that your husband told you that he thought his condition was caused by his work? A. I went with my husband at the same time to the office and they say that it was pretty bad and it came from the dust, that is all they say.

"Q. So, then, you and your husband both thought in April, 1939, that his work caused his condition, is that right? A. Yes.

"Q. And when was the first time before April, 1939, that he lost any time because of his condition? A. I don't remember now."

The physician, personally selected by the employee, testified in substance that the symptoms of silicosis had been present for a number of years; that "When I explained to him it was due to silica dust he explained to me then the nature of the work when he was in Paris and he himself attributed it to that work. * * *

"Q. In other words, you just told him to keep out of the dust and away from colds and infections? A. That is right.

"Q. Did he appear to you as being incapacitated from pursuing his normal occupation there at Gladding, McBean and Company? A. He certainly couldn't have done hard work at that time, that is heavy work, because of his shortness of breath. He was definitely partially disabled. * *

"Q. Did he seem to understand the explanation you made of these X-rays to him? A. Oh, yes."

The employee remained away from work for some time and upon his return requested lighter work; he evidently did not inform his employer of the seriousness of his physical condition. It seems to be admitted that no compensation was paid during the period of his absence, and none requested. However, in this regard Mrs. Bianco during the period of her husband's hospitalization consulted certain insurance carriers.

The Glavich decision is controlling. However, as I read the majority opinion it holds that to fix the date of injury, in addition to the employee's knowledge of his disability, there must be proof that he knew the disability to be compensable. The opinion also holds that a different rule applies in the case of a "distinct injury," such as the loss of a limb. As to a progressive occupational disease, the majority opinion states that "there is no precise point of time that can be determined to be the exact date of injury."

The majority opinion relies primarily upon certain language in Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 939, 86 A.L.R. 563, where there were three separate and distinct petitions for compensation. The Marsh and the Woods applications were for death benefits; that of Lange was for disability compensation in petitioner's own behalf. As to the Woods' application, it was determined that it was not filed within the statutory period, and that the action of the commission "in denying relief was clearly correct." As to Marsh, the evidence did not "disclose when the presence of pneumonoconiosis or silicosis was or should have been diagnosed as the primary and efficient cause of the disability and later the death of Marsh." That award was annulled. Such difficulty does not arise in this case. The personal physician of the employee herein fixed the date of partial disability. There is some confusion relative to the month—April or May—but that it immaterial. Either month would have been beyond the statutory period. The physician testified that the patient was suffering from silicosis; that "he had a disability, unquestionably." In the Lange case there was no finding that silicosis was the cause of the disability, the court at page 352 of 217 Cal., 18 P.2d at page 939, saying, "the evidence fails to disclose sufficient data for a conclusion as to when a causal connection between the occupation and the disability was or should have been discerned." In the present case the commission found: "By reason of information imparted to the employee in April, 1939, by his physician, he became aware at that time that he was suffering from the disease silicosis, and that a causal connection existed between said employee's occupation as a tile setter and the silicosis from which he was suffering. At said time the employee was temporarily totally disabled for a period of approximately two weeks, and there-

after was partially disabled until the time of his death." In brief the commission found that there was a disability justifying a compensatory award, and that there was a causal connection between the employment and the injury, and noted the date thereof. "It is at that time that the employer's liability becomes fixed." Marsh v. Industrial Acc. Comm., supra, 217 Cal. at page 345, 18 P.2d at page 936.

The majority opinion further holds that "There is no finding that the employee had knowledge that he had suffered a compensable disability." The findings are definite, as above quoted, that the employee was aware that he was suffering from the disease silicosis. The test set forth in the majority opinion (which I am of the opinion is not in entire conformity with the Marsh case) is that the statute runs from the time the employee "knows, *or should know, that he has suffered* a total or partial *compensable disability.*" (Italics added.)

With all of the legal ramifications involved in the determination of the question, it was not incumbent upon the commission to directly find that the employee knew that his injury was in fact and in law compensable. It is sufficient under section 5953, St.1937, p. 305, if all the ultimate facts and conclusions are found. In a case such as this, where it does not appear that a constitutional question is involved, the findings on factual questions are not subject to review (sec. 5953) unless there is no evidence to support them. "And if the specific findings of the commission have the support in the evidence and if such findings with the aid of fair inferences sustain the findings of ultimate facts, the action of the commission will not be overthrown." 27 Cal.Jur., p. 579. In Argonaut M. Co. v. Industrial Acc. Comm., 21 Cal.App.2d 492, 499, 70 P.2d 216, 221, the court said: "The question regarding the possession of knowledge on the part of a claimant, of the cause of his ailment, or as to whether the disease has progressed to an extent which constitutes compensable disability, is primarily one of fact to be determined by the commission. This court will not interfere with its conclusions in that regard unless there is a total absence of evidence to support that finding." See, also, Pacific Employers Ins. Co. v. Industrial Acc. Comm., 47 Cal.App.2d 494, 118 P.2d 334; Clendaniel v. Industrial Acc. Comm., 17 Cal.2d 659, 111 P.2d 314; Dawson v. Industrial Acc. Comm., 54 Cal.App.2d 594, 129 P.2d 479. The evidence amply supports the findings. The employee knew that he had suffered an injury, and under all the facts and circumstances "should have known" as a "reasonable man" (majority opinion) that the injury was compensable. In Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, where the holding in the Marsh case was considered, the court said (6 Cal.2d at page 312, 57 P.2d at page 913): "We annulled the awards, and held that the date of the injury was not the date of the exposure, nor even the date of the last exposure to the dust laden atmosphere, but rather the time when the employees became aware that their injuries were due to such exposure, or when by the exercise of reasonable care and diligence they might have ascertained that fact."

The majority opinion holds that there is "no showing in the record that Domenic did not receive his regular wages from his employer" during a two weeks' layoff (neither was there a direct showing that he did); that any wage loss was not because of his health, and that in any event "The cessation was temporary and insignificant"; that to be entitled to compensation "the injury must have culminated in a real and material disability to perform his normal work and must have resulted in a material wage loss."

The extent of a temporary layoff and of a "material wage loss" are clearly questions of fact. There is proof that the amounts received as wages for the various half month periods varied materially. We can not say that the inference drawn by the commission from the evidence on these questions is without evidentiary support. Under the circumstances a reviewing court in an industrial accident proceeding is not permitted arbitrarily to determine that as a matter of law a temporary layoff is not sufficient or that a loss of wages is immaterial.

That there was a layoff for two weeks is not contradicted; that Domenic lost some wages is a reasonable inference since his compensation took the form sometimes of a daily or hourly wage and sometimes was on a piecework basis; that there was a material disability is proven by the testimony of his physician, and the fact that he did not perform "his normal work" upon his return, but was assigned to "lighter work."

The holding in the majority opinion that the finding that the claim is barred by the statute of limitations is "totally unsupport-

ed by any evidence" is partially based upon the absence of a material wage loss. That there must be a "material wage loss" to start the statute running is a new rule, to which I am unable to subscribe when the numerous past, present and probable future applications for compensation in silicosis and other diseases or injuries are considered. Such a rule might result in denying compensation in many meritorious cases. In the Marsh case, mainly relied upon in the majority opinion, the employee lost no time and no wages as the result of silicosis. In Postal Tel. Cable Co. v. Industrial Acc. Comm., 213 Cal. 544, 550, 3 P.2d 6, 8, the court said: "The statute does not require a showing of loss of earning power as a prerequisite to the payment of compensation for a permanent disability." See, also, Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150. It seems unnecessary to consider this point further.

In my opinion the award should be affirmed.



61 Cal.App.2d 134

JORDAN et al. v. HARVEY et ux.
Civ. 3233.

District Court of Appeal, Fourth District, California.

Oct. 25, 1943.

1. Animals ⇐74(5)

Evidence sustained judgment denying recovery for injuries inflicted by dog on theory that dog which caused injuries was not sufficiently identified as defendants' dog.

2. Appeal and error ⇐1047(4)
Trial ⇐62(2)

Where a defendant testified that children had admitted that they could not swear that dog which bit minor plaintiff was defendants' dog, plaintiff's witness who was present during the conversation should have been permitted to answer rebuttal question with reference to the conversation, but error, if any, was not sufficiently prejudicial to justify reversal in view of other evidence and absence of offer of proof.

3. Appeal and error ⇐1056(1)

Even if statements of minor plaintiff and his brother, made shortly after the occurrence, indicating that defendants' dog bit plaintiff were admissible, exclusion of evidence of statements was not sufficiently prejudicial to require reversal, where statements would have added little to testimony actually received.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action for personal injuries by Richard Jordan, a minor, by Ruth Jordan, his guardian ad litem, and Jack Jordan against E. M. Harvey and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Mize, Kroese & Larsh, of Santa Ana, for appellants.

Roland Thompson, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for damages. Richard Jordan, the minor plaintiff, was bitten by a Scotch Terrier dog. On the occasion in question Richard, who was 9 years old, was playing in a private garage with his brother Robert and two Jardine children. Fortunately, the boy was not seriously injured and the special damages proved, the cost of medical attention and supplies, amounted to about $35. There were several Scotch Terrier dogs in the neighborhood and the principal issue at the trial of the case was as to whether or not the dog that bit Richard was the one owned by the defendants. The court, sitting without a jury, found for the defendants, finding specifically that the dog owned by them did not bite the minor plaintiff. A motion for a new trial was denied and the plaintiffs have appealed from the judgment.

In a written opinion ordering judgment for the defendants and directing their counsel to prepare findings the court said, among other things, "It therefore resolves itself into simply a question of fact. The day after Plaintiff was bitten, the only eyewitness stated to Mrs. Harvey, one of the Defendants, that she was not sure 'Sandy' was the dog that had bitten Plaintiff. The testimony adduced by Defendants would preclude any possibility of the dog 'Sandy' having bitten Plaintiff." Ap-

pellants' first contention is that "the statement contained in the court's opinion to the effect that there was only one eyewitness to the biting is contrary to the evidence." It is argued that this statement in the opinion discloses that the trial judge, in reaching his conclusion, based it upon the erroneous belief that there was only one eyewitness, when in fact all four of the children who were playing in the garage saw what occurred.

The opinion of the court neither indicates that the trial judge took an erroneous view of the law applicable to the case (see Coakley v. Ajuria, 209 Cal. 745, 290 P. 33), nor that any misconception of the facts was responsible for the decision. The court not only referred to the uncertainty of this one witness but pointed out the definite nature of the evidence for the respondents, including a comment on two other phases of the evidence, and then finally observed that the appellants had not met the burden of proof resting upon them.

While the court referred to but one of the eyewitnesses the testimony of all four of them discloses, in greater or less degree, an uncertainty with respect to the identification of this dog. Richard Jordan testified that it was dark at the time although there was a light in the garage, that he knew the Harveys had a "Scotty" as he had seen it in the road in front of their house, that this was the first time he had ever seen the dog which bit him, and that "I never knew whose it was when I first came in." On redirect examination he testified that he had seen the dog on several previous occasions but that "I wasn't familiar with the dog though." When asked if he thought he could identify the dog if it was brought into court with two or three other "Scotty" dogs, he replied: "I wouldn't like to have him brought up here." Robert Jordan was asked on the stand if he would say that the dog he saw bite his brother was the same dog he had seen around the Harvey place, and he replied: "I wouldn't be sure—but he looked a lot like that dog." Laurs Jardine testified that she had seen the dog that did the biting in front of the Harvey house and around her own home and that after the biting she chased it down the sidewalk until it ran in between the Harvey house and the one next to it. Jack Jardine testified that the dog that bit the minor plaintiff was the Harveys' dog, "at least so we thought." While on the witness stand he admitted that on the day after the biting occurred he had told Mrs. Harvey that he didn't know whether it was her dog or not. A little later he testified, "I am under the impression it was the Harvey dog," and that he formed this impression from talking to other people in regard to it and not knowing any other "Scotty". Another boy testified that a couple of days after the incident Jack Jardine had told him that he could not be sure what dog had bitten Richard because he had noticed other similar dogs in the neighborhood.

Not only does the testimony of these four eyewitnesses disclose an uncertainty with respect to identifying this dog as the one owned by the Harveys, but other portions of their testimony strongly indicate that the offending canine was not the Harvey dog. Each of these children was very positive that the dog which did the biting was a black "Scotty" with gray streaks in it which were very noticeable. On the other hand, it was clearly established by other evidence that the Harvey dog was a black one without any gray streaks in its fur. Moreover, if the testimony of some five witnesses for the defendants is to be believed, the Harveys' dog was confined in their home at the time in question and could not have bitten this boy. This fact was pointed out by the court in its written opinion and the only reasonable conclusion is that the court accepted that evidence as true.

[1] After reading all of the evidence we are unable to see how the court could have been reasonably expected to decide the case the other way. Under such circumstances, and in view of the court's statement in its entirety, it cannot be held that the decision was based upon the mistaken reference therein to "the only eyewitness", or that this statement discloses a misconception of the controlling facts.

[2] It is next contended that the court erred in sustaining objections to questions asked of two witnesses for the plaintiffs on rebuttal. Mrs. Harvey had testified that on the next day after the biting occurred she had a conversation with Laurs and Jack Jardine when Mrs. Jordan and several others were present, during which she asked the two Jardine children whether they were positive whether it was her dog that had bitten Richard Jordan, and that both children had replied, in effect, that

they thought it was "Sandy" but that they could not swear to it. Frances Harvey, the daughter of the respondents, testified to the same effect. On rebuttal, Mrs. Jordan was asked a question with reference to this conversation and an objection was made on the ground that this was not proper rebuttal and that the matter had previously been gone into with this witness. After some argument, in which the witness participated, counsel for the appellants withdrew the witness without the objection having been directly ruled upon. The record discloses that this witness had not previously been asked about this conversation. However, no offer of proof was made and counsel for the appellants may have misled the court when, in arguing the matter, he stated: "She was asked on cross examination about that, and went into the details." Moreover, Jack Jardine, while on the witness stand, had admitted that during this conversation he had told Mrs. Harvey that he could not swear that the dog in question was her dog. Laurs Jardine was also called on rebuttal and, her attention being directed to this conversation, was asked whether she had then stated that she was not sure whose dog it was that bit Richard. A similar objection to this question was sustained. It appears from the record that practically the same question had been asked during her previous cross examination, at which time she replied that she could not remember making the statement. While Mrs. Jordan should have been allowed to answer the question asked of her it cannot be held, under the circumstances here appearing, and in view of the other matters to which we have referred, that any possible error in that connection could be sufficiently prejudicial to justify a reversal.

[3] The only other point raised is that the court erred in sustaining objections to and striking out certain statements as being hearsay and not part of the res gestae. The statements in question were that "'Sandy' Harvey bit my eye out" and that "The Harvey dog bit Richard in the eye," and were said to have been made by Richard and Robert Jordan, respectively, as they ran into their home shortly after the biting occurred, there being but one house intervening between their home and the garage where they had been playing. Assuming that these statements were admissible (See Showalter v. Western Pacific R. Co., 16 Cal.2d 460, 106 P.2d 895), it does not follow that their exclusion was sufficiently prejudicial to require a reversal. The obvious purpose of offering the statements was for their value in identifying the dog that had done the biting. Both of these boys disclosed in their testimony in this case that they had thought that the dog in question was the Harvey dog, although, as we have noted, their testimony in this regard was somewhat uncertain. These statements, had they been admitted, would have added little to the testimony that was actually produced and their value would have been affected by the other matters to which we have referred, a part of which appears in the testimony of the boys themselves. It does not appear that the admission of the testimony here in question could have affected the result and we are far from convinced that any miscarriage of justice has resulted.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



61 Cal.App.2d 130

SINNOCK v. YOUNG.

Civ. 3228.

District Court of Appeal, Fourth District, California.

Oct. 25, 1943.

1. Stipulations ⇐13

Action of trial court in relieving plaintiff from portions of stipulation which incorrectly set forth material facts and which were contradicted by undisputed evidence, was not improper.

2. Mechanics' liens ⇐281(3)

In action to foreclose a materialman's lien and to secure a personal judgment against owner, evidence sustained finding that owner had promised to pay materialman for materials furnished.

3. Appeal and error ⇐994(3), 1011(1)

An appellate court cannot pass on credibility of witnesses and weight to be given their testimony merely because there

is a conflict in the evidence, where there is substantial evidence supporting challenged finding.

4. Mechanics' liens ⇐284

Where materialman brought action to foreclose materialman's lien and to secure personal judgment against contractor and owner, dismissal of action against contractor did not relieve owner, who had promised to pay materialman for materials furnished, from liability.

5. Appeal and error ⇐110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by R. L. Sinnock, doing business under the fictitious name of Sinnock Lumber & Supply Company, against L. M. Young, to foreclose a materialman's lien and to secure a personal judgment. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sylvan Y. Allen, of Los Angeles, for appellant.

Best, Best & Gabbert, of Riverside, for respondent.

MARKS, Justice.

This is an action to foreclose a materialman's lien upon a motor court in Blythe, Riverside County.

Defendant was the owner of the property and entered into an unrecorded written contract with Verne P. Deering for the erection of two buildings upon it. Plaintiff was the materialman who furnished the materials which were used in the improvement. He filed a lien on the property to secure payment of an unpaid balance of $1,222.29 and brought this suit to foreclose the lien and secure a personal judgment against the contractor and the owner for the amount unpaid. The action against Deering was dismissed without prejudice and judgment was entered against Young as prayed for.

[1] At the commencement of the trial counsel entered into a written stipulation as to certain facts. During the trial evidence was introduced, without objection, which contradicted certain parts of the stipulation and conclusively showed that certain facts set forth in it were incorrect and untrue. Counsel for plaintiff asked to be relieved from those portions of the stipulation which were contradicted by the evidence introduced. Over the objection of defendant the trial court granted this request at the close of the trial.

It is now urged that this was prejudicial error that requires a reversal of the judgment. We cannot agree with this argument. Certainly a court of justice should be permitted to relieve a party from a stipulation which incorrectly sets forth material facts some of which are contradicted by undisputed evidence. See 23 Cal.Juris, p. 829, sec. 14, and cases cited; 10 Year Supp. p. 423, sec. 14, and cases cited. Had the trial court refused the request then a serious question of abuse of discretion would have been presented.

[2] The trial court found that defendant had promised to pay plaintiff for the materials furnished and held him to his contract. Defendant urges that this finding is contrary to the evidence.

[3] Plaintiff testified that prior to the time he furnished any materials he talked to Young; that he told Young he did not know Deering; that if he could charge the materials to Young he would furnish them; that Young consented to have the materials charged to him. Young denied this conversation. This presents the familiar question of a conflict in the evidence which is addressed to and settled by the trier of fact. This conflict having been solved in favor of plaintiff by the trial judge, the question cannot be reopened here as an appellate court cannot pass on the credibility of the witnesses and the weight to be given their testimony merely because there is a conflict in the evidence, where, as here, there is substantial evidence supporting the challenged finding.

[4] Young suggests that the dismissal of the action against Deering released him from liability. There is no merit in this contention. Under the evidence which the trial judge found to be true, Young was primarily liable.

[5] Defendant has attempted to appeal from the order denying his motion for new trial. Such an order is not appealable (Sec. 963, Code Civil Procedure) and the appeal therefrom is dismissed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

61 Cal.App.2d 132

HOOVAL v. HOOVAL et al.
Civ. 3229.

District Court of Appeal, Fourth District, California.

Oct. 25, 1943.

Appeal and error ⇐1011(1)

Where wife brought action to set aside alleged fraudulent conveyance by deceased husband during his last illness to deceased's son by former wife and to son's wife, question whether fraud was committed or undue influence exercised, and whether deceased was perfectly normal at time of conveyance, was on conflicting evidence for the trial court, and where no abuse of discretion appeared, judgment was affirmed.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Eva M. Hooval, individually, and as administratrix of the estate of Peter J. Hooval, deceased, against John H. Hooval and others to set aside alleged fraudulent conveyance. From a judgment for defendants, plaintiff appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Daily & Gallaudet, of Glendale, and Swing & Swing, of San Bernardino, for respondents.

GRIFFIN, Justice.

Peter J. Hooval died August 25, 1939, leaving as his heirs the plaintiff, his widow, and the defendant John H. Hooval, a son by a former marriage. The action was instituted by the widow against the son and Elsie McLeran Hooval, the son's wife, to set aside conveyances made by the husband during his last illness, alleging fraud and undue influence. The remaining defendants consist of a bank and three building and loan associations in which the husband had monies deposited or invested. By the conveyances the son received two certificates, one for $10,000 and one for $6,700 in a building and loan association; another certificate for $15,000 in another association, a pass book account for $873.84 in another one; and a checking account of $813.70 in a bank and a savings account of $2,289.20 in the same bank. The son's wife received a pass book of $2,447.87 and other property, all aggregating $3,447.87, in addition to the home property. The widow received nothing except a $1,000 certificate which had been issued by the Home Association in her name. The trial court rendered judgment in favor of the son and his wife and permitted the $1,000 certificate to remain in the name of the plaintiff which he adjudged to be her property. Plaintiff appealed from the judgment.

There apparently was considerable objection by the son to the marriage of his father to the plaintiff. Considerable evidence was offered which might indicate that the son took some steps to have the father, during his last illness, transfer the property to the son and his wife. On the other hand, there is also evidence that prior to the death of the first wife, John's mother and father entered into some agreement in which they agreed that their son John would receive all of their property after his father's death and that, in pursuance of the agreement, a deed which referred to this agreement was executed and recorded.

There is testimony of the attending physicians and nurses to the effect that at the time the transfers were made Peter J. Hooval was "perfectly normal" as to his mental state, and that there were no signs of "mental upset" or "mental weakness".

From an examination of all the evidence, it clearly appears that only a conflict in the evidence resulted and that the question was for the trial court to determine. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. No abuse of discretion appears.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

61 Cal.App.2d 140

ANDERSON v. STATE et al.

Civ. 3234.

District Court of Appeal, Fourth District, California.

Oct. 25, 1943.

1. Eminent domain ⇐85
Highways ⇐85

An abutting property owner has easement in right of access to public highway and is entitled to compensation for infringement of such right. Const. art. 1, § 14.

2. Evidence ⇐113(2)

Where flood greatly damaged highway and adjoining property, grade of highway was raised, and adjoining property owner sued state for damage from change of grade, testimony as to value of adjoining property prior to flood was inadmissible. Const. art. 1, § 14.

3. Eminent domain ⇐141(3)

The proper measure of damage to adjoining property by change of grade of highway was depreciation in value of such property caused by and resulting from change of grade, and from that cause alone. Const. art. 1, § 14.

4. Appeal and error ⇐1008(1)

In action for damage from change of grade of highway, weight of testimony was for trier of facts rather than for District Court of Appeal. Const. art. 1, § 14.

5. Appeal and error ⇐907(2)

A reviewing court is required to presume that evidence not included in record supports verdict and judgment.

6. Appeal and error ⇐930(2)

The reviewing court is required to presume that jury followed trial judge's instructions.

7. Appeal and error ⇐1053(2), 1170(7)

In action for damage from change of grade of highway made after flood damaged both highway and plaintiff's adjoining property, admission of evidence of value of plaintiff's property prior to flood and refusal to strike such evidence did not require reversal, where jury was instructed to disregard such evidence as a measure of damage and jury awarded relatively small amount of damages. Const. art. 1, § 14; art. 6, § 4½.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by W. D. Anderson against the State and others for damages suffered by reason of the change of grade of a highway. From a judgment for plaintiff, defendants appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, and Francis J. Carr, of San Francisco, for appellants.

Martin J. Coughlin and Julius J. Novack, both of San Bernardino, for respondent.

MARKS, Justice.

This action is in the nature of an action for inverse condemnation. It sought recovery for damages alleged to have been suffered by reason of the change of grade of the highway on which plaintiff's property fronted. Plaintiff recovered judgment for $1,000.

Plaintiff's property is situated about three quarters of a mile south of the southerly city limits of the city of San Bernardino. It lay on the west side of South E Street with a frontage of 191.11 feet. Plaintiff had on it a machine shop, garage and other smaller buildings in which he conducted his business.

Prior to March 2, 1938, E Street was a main paved highway running in a general northerly and southerly direction with its grade about one foot above that of the adjoining land. Plaintiff had easy access to the street from all points of the frontage of his property. Lytle Creek carried water from the mountains northwest of San Bernardino into the Santa Ana River. Its general course is southeast until it reaches a point a short distance west of E Street and north of plaintiff's property where it makes a turn to the southwest. Warm Creek runs in a general northerly and southerly direction through the easterly part of San Bernardino. South of the city limits it makes a turn to the west, passes under E Street under a bridge located a short distance north of plaintiff's property and flows into Lytle Creek at the lower end of its curve westerly. A waterway carrying surface and seepage waters ran in a southwesterly direction and passed the southeasterly corner of plaintiff's property.

There were two pipes under E Street easterly of the southeast corner of this property through which this water normally flowed.

On March 2, 1938, a great and unusual storm occurred. Lytle Creek broke out of its banks at its westerly curve, washed out part of the E Street pavement and proceeded southeasterly, its waters joining those of Warm Creek. Warm Creek broke its bank where it curved to the southwest and the waters of the two streams flooded a large section of the low-lying country between San Bernardino and the Santa Ana River to the south. Some of these waters in considerable volume collected in and followed the waterway we have described. It washed out E Street opposite the southerly half of plaintiff's property and cut a considerable channel, in some places seven feet deep, where the waterway had existed before and much wider than the former modest channel. Plaintiff's property was flooded and silt and debris deposited upon it and on the floors of his buildings. The southeast corner of the property was washed away and the machine shop was considerably damaged.

As soon as the crest of the flood had passed the break in the southerly bank of Warm Creek was repaired and the water was returned into the former channel which passed under E Street north of plaintiff's property. Within a short time after March 2nd, and before defendants began the work of repairing the road, vehicular traffic could reach plaintiff's property from the north over the old grade of E Street. A highway engineer testifying for defendants was of the opinion this was done about two days after the flood, though he said the trip would be rough because of the broken and bulging pavement. No vehicular traffic could pass over E Street south of plaintiff's property. The highway department constructed a detour along the east side of E Street to permit vehicles to pass during the time of the reconstruction of that street. It is therefore in evidence that after the flood, and prior to the commencement of the work which resulted in the change of grade, plaintiff's property could be reached, somewhat inconveniently, over a road having the approximate grade of E Street prior to the flood. Plaintiff testified in response to the question: "How long was that before they got the road fixed to the north? A. Not a week after the flood; I could drive right down to it."

The lessons of the flood convinced the state engineers in charge of highway construction and repair that it would be necessary to provide for the discharge of much more flood water where it passed under the highway in the old drainage channel than was afforded by the two pipes installed there before March 2, 1938.

A pile bent and timber bridge with a concrete deck approximately 226 feet long was constructed. It was considerably above the grade of the old road so approaches were constructed both north and south of the bridge. Both approaches started at about the level of the old grade and rose to each end of the new bridge. An engineer for the highway department testified that the approach was 3½ feet above the old grade at the north line of plaintiff's property and 4½ feet above that grade at the south line. Witnesses for plaintiff estimated the new grade at between six and seven feet above the level of the Anderson property.

Defendants constructed an approach leading westerly from the pavement on the northerly bridge approach down to the Anderson property.

Anderson testified that he had much difficulty in getting heavy machinery from his shop onto the highway because of the rise in the grade from his land to the pavement; that he had to make a fill on his lot and build a ramp in order to be able to move heavy machinery onto the highway.

[1] Defendants do not question the right of a property owner who has been damaged by a change in grade of a street on which his property abuts to recover damages caused by such change of grade. It is settled in California that such an abutting property owner has an easement in the right of access to the public highway and that he is entitled to compensation for an infringement of his right of ingress and egress under the provisions of section 14 of Article I of the Constitution. See Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Brown v. Board of Sup'rs, 124 Cal. 274, 57 P. 82; McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; Geurkink v. City of Petaluma, 112 Cal. 306,

44 P. 570; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750.

Defendants argue that the evidence of damage is insufficient to support the verdict and that the trial court committed serious error sufficient to justify a reversal of the judgment in admitting evidence, over their repeated objections, of the value of plaintiff's property prior to its damage by the flood as a basis for estimating his damage by deducting therefrom its value after the construction of the bridge and the completion of the approaches to it. Defendants made several motions to strike out such testimony which were denied.

[2, 3] We agree with defendants that it was error to admit testimony of the value of plaintiff's property prior to the flood as it furnished no proper basis for estimating his damage resulting from the change of grade. A most cursory examination of the record and inspection of the exhibits discloses that the flood caused plaintiff serious damage. It was a great and unusual storm and defendants were in no way responsible for that damage. The proper measure of his damage caused by the change of grade is the depreciation in value of plaintiff's property caused by and resulting from the change of grade and from that cause alone. See Rose v. State of California, supra; Muller v. Southern Pac. B. Ry. Co., 83 Cal. 240, 23 P. 265; McDougald v. Southern Pac. R. Co., 162 Cal. 1, 120 P. 766. The value of the property at the time the improvement was started and the extent of the depreciation of that value caused by the change of grade and not the depreciation of the value of the property at some prior time is the true measure of damage. It follows that evidence of value of the property prior to the flood had no proper place in the record and that objections to the introduction of that evidence should have been sustained. Counsel for plaintiff recognized this to be true because in offering the evidence they agreed to segregate the damage caused by the flood from that caused by the change of grade. This they failed to do in the examination of either of their two witnesses who testified on the question of valuation of the property. Defendants assumed that burden in cross-examination. They were unsuccessful with plaintiff who testified his property had a value of $15,000 prior to the flood and of $5,000 after the change of grade. He was unable to estimate the damage caused by the flood or the value of his property at the time the work started which resulted in the change of grade. The motion to strike his testimony as to values prior to the flood should have been granted.

[4] Defendants' counsel were more successful in their cross-examination of George W. Holbrook, the other witness called by plaintiff, on the question of values. He estimated the value of the property at $13,775 prior to the flood and at one third that amount after the change of grade. On cross-examination he testified that the value of the land had not been reduced by the flood but that the value of the buildings had been reduced by $1,000 which he thought it would cost him to repair them. Thus he estimated the value of the property at $12,775 after the flood and at the time defendants started the work on the road and plaintiff's damage caused by the change of grade at two thirds of that amount which would be $8,516.66. The value of this evidence was considerably lessened by the admissions of the witness that he was not a contractor or builder and knew little of the cost of repair. He was very reluctant to estimate the damage to the buildings but this testimony was brought by defendants and is in the record. The weight to be given it is a question addressed to the trier of fact and not to this court.

[5] At the close of the evidence the jury was taken to view the premises. What they saw there is evidence and from its very nature is not incorporated in the written record. We are required to presume that evidence not included in the record supports the verdict and judgment. Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P.2d 1044. Evidence obtained by the trier of fact viewing the premises has been held sufficient to support a judgment. Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942; Gates v. McKinnon, 18 Cal. 2d 179, 114 P.2d 576; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Rose v. State of California, supra; Universal Sales Corp. v. California, etc., Co., 20 Cal.2d 751, 128 P.2d 665; Brugger v. Lee Yim, 12 Cal.App.2d 38, 55 P.2d 564; Foothill Ditch Co. v. Wallace Ranch W. Co., 25 Cal.App.2d 555, 78 P.2d 275; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213; Stacey v. Hayes, 31 Cal.App.2d 422, 88

P.2d 165; Jones v. Bridges, 38 Cal.App. 2d 341, 101 P.2d 91.

This conclusion does not leave the amount of damages awarded by the jury supported by nothing more than the guess or speculation of that body. The condition of plaintiff's property, both before and immediately after the flood, was fully described by witnesses and numerous pictures were introduced so the jury was fully informed on that subject. The damages recoverable by plaintiff were limited to those caused by interference with his convenient ingress to and egress from his property resulting from the change of grade. The added difficulty, inconvenience and expense in getting to and from the property is the real element causing his damage and the decrease in the value of his property. The extent and amount of this damage might have been apparent to the citizens of the county who composed the jury. They were not necessarily matters exclusively within the knowledge of real estate brokers or appraisers who qualified and testified as experts. See Robinson v. County of San Diego, 115 Cal.App. 153, 300 P. 971. Regardless of this view of the case the jurors had before them the evidence of Holbrook which supports the verdict and judgment even though he estimated the damage at a much larger sum than that fixed by the jury.

It follows that the argument that there is no evidence in the record to support the judgment because no proper measure of damage can be found is not supported. Therefore we must consider whether the errors we have already pointed out in admitting evidence and in refusing to strike out evidence are sufficiently prejudicial to require a reversal of the judgment.

At the request of defendants the trial court gave the following instructions to the jury:

"In determining the issues, you are not to compare the conditions existing before the flood of March, 1938, with those which existed after the construction of the bridge and its approaches by the State of California. Rather, you are to consider the conditions which existed at the time the State of California commenced the construction of the bridge and approaches and those conditions which existed immediately after such construction was completed.

"You are instructed that the defendant is not responsible to the plaintiff, W. D. Anderson, for any damage resulting to the plaintiff's land or to his ingress and egress thereto and therefrom as a consequence of the flood of March, 1938.

"You are instructed that under the law the defendant, the State of California, was not obligated to restore or to replace any portions of the highway which had been damaged or destroyed in the flood of March, 1938, and, accordingly, it is your duty to determine from the evidence whether the construction of the bridge and approaches resulted in an impairment of the access available to and from the plaintiff's land in the condition in which the highway and the land were left by the said flood. * * *

"If you find from the evidence that the plaintiff's access has been substantially impaired as a result of the construction of the bridge and its approaches, it will then be necessary for you to ascertain the amount of such damages. This you will do by determining the market value of the plaintiff's property as it existed immediately prior to the said construction and the market value thereof immediately after said construction. The difference, if any, between these two figures will be the amount of such damage. In ascertaining such damages, you are to exclude all depreciation in the market value of the plaintiff's property which resulted from the flood of March, 1938, as it would be unlawful for you to require the defendant, the State of California, to compensate the plaintiff for any such flood damage."

[6] These instructions are clear and it is not probable that they could have been misunderstood by the jurors. They were proposed by defendants and are as favorable as they could have expected. Their effect was to instruct the jury to disregard the evidence of the value of plaintiff's property prior to the flood as a measure of his damage. We are required to presume that the jury followed the instructions given by the trial judge.

[7] In view of the relatively small amount of damages awarded by the jury, when compared with the $10,000 asked by plaintiff in his pleadings and fixed in his evidence, and the $8,516.66 damages shown by the only competent evidence offered by his witness, coupled with the further undeniable fact that the change of grade actually impaired, to some extent at least, the convenient ingress to and egress from

his property for the benefit of the public, we are not convinced that the errors committed resulted in a miscarriage of justice. Under these circumstances we are not permitted to reverse the judgment. Sec. 4½, Art. VI, Constitution.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



61 Cal.App.2d 557

PEOPLE v. McGARVY.

Cr. 1823.

District Court of Appeal, Third District, California.

Dec. 2, 1943.

1. Criminal law ⇐264

Prompt disposition of criminal cases should be encouraged, but an accused charged with a serious crime must not be stripped by token gestures of his right to have sufficient time to confer with counsel of his own choosing and properly to prepare his defense.

2. Criminal law ⇐264

The duty of the trial court to assign counsel to accused is not discharged by the assumed delegation of such duty by the district attorney, who is without power to do more than merely to ask an attorney if he will talk to accused.

3. Criminal law ⇐264

An accused having the right to counsel should be afforded fair opportunity to secure counsel of his own choice.

4. Criminal law ⇐274

When there is reason to believe that a plea has been entered through inadvertence, and without due deliberation, or ignorantly, trial court should be indulgent in permitting the plea to be withdrawn. Code Civ.Proc. § 473.

5. Criminal law ⇐264

When a right is conferred by law, everything necessary for its protection is also conferred.

6. Criminal law ⇐264

Fact that an attorney requested by the district attorney to talk to accused had duly advised accused to plead guilty did not abridge accused's right to counsel of his own selection.

7. Criminal law ⇐274

Although withdrawal of a plea of guilty is within the discretion of the trial court, and such discretion must be exercised upon the facts of each individual case, withdrawal of such plea should not be denied where it is in the least evident that the ends of justice would be subserved by permitting accused to plead not guilty.

8. Criminal law ⇐274

Where accused inexperienced farm laborer had been refused permission to talk with his family and attorney after his arrest and, after some 30 minutes' conversation with an attorney requested by the district attorney to talk to accused, pleaded guilty to manslaughter, superior court abused its discretion in denying accused's motion to change his plea to not guilty on ground that his right to be represented by counsel of his own choice had been invaded.

9. Criminal law ⇐273

Where accused in justice court pleaded guilty to manslaughter, a crime not punishable by death, and murder count against accused was abandoned, the magistrate properly certified the case to the superior court for sentence, and proceeding by information in the superior court was not required. Pen.Code, §§ 682, 859a; Const. art. 1, § 8.

Appeal from Superior Court, Colusa County; Ben R. Ragain, Judge.

Billy McGarvy was convicted of manslaughter, and he appeals.

Reversed and remanded.

Manwell & Manwell, of Marysville, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from an order denying defendant's petition to change his plea from guilty to not guilty, and to set aside the judgment entered thereon.

The record discloses that he was arrested early Sunday morning, August 9, 1942. On

the following afternoon he was arraigned in the Justice's Court of Colusa Township, on a complaint alleging two counts, the first, murder, and the second, manslaughter.

At the time of the arraignment defendant stated that he would like to talk to an attorney but that he had no money, and he asked if the court appointed attorneys. He was advised the Justice's Court had no such authority but that it would not be necessary to have an attorney at the preliminary hearing. The court then adjourned until 2:00 o'clock the following afternoon. The next morning at 10:25 the defendant again appeared in the Justice's Court, but with an attorney. He then plead "guilty" to the charge of manslaughter and "not guilty" to the charge of murder. The record contains no explanation for the advancement of the time for the preliminary examination from 2:00 o'clock P.M. to 10:25 o'clock A.M. Ten minutes later, at 10:35 o'clock of the same day, the defendant, with the attorney, appeared for sentence before the Superior Court, at which time the defendant was sentenced upon his plea of guilty to the charge of manslaughter. Upon motion of the district attorney the murder charge as contained in Count I of the complaint was dismissed because of "the insufficiency of the evidence and on the grounds that it is inconsistent to the present plea."

Thereafter, on the 13th day of August, the defendant substituted his present counsel in place of the attorney who had appeared with him at his arraignment and plea. On the same date he also filed a motion to set aside the judgment, and for permission to change his former plea of guilty to not guilty. Attached to said petition, and in support thereof, was the affidavit of defendant to the effect that after his arrest he had requested permission to talk with members of his family or an attorney, but permission was refused; that he was not allowed to see anyone; that he was advised by the attorney who appeared with him that he should plead guilty to the charge of manslaughter and waive time for sentence; that he did not have sufficient time within which to discuss his case with the attorney; that he had always maintained his innocence; that he was never fully advised of the seriousness of the crime nor did he understand the nature of the proceedings; that had he been properly or completely advised he never would have plead guilty to the offense; that because all of the proceedings were so hurried he "was not given time to think of anything." Also as a part of said motion, but filed at the time of the hearing thereon, was the affidavit of one Retha Smith, to the effect that she was with the defendant at the time of his arrest early Sunday morning; that on the same day she conferred with members of his family and was instructed by them to employ a lawyer to represent him; that the following morning (Monday) she made arrangements with defendant's present counsel to represent the defendant, and was instructed by counsel to communicate with the defendant and inform him that said counsel would visit him the following morning (Tuesday); that she went to the sheriff's office on the same day (Monday) and informed the attendant that the defendant had a lawyer and that she wished to inform him of that fact; that she was refused admission to see the defendant; that the said attorney did arrive in Colusa between the hour of 10:30 and 11:00 o'clock A.M. Tuesday, August 11th, but by the time he arrived the case against the defendant had been concluded.

In opposition to the motion by defendant were affidavits of the attorney who appeared with him in the Justice's and Superior courts, the Justice of the Peace, and the arresting officer. The affidavit of the attorney merely stated the fact of a conversation with defendant prior to the hearing on August 10th, which was at the request of the district attorney to "at least talk to him" (defendant). The affidavit of the Justice of the Peace recounted the conversation between the attorney and defendant in the court room, the circumstances of the hearing before him, and alleged that in his opinion the defendant was fully informed concerning the proceeding, and that there was no fraud or duress affecting the will of the defendant, nor were there any inducements or promises other than his own statement that "in my opinion * * * the plea of guilty to the charge of manslaughter would automatically dismiss the charge alleged in Count I, namely: that of murder." The affidavit of the deputy sheriff who arrested the defendant was much to the same effect.

Inasmuch as the defendant makes an issue of the question of time and the inadequacy of his discussion with the attorney, it should be noted further that the affidavit of the Justice of the Peace states that the attorney was called to the courtroom, and upon his

arrival he was introduced to the defendant; that after conversing together for 20 or 30 minutes in an anteroom they reappeared in court and stated they were ready to proceed. The affidavit of the attorney, however, states that he was called Tuesday morning by the district attorney and asked if he would "at least talk" to "a defendant charged with murder and manslaughter", and that he did talk with the defendant at the county jail.

The record further discloses that the Justice's Court convened Tuesday morning at the hour of 10:25 o'clock, and that the Superior Court was called to order at the hour of 10:35 o'clock of the same day. All of the affidavits agree that the defendant and the attorney conversed only 20 to 30 minutes. It is hard to conceive that 20 to 30 minutes would be sufficient time for an attorney to discuss the facts of murder and manslaughter charges to determine what steps should be taken, such as legality of defendant's detention, insufficiency of the charge, possible petition for a writ of habeas corpus, or other legal processes, and then, with such scanty knowledge feel competent to advise a plea of guilty.

It is apparent that said attorney did not represent the defendant by virtue of an order of appointment by the court but only upon request of the district attorney to at least talk to a defendant. Also in this regard it is noteworthy that the attorney should file an affidavit on behalf of the prosecution, in opposition to the petition of the one for whom he originally appeared, the defendant herein. It is obvious that no such duty was impressed upon him as would have been the case had he been appointed by the court to represent the defendant.

[1] It is frequently said that one of our most common and prevalent evils is the sometimes inexcusable delay in the enforcement of our criminal laws. Without doubt prompt disposition of criminal cases should be encouraged. Commendable as that may be, "something more than haste is required." Dumas v. State, 54 Okl.Cr. 207, 16 P.2d 886, 887. But in reaching the desired result a defendant charged with a serious crime must not be stripped by token gestures of his right to have sufficient time to advise with counsel of his own choosing and to properly prepare his defense. "Time may be precious to the court; but it is infinitely more so to him whose life or liberty may depend upon the careful and patient consideration of the evidence." Cooley Const. Limitations, 8th Ed., p. 704.

With all due respect to the advice given by the court to the defendant, and to the undoubtedly good motives of all parties concerned, we cannot escape the conclusion that there was undue haste in the entire disposition of the case.

[2] It is not enough to assume that counsel, without obligation to the defendant and so casually precipitated into a case, thought there was no defense and exercised his best judgment in proceeding without preparation. Neither could the court, in such a short space of time, say what a prompt and thorough investigation might disclose. Here there was neither investigation nor preparation. As was observed by the Chief Justice of the Supreme Court of Alabama in his dissenting opinion in the Scotsboro cases, (Powell v. State, 224 Ala. 540, 141 So. 201), which opinion was later affirmed by the United States Supreme Court in Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 60, 77 L.Ed. 158, 84 A.L.R. 527: "The record indicates that the appearance was rather pro forma than zealous and active." The duty of the court to assign counsel to defendants charged with crime is not discharged by the assumed delegation of such duty by the district attorney, who is without power to do more than was done in this case—merely ask an attorney if he would talk to a defendant. Such a perfunctory appearance at the request of the district attorney is a practice not to be commended. Under such circumstances the defendant is precluded from receiving effective aid in the preparation and the trial of the case.

[3] From the statements made by defendant in open court, it is evident that he knew of no attorney of his own personal acquaintance, and that to procure counsel he, of necessity, had to look to his family, who resided elsewhere, or failing in that to the bounty of the court. "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. State of Alabama, supra.

Here the evidence discloses that the defendant left school in the eighth grade, and since that time had been a farm laborer, neither experienced in business nor com-

mercial practices. Few, if any, intelligent and well educated laymen are schooled in the science of law, and if charged with a crime are capable of determining for themselves whether the indictment is good or bad. They are unfamiliar with the rules of evidence, lacking both the skill and knowledge to adequately prepare their defense, even though they may have a perfect one. They require the guiding hand of counsel at every step of the proceeding. Though they be not guilty, they face the danger of conviction because they do not know how to establish their innocence. If this be true of a man of intelligence how much more true it is of those without adequate schooling and experience.

[4, 5] Respondent, however, contends that there was no statutory compulsion to require that either the friends or family of the accused be allowed to see him; that the deputy sheriff stated he would get in touch with his counsel for him, and that in any event, to grant the motion of defendant it would be necessary to show misrepresentation, coercion, wrongful persuasion and promise of something which was not carried out; in other words, that there must be some act by some official connected with the case amounting to a fraud or an infringement upon the inherent rights of the defendant, and that in the present case no such showing has been made. We do not so understand the law. While such matters must be addressed to the sound discretion of the trial court, with each case viewed in the light of its own particular circumstances, "when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly * * * the Court should be indulgent in permitting the plea to be withdrawn." People v. McCrory, 41 Cal. 458, 462. It might well be added that a court, in furtherance of justice, and upon such terms as may be proper and just, should likewise "relieve a party * * * from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." Section 473, Code Civ.Proc. For how can it be contended seriously that when an inalienable constitutional right of a citizen is at stake in a criminal proceeding a greater and more technical showing is necessary than is contemplated by our civil law when relief is sought from the judgments or orders taken against him. Where a right is conferred by law everything necessary for its protection is also conferred. Turner v. State, 91 Tex.Cr.R. 627, 241 S.W. 162, 23 A.L.R. 1378.

[6] It was undoubtedly upon the attorney's advice that the defendant made his plea of guilty, and it is not too much to say that it is not improbable that defendant might not have done so if he had been advised that his family had secured for him the services of his present counsel. Nor is it too much to say that his financial straits may likewise have led him to consent to the procedure which was followed through ignorance of the availability of counsel of his own. This does not necessarily mean that he was improperly induced to so plead. But the fact that he may have been ably advised "does not abridge his right to have counsel of his own selection." Jackson v. State, 55 Tex.Cr.R. 79, 115 S.W. 262, 264, 131 Am.St.Rep. 792.

His present counsel, in the orderly course of events, did endeavor to converse with the defendant, and had no change been made in the time set for the appearance of the defendant, for which no explanation appears in the record, he might have had ample time to converse and advise with him prior to the making of his plea. There is nothing to show that defendant's motion was not made in good faith or that the entry of the plea and the motion to withdraw it was a mere artifice intended for delay.

[7] We do not point to any one circumstance in this case and say that because of it defendant is entitled to withdraw his plea; but, considering all of the facts, it seems to this court that the ends of justice demand it. As the withdrawal of a plea of guilty is within the discretion of the trial court, and as such discretion must be exercised upon the facts of each individual case, it is difficult to lay down a general rule. However, the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty. State v. Williams, 45 La.Ann. 1356, 1357, 14 So. 32; 20 A.L.R. 1450. "The law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings

* * * shall be fairly and impartially conducted." People v. Schwarz, 201 Cal. 309, 257 P. 71, 73.

[8] We believe this is a case in which the court below should have exercised its discretion in favor of defendant. No possible harm could have resulted or can result to the state by allowing him to withdraw his plea of guilty and substitute a plea of not guilty. If he is innocent of the charge, as he has maintained, he ought to have a fair opportunity for a defense; otherwise, he would, under the ruling complained of, suffer a great wrong. If he is guilty, the law may still be vindicated, and the state will have an opportunity to establish that guilt under a plea of not guilty. City of Salina v. Cooper, 45 Kan. 12, 25 P. 233, citing with approval the case of People v. McCrory, supra; State v. Brown, 33 N.M. 98, 263 P. 502.

[9] We find no merit in the second issue raised by defendant. Since the defendant pleaded guilty to the charge of manslaughter, a crime not punishable by death, and by virtue of such plea the separate count of murder was for all purposes abandoned by all of the parties, it would seem that the procedure followed was in substantial compliance with Section 8, Article I of the Constitution, and Section 859a of the Penal Code. Therefore, it became unnecessary to proceed by information in the Superior Court as provided in Section 682 of the Penal Code, "for * * * upon such plea of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, * * * to the Superior Court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court." Section 859a, supra; People v. Zolotoff, 48 Cal.App.2d 360, 119 P.2d 745.

We therefore conclude that the law was not complied with by the token appearance of an attorney brought into the case by the district attorney; that under the facts and circumstances as disclosed by the record the defendant's right to be represented by counsel of his own choice was invaded, and that therefore it was an abuse of discretion by the trial court to deny the motion of defendant.

The judgment and order appealed from are reversed, and the cause hereby remanded for trial in accordance with the opinion herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 73

PAUL v. MILLER et al.

Civ. 14122.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1943.

Rehearing Denied Nov. 10, 1943.

Hearing Denied Dec. 16, 1943.

1. Judgment ⇐815

Under full faith and credit clause of United States Constitution, a valid judgment of a sister state must be enforced by the courts of every other state. U.S.C.A. Const. art. 4, § 1.

2. Judgment ⇐818(1)

Jurisdiction to render judgment is a prerequisite to its enforcement in the court of a sister state under the full faith and credit clause of the Constitution. U.S.C.A. Const. art. 4, § 1.

3. Judgment ⇐818(2)

Kentucky judgment in favor of creditor of estate against heirs to whom distribution was made before creditor was paid was not valid as against California heirs who were not served with process and who had not authorized any one to represent them in such action, and such judgment was not entitled to full faith and credit in California for want of jurisdiction of Kentucky court. U.S.C.A. Const. art. 4, § 1.

4. Judgment ⇐818(3)

Mere fact that Kentucky court had jurisdiction of California heirs in executor's suit in equity against heirs, devisees and creditors of decedent, wherein creditor sought by cross-petition to recover from heirs amount distributed which should have been paid to creditor, did not give Kentucky court jurisdiction of California heirs when equitable suit was consolidated with independent action by a creditor for same relief, and judgment in consolidated action as to such California heirs was not entitled to full faith and credit in California. U.S.C.A. Const. art. 4, § 1.

5. Judgment ⇐957

In action on Kentucky judgment rendered against California heirs of Kentucky estate by reason of overpayment of distribution, evidence supported finding that attorney who represented California heirs in such proceeding did so without authority and that Kentucky court had no jurisdiction over such California heirs.

Appeal from Superior Court, Los Angeles County; C. A. Paulsen, Judge.

Action by Sarah McMillan Paul against James Miller and others to recover on a Kentucky judgment. Judgment for defendants, and plaintiff appeals.

Affirmed.

Percilla Lawyer Randolph and W. Neil Randolph, both of Los Angeles, for appellant.

Hiram T. Kellogg, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

In the County of Bourbon, in the State of Kentucky, W. W. Massie died in 1906. Upon settlement of his estate, by direction of his will there was established a trust for the use and benefit of his only son W. C. Massie during his lifetime, with remainder over to the heirs of his body. In 1922 the son died, without issue. The son's executor filed a suit in equity in the Circuit Court of the State of Kentucky, to ascertain by judicial decree the persons entitled to the trust, and also to determine the validity of such claims as might be presented against the probate estate of the son. In this suit the heirs at law, devisees and creditors of W. C. Massie were defendants.

The Circuit Court determined that the trust property passed by inheritance to the son's heirs, the collateral kin of his father and mother, a moiety to each branch. As to heirship, this decision was affirmed by the Court of Appeals of Kentucky in 1924. Bourbon Agr. Bank & Trust Co. et al. v. Miller et al., 205 Ky. 297, 265 S.W. 790.

As a creditor defendant in this equity action the son's housekeeper presented claims for several thousand dollars for use and occupancy by him of her house and for nursing and caring for him in his declining years. These claims were disallowed. From this judgment the housekeeper appealed.

When the Court of Appeals of Kentucky adjudged her claims to be valid, McMillan v. Massie's Ex'r et al., 233 Ky. 808, 27 S.W.2d 416, it was found that, notwithstanding the appeal, in 1927 or 1928 all the property of the estate had been distributed to the heirs at law, and nothing was left in the estate with which to pay the claims.

With the situation thus confronting the claimant, her legal remedies under the law of Kentucky are set forth in Massie et al. v. Paul, 263 Ky. 183, 92 S.W.2d 11, 18, as follows: "It was competent for the court by appropriate orders in the action to settle Massie's estate, to compel either a creditor, heir, devisee, or legatee to refund or make restitution of any sum, or a portion thereof, received by him under its orders, in excess of that to which he was entitled to accomplish an equitable distribution or to pay any creditor entitled thereto. How to accomplish such refund or restitution was entirely within the sound discretion of the court. * * * A procedure for that purpose may be on notice, for rule, or on pleading or a petition of any interested party to the action to settle the estate and if by an independent petition, a consolidation therewith."

November 29, 1930, the Circuit Court of Kentucky denied claimant's motion for a rule against the heirs to refund a sum sufficient to pay her judgment, and struck from the files her answer, counterclaim and cross-petition to accomplish the same objective.

January 10, 1931, claimant filed in the circuit court an independent petition for the same objective, but twelve of the heirs at law and devisees of Massie "were not made parties and were never brought before the court in the independent action." Paul v. Fidelity & Deposit Co. of Maryland, 277 Ky. 257, 126 S.W.2d 157, 158.

Thereafter the equity action and the independent action were consolidated, the trial court dismissed the answer, counterclaim and cross-petition of claimant as against the twelve heirs not served with process, and rendered judgment against the rest of the heirs for the whole amount of the housekeeper's claim.

From this judgment appeal was taken, and the Court of Appeals of Kentucky made the following order: "Wherefore, the judgment is reversed, with directions to the court to enter a judgment in favor of Sarah McMillan Paul against each of the heirs, devisees, and legatees of Massie, limiting her recovery against each to the proportionate part of the excess paid each of them, respectively, over and above the sum to which they were respectively entitled, and for proceedings consistent with this opinion." Massie et al. v. Paul, 263 Ky. 183, 92 S.W.2d 11, 18.

Pursuant to this mandate the following proceedings were had: "On July 3, 1936,

the trial court, pursuant to the mandate, entered judgment against the ten heirs who took the appeal, 'limiting appellant's recovery against each of them to the proportionate part of the excess paid each of them respectively over and above the sum to which they were respectively entitled.' Each of these ten heirs at law has paid in full this judgment. In this judgment it is recited that the court withholds judgment and takes further time as to the right of appellant to judgment against the twelve above named heirs who were not parties to the appeal; but on June 26, 1937, judgment was entered against these twelve, 'limiting appellant's recovery against each of them to the proportionate part of the excess paid each of them respectively over and above the sum to which they were respectively entitled,' the amount for which each was liable on the judgment ranging from $359.12 to $2,611.88, the aggregate of the several liabilities of the twelve being slightly in excess of $15,000." Paul v. Fidelity & Deposit Co. of Maryland, 277 Ky. 257, 126 S.W.2d 157, 159.

It is upon the judgment thus obtained that the rights of the parties to this case in California are to be determined. Based thereon the claimant instituted an action in California to recover against three of the heirs of Massie, residents of this state. These three heirs were three of the twelve who "were not made parties and were never brought before the court in the independent action."

Upon the trial in the Superior Court, the Kentucky judgment was received in evidence. Countering its effect, the three California heirs testified they had not been in Kentucky for twenty-five years; that they had never been served with summons or complaint or other process in the independent action; and that they had not authorized any appearance by counsel for them in that proceeding. The trial court rendered judgment against the plaintiff claimant and in favor of the defendant heirs; from which judgment appeal has been prosecuted to this court.

[1] Under the full faith and credit clause of the United States Constitution, art. 4, § 1, a valid judgment of a sister state must be enforced by the courts of every other state. Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264, and authorities there cited.

[2] But before the courts of any state will enforce the judgment of a court of a sister state, there must have been jurisdiction to render the judgment.

[3] The foregoing recital of facts demonstrates that the Kentucky judgment was without jurisdiction and was not valid as against the California heirs. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1; Harrington v. Superior Court, 194 Cal. 185, 228 P. 15; Comfort v. Comfort, 17 Cal.2d 736, 112 P.2d 259; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Carlton v. Miller, 114 Cal.App. 272, 299 P. 738; DuQuesnay v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294.

[4] Appellant asserts that the consolidation of the heirship case and the independent action conferred jurisdiction upon the Circuit Court of Kentucky. But the fatal defect of want of service of process upon the California defendants, or of any other thing upon which to base jurisdiction, still remained, despite the consolidation of the two cases. It is evident that as to these California defendants there was jurisdiction in the equity case and there was no jurisdiction in the independent action.

[5] Appellant also asserts that jurisdiction in the independent action may be predicated upon the fact that the California defendants were represented in that proceeding by the same counsel who appeared for them in the heirship case. There is evidence in the record which will support the finding of the trial court to the contrary.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

61 Cal.App.2d 29

UNGEMACH v. UNGEMACH.

Civ. 12538.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1943

Rehearing Denied Nov. 17, 1943.

Hearing Denied Dec. 16, 1943.

1. Divorce ⇐27(1), 184(6)

"Extreme cruelty", authorizing a divorce, is the wrongful infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage, and whether facts justify a finding that complaining party has undergone grievous mental suffering constituting extreme cruelty depends upon the sound sense of justice of the trial court, and in each case it is a question of fact to be deduced from the circumstances. Code Civ.Proc. § 426b.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

2. Divorce ⇐141

In determining whether complaining party has undergone grievous mental suffering constituting extreme cruelty authorizing a divorce, the trial court may consider acts committed subsequent to the separation of the parties. Code Civ.Proc. § 426b.

3. Divorce ⇐184(10)

Where the evidence would have supported an adverse finding of extreme cruelty, but it was also legally sufficient to sustain an affirmative finding of cruelty on part of wife, trial court's conclusion was binding on appeal. Code Civ.Proc. § 426b.

4. Divorce ⇐184(5)

It is only where the evidence is so slight as to indicate an abuse of discretion that trial court's conclusion as to existence of cruelty will be disturbed. Code Civ.Proc. § 426b.

5. Divorce ⇐127(4)

It is not required that evidence of cruelty be corroborated as to every fact and circumstance appearing in the record, but, if there is corroborative evidence of one or more facts which are sufficient to show cruelty, there is sufficient "corroboration". Code Civ.Proc. § 426b.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

6. Divorce ⇐62(1), 108, 127(3)

In divorce action, the statutory requirements of residence are jurisdictional and must be affirmatively alleged and proved by plaintiff and such evidence must be corroborated even where the issue is not controverted in the pleadings. Civ. Code, §§ 128, 130.

7. Divorce ⇐125

The effect of statute requiring proof of all facts necessary to obtain a divorce is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action, and the party appealing from a judgment of divorce may successfully urge such error as a ground for reversal even though the essential fact was admitted by the pleadings. Civ. Code, §§ 128, 130; Code Civ.Proc. § 426b.

8. Divorce ⇐59

The parties to a divorce action may not by consent confer jurisdiction. Civ. Code, § 128.

9. Divorce ⇐62(2)

The "residence", referred to in statute requiring plaintiff in divorce action to establish residence, is equivalent to "domicile" and there must be established both the act of residence and the intent that the same shall become the residence. Civ. Code, § 128.

See Words and Phrases, Permanent Edition, for all other definitions of "Domicile" and "Residence".

10. Divorce ⇐127(4), 184(6)

The reason for the rule requiring corroboration in divorce action is to prevent collusion, and where a case is hotly contested it is obvious that no collusion existed, and the corroboration required is slight and its sufficiency is largely for the trial court. Civ. Code, § 130.

11. Divorce ⇐62(1)

Physical presence in the state and county for every day of the required periods to maintain action for divorce is not indispensable where the evidence shows the act of residence plus the requisite intent. Civ.Code, § 128.

12. Divorce ⇐127(4)

In divorce action where the only contested issue was cruelty and plaintiff's residence in the state for one year prior to

filing action was not disputed, plaintiff's testimony as to his residence in the county for three months prior to bringing of action was sufficiently corroborated by testimony of defendant and plaintiff's attorney and other evidence. Civ.Code, §§ 128, 130.

13. Trial ⇐398

The rule that a specific finding controls over a general finding applies only to findings that are inconsistent, and it is appellate court's duty to reconcile findings when it reasonably can be done.

14. Divorce ⇐150(2)

Where specific finding of cruelty in divorce action was insufficient in that it did not state when the acts were perpetrated or that they were wrongfully inflicted or that they caused grievous mental suffering, but such deficiencies were supplied by the general finding, which was not inconsistent, the two findings read together were legally sufficient to support judgment of divorce. Code Civ.Proc. § 426b.

15. Divorce ⇐150(2)

Since it is now permissible to plead cruelty in divorce action in general terms, where there was no demurrer to the complaint nor was there any request for findings as to specific acts, a finding following general language of complaint was sufficient. Code Civ.Proc. § 426b.

Appeal from Superior Court, Mariposa County; Andrew Schottky, Judge.

Action by George R. Ungemach against Barbara Ungemach for divorce on the ground of extreme cruelty. From the judgment awarding an interlocutory decree of divorce to the plaintiff, the defendant appeals.

Affirmed.

Barbara Ungemach, in pro. per., and Roy J. Farr, both of Los Angeles, for appellant.

Louis T. Milburn, of Mariposa, for respondent.

PETERS, Presiding Justice.

George Ungemach brought this action for divorce against his wife, Barbara Ungemach, on the ground of extreme cruelty. From a judgment awarding an interlocutory decree of divorce to the plaintiff the defendant appeals.

The parties first met in the summer of 1939 at Yosemite Valley, where plaintiff was an officer in a C.C.C. Camp. They were married in October, 1939. They lived together for brief periods, but in April of 1940, less than six months after the marriage, separated. This action was filed September 16, 1940. There are no children of the marriage and no property questions are involved. Plaintiff is now an officer in the United States Army, stationed outside California.

The complaint charged cruelty in general terms as permitted by § 426b of the Code of Civil Procedure. The answer denied the allegations of cruelty, but, by failing to deny, admitted the allegations of residence. The trial court found that all of the allegations of the complaint were true, and specifically found that during the marriage "defendant has on numerous occasion[s] in the presence and hearing of other persons, spoken to and of defendant in an unreasonable, derogatory and insulting manner, which was calculated to cause, and did cause, plaintiff embarrassment, humiliation, and mental pain and suffering."

The first part of the trial was had in July, 1941. At the conclusion of the first day of trial the court granted a long continuance. This was apparently done because although plaintiff testified he no longer loved defendant, the latter testified she still loved plaintiff, and wanted a chance to see if the marriage could not be salvaged. The trial was resumed in June of 1942. It then appeared that no reconciliation had been effected. At the conclusion of this portion of the trial the court granted the judgment appealed from.

The appellant urges that there was no legally sufficient evidence to support the finding of cruelty. The evidence shows that on one occasion appellant stated to the witness Dr. Strickland, in the presence of the plaintiff, that "she was unhappy with her husband and that he did not understand her. That she was unhappy with her husband, that that was the cause of her nervousness * * * that Lieut. Ungemach did not understand her * * * that he was not a gentleman, that he was not refined in his home * * * that he was untrained in home refinements and was not a gentleman." The witness further testified that defendant was irrational in her conduct; that the two parties quarreled a great deal in his presence; that on one occasion the appellant told the witness in

the presence of plaintiff that "she had been raised in the east and in Europe and that gentlemen in Europe behave differently"; that on another occasion, in the presence of respondent's father and the witness, appellant told respondent's father that "he had not raised his boy to be a good husband or something to that effect, because he was ill mannered and so on." Another witness, a ranger at Yosemite, testified that in September, 1940, appellant caused a scene at Camp Curry and Camp Cascades in Yosemite, and that respondent mildly chided her for making such a fuss. This witness testified that appellant charged that her husband "was a beast." The respondent testified that he was present when appellant made the charges above set forth to Dr. Strickland, and that his father recounted to him the conversation above set forth; that these and similar charges caused him embarrassment. He also testified that on the day they separated his wife had him arrested for nonsupport although she had sufficient funds received from him to support herself, and that these charges were later dismissed. He also testified as to a series of misunderstandings the parties had and various charges she had made against him. At one time, after he had joined the United States Army, she caused such a disturbance at the San Francisco Presidio that respondent was compelled to ask the military police to ask her to leave. The record also shows that in April, 1940, appellant filed a complaint in Los Angeles County for divorce in which she charged that respondent had treated her in a cruel and inhuman manner. This complaint was later dismissed by appellant, and on the present trial she admitted the charges therein were untrue, stating she had been induced to make them on advice of her then attorney. During the trial of the present case appellant charged in open court that her husband was a perjurer.

[1-4] It is true that appellant denied most of these charges. This conflict was for the trial court. The contention that the statements and acts alleged to have been committed by her, even if true, do not constitute extreme cruelty, requires no serious consideration. This court, in the recent case of Scheibe v. Scheibe, 57 Cal. App.2d 336, 134 P.2d 835, reviewed the applicable legal principles involved in the following language (57 Cal.App.2d at page 340, 134 P.2d at page 839): "As defined by section 94 of the Civil Code, extreme cruelty is the wrongful infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage; and ever since the decisions in Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660, and Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124, it has been repeatedly held that no arbitrary rule of law can be laid down as to what particular facts must be proved to justify a finding that the complaining party has undergone grievous mental suffering; that a correct decision in such cases depends upon the sound sense of justice of the trial court and that in each case it is a pure question of fact to be deduced from all the circumstances of each particular case, keeping in mind always the intelligence, apparent refinement and delicacy of sentiment of the complaining party. Thoele v. Thoele, 102 Cal.App. 387, 282 P. 1001; Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1; Cline v. Cline, 4 Cal.App.2d 626, 41 P.2d 588; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876. Furthermore, it is held that in determining such question the trial court may consider acts committed subsequent to the separation of the parties. Palmanteer v. Palmanteer, 11 Cal.2d 570, 81 P.2d 910. It is apparent, therefore, that in the present case the question of whether the acts and conduct of the appellant were of such a nature as to inflict mental suffering upon respondent was one of pure fact for the determination of the trial court from all the facts and circumstances of the case; and while the state of the evidence may have been such as would have supported an adverse finding of cruelty, it is also legally sufficient to sustain an affirmative finding on that issue; therefore the trial court's conclusion is binding on appeal. In other words, as said in Keener v. Keener, supra, it is only where the evidence is so slight as to indicate an abuse of discretion that the trial court's conclusion will be disturbed; and in the present case it is our opinion that we would be unwarranted in so holding." See, also, Tomaier v. Tomaier, 50 Cal.App.2d 516, 123 P.2d 548; cases collected 9 Cal.Jur. p. 653, § 27.

[5] The contention that the evidence of cruelty was not sufficiently corroborated requires but brief mention. Dr. Strickland, ranger Mernin and respondent testified as to the various acts of cruelty above set forth. It is true that some of the charges made by respondent were not corroborated,

but this is not required under the law of this state. A single act of cruelty, if corroborated, even where it consists of making an unfounded charge or false imputation, is sufficient. See cases collected 9 Cal.Jur. p. 661, § 34. It is not required that the evidence be corroborated as to every fact and circumstance appearing in the record. If there is corroborative evidence of one or more facts which is, or are, sufficient to show cruelty, that is sufficient. See cases collected 9 Cal.Jur. pp. 737 and 738, §§ 95 and 96.

Appellant also contends that the specific finding on cruelty is in her favor. In the original findings the court found that "* * * defendant has * * * spoken to and of *defendant* in an unreasonable, derogatory and insulting manner" etc. The appellant urges that speaking in a derogatory fashion of herself is not cruelty, and even if it were, there is no evidence that she so acted. It is apparent that this is an inadvertent clerical error and that the word " defendant" appearing in the above quotation for the second time was intended to be "plaintiff." The trial court, since the preparation of the record on appeal, has made a nunc pro tunc order correcting this obvious and palpable error in the findings.

[6-8] The appellant next urges that there is no legally sufficient evidence to support the finding that respondent was a resident of California one year and of Mariposa County three months next preceding the commencement of the action as required by § 128 of the Civil Code, and that even if respondent's testimony was sufficient on these issues, there was no sufficient corroboration. There can be no doubt, as appellant urges, that the requirements of § 128 are jurisdictional and must be affirmatively alleged and proved by the plaintiff, and that under § 130 of the Civil Code such evidence must be corroborated even where the issue is not controverted in the pleadings. The applicable principles have recently been reviewed by this court in Eriksen v. Eriksen, 57 Cal. App.2d 532, 134 P.2d 825. It is there stated (57 Cal.App.2d at page 535, 134 P. 2d at page 826):

"Ordinarily a failure by way of answer to deny allegations of residence in a complaint, or affirmative allegations in that regard by cross-complaint, preclude the introduction of evidence on that point as the allegation of the pleading is deemed to be admittted. Code of Civ.Proc. § 462. This rule does not apply in a divorce action for the reason that the state has an interest in the continuance of the marriage contract and specifically prohibits the parties from obtaining a divorce by collusive agreement. Civ.Code, § 114; Kegley v. Kegley, 16 Cal. App.2d 216, 60 P.2d 482. In Bennett v. Bennett, 28 Cal. 599, it was held that while residence is not in itself a ground for divorce, it is the basis upon which jurisdiction rests. In Flynn v. Flynn, 171 Cal. 746, 748, 154 P. 837, 838, the court said: 'The well-settled policy of the law is to protect the marriage relation and to prevent its dissolution in any case, even where the parties consent to or desire its dissolution, unless cause recognized by the law as warranting the same exists. Section 130, Civil Code, provides as it has ever since the year 1874, that "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, * * * require proof of the facts alleged." The object of this provision is, of course, to prevent the obtaining of a divorce by collusion between the parties, where no lawful ground for a divorce exists. Its effect necessarily is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action. That a party appealing from a judgment of divorce may successfully urge such error as a ground for reversal, even though the essential fact was admitted by the pleadings, appears to follow, and was decided in Bennett v. Bennett, 28 Cal. 599.'

"Proof of residence is essential to jurisdiction, and a valid decree may not be founded upon a simulated residence. Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556. A divorce obtained with the aid of an assumed residence as one of its bases is not in good faith. Kegley v. Kegley, supra. Parties may not by consent confer jurisdiction. Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069."

[9] The residence referred to in the statute is equivalent to domicile. In this respect there must be established both the act of residence and the intent that the same shall become the residence. Catsiftes v. Catsiftes, 29 Cal.App.2d 207, 84 P.2d 258;

Bragg v. Bragg, 32 Cal.App.2d 611, 90 P.2d 329.

[10] So far as corroboration is concerned, it must be remembered that the reason for this rule is to prevent collusion. In a case which is hotly contested, as the one here involved, it is obvious that no collusion existed. In such a case the corroboration required is slight and its sufficiency is largely for the trial court. The applicable principles were thus stated in Wilson v. Wilson, 124 Cal.App. 655, 658, 13 P.2d 376, 377:

"No divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties (Civ.Code § 130); and in an action for divorce on the ground of adultery a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce (Code Civ.Proc. § 2079). It has been held, however, that the principal object of the rule requiring corroboration is to prevent collusion; and, where it is clear that there is no collusion, and the defendant's testimony, though conflicting with that of plaintiff in many of its details, in the more important matters was corroborative of the plaintiff's testimony, which was also corroborated in certain respects by other testimony, the corroboration is sufficient. Smith v. Smith, 119 Cal. 183, 48 P. 730, 51 P. 183; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; McMullin v. McMullin, 140 Cal. 112, 119, 73 P. 808.

"And it has been held that the fact that a defendant has vigorously contested the suit dispels any idea of collusion between the parties in the procurement of the divorce. Hill v. Hill, 106 Cal.App. 309, 289 P. 227."

These rules are particularly applicable to a case in which the main contested issue was whether cruelty existed, and where the allegations of residence were admitted in the answer.

The respondent testified that in February, 1939, he was permanently assigned to a C.C.C. Camp in Yosemite Valley, Mariposa County; that this constituted his "home" station thereafter; that this was his "permanent station"; that he was assigned to the Yosemite camp as his "permanent camp"; that he remained at this permanent camp until October, 1939; that thereafter he was "temporarily" assigned to other camps outside Mariposa County, but that he always returned to the Yosemite camp; that he met appellant there in June, 1939, and they spent their honeymoon there in October, 1939; that when he went to the other camps he was "on detached service"; that when the action was filed he was living at the Yosemite camp; that from April to June of 1940 he was on "detached service" in Monterey County, and then was sent to Florida on government business; that he remained in Florida one day and in Colorado two days awaiting transportation; that he then returned to the Yosemite camp; that he remained at the Yosemite camp thereafter until the filing of the action; that while he was in Monterey County from April 16, 1940, to about June 20, 1940, that was not his residence; that while there he "was on detached service from my home station in Yosemite Valley"; that he was assigned to the Yosemite camp as his "permanent camp," and the other assignments "were merely temporary assignments"; that his residence in Mariposa County was continuous from February, 1939, until he filed the divorce action in September, 1940, with the exception of being absent temporarily.

[11] This evidence shows that respondent took up his residence in Yosemite in February of 1939, and that thereafter he considered that station his home, although for short periods he was required by his employment to go elsewhere. Physical presence in the state and county for every day of the required periods is not indispensible where the evidence shows the act of residence plus the requisite intent. So far as the intent is concerned, the trial court was justified in inferring, as it did, that the requisite intent existed. The facts that he was "assigned" to the Yosemite camp, that there is no evidence that he ever voted or registered in Mariposa County, or that he ever paid taxes there, or joined any local organizations, while important, are not conclusive. The trial court was entitled to make any reasonable inference justified by the evidence. Read as a whole, the evidence shows the act of residence for the required periods, and the requisite intent to make Mariposa County his home is reasonably inferable from that evidence.

[12] So far as corroboration is concerned, there is no reasonable doubt, and no serious contention is made to the contrary, that the evidence amply corroborates the fact that respondent was physically in the state more than one year prior to the filing

of the action except for the brief visit to Florida in July of 1940. The appellant concedes they met at Yosemite in June of 1939 and were married in October, 1939. The only doubt that exists is whether there is sufficient corroboration of respondent's testimony that he was a resident of Mariposa County for three months prior to filing the action. In addition to appellant's own testimony as to her several visits to the Yosemite camp to see respondent during the requisite period (which evidence being of the adverse party in a divorce action, similar to the admissions in the answer as to residence, is not alone sufficient corroboration), the attorney for respondent testified that he first met respondent in March, 1940, in Mariposa; that he saw him several times in April and May, 1940; that he had visited respondent four or five times at his camp; that respondent during this period stopped at the city of Mariposa "quite frequently. I believe he did his banking here." He concluded his testimony with the statement, made without objection from the then counsel for appellant: "It was more than three months prior to the time the divorce action was filed that he was a resident of the County."

Tested by the standards set forth above, while the corroborative evidence on the issue of residence was weak, in our opinion it was legally sufficient.

Appellant next urges that, although the trial court found all of the allegations of the complaint to be true, it also made a specific finding on the issue of cruelty, and contends this finding is insufficient to support the judgment because this specific finding did not recite that the acts of cruelty were "wrongfully inflicted" and caused "grievous mental suffering." In other words, the specific finding merely recites that defendant treated the plaintiff in a cruel and inhuman manner. It is also urged that it does not appear from the specific finding when the cruel words were spoken, whether before or after the filing of the complaint. It is also urged that even though cruelty may be alleged in general terms the trial court must find specifically on the issue.

[13, 14] None of these contentions is sound. The complaint alleged that "throughout the married life of the parties hereto and particularly during the two months preceding the separation of said parties, defendant has treated plaintiff in a cruel and inhuman manner; that the acts complained of were done through no fault on the part of plaintiff, were without cause or provocation, and were wrong and unjust, and, as a result thereof, plaintiff has suffered great humiliation, anguish, distress, and mental and physical pain and suffering, all of which has caused him to become nervous and sick." This allegation of cruelty was sufficient under § 426b of the Code of Civil Procedure. It was found to be true by the trial court. The specific finding on cruelty also made by the trial court did not purport to contradict, restrict or limit the general finding. It merely recited that since the marriage of the parties "defendant has on numerous occasions in the presence and hearing of other persons, spoken to and of defendant [plaintiff] in an unreasonable, derogatory and insulting manner, which was calculated to cause, and did cause, plaintiff embarrassment, humiliation and mental pain and suffering." While it is true that this specific finding is insufficient in that it does not state when the acts of cruelty were perpetrated or that they were "wrongfully inflicted," or that they caused "grievous" mental suffering, these deficiencies were all supplied by the general finding. It is true, of course, that where a general finding is inconsistent with a specific finding, the latter controls. But that rule only applies to findings that are inconsistent. It is the duty of the appellate court to reconcile the findings if that can reasonably be done. Here the general finding is not inconsistent with the specific finding. It supplements, amplifies, complements and supplies the deficiencies in the specific finding. Read together the two findings are legally sufficient to support the judgment.

[15] The contention that the findings should have been more specific is without merit. Since the addition of § 426b to the Code of Civil Procedure it is now permissible to plead cruelty in general terms. There was no demurrer to the complaint, nor was there any request for findings as to specific acts. Under such circumstances, a finding following the language of the complaint is sufficient. Bilger v. Bilger, 54 Cal.App.2d 739, 129 P.2d 752.

The other contentions of appellant are too unsubstantial to require discussion.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

61 Cal.App.2d Supp. 823

CREDIT BUREAU OF SAN DIEGO, Inc., v. GETTY et al.

No. 115559.

Appellate Department, Superior Court, San Diego County, California.

Oct. 14, 1943.

1. Garnishment ⇐59

The creditors of one who has deposited bail in court can reach deposit, after it has served its purpose as bail by levying upon it as being to all intents and purposes in possession of clerk of court, though it in fact is placed physically for safekeeping in county treasury. Pol.Code, § 4292a.

2. Garnishment ⇐58

Money which is in custodia legis is incapable of being reached either under statute authorizing enforcement of a judgment rendered against a defendant to whom money is owing and unpaid by state or political subdivision thereof against such money, or by garnishment or levy on part of depositor's creditors. Code Civ.Proc. § 710.

3. Garnishment ⇐58

Though money is still technically in custodia legis, it is subject to levy after substantial reason for its continuance in that status has ceased.

4. Garnishment ⇐1

The remedy afforded by statute authorizing enforcement of a judgment rendered against a defendant to whom money is owing and unpaid by state or political subdivision thereof against such money, being purely statutory, can have no broader scope than grant of the statute. Code Civ. Proc. § 710.

5. Garnishment ⇐59

The cash bail deposited by judgment debtor in a criminal action could not be reached by judgment creditor after criminal action had been dismissed and bond exonerated by procedure pursuant to statute authorizing enforcement of a judgment rendered against a defendant to whom money is owing and unpaid by state or political subdivision thereof against such money, since county as such did not owe to judgment debtor the bail. Code Civ.Proc. § 710.

Appeal from Municipal Court of San Diego; W. J. Collard, Judge pro tem.

Action by Credit Bureau of San Diego, Inc., against R. W. Getty, individually, and R. W. Getty, as Auditor of the County of San Diego, State of California, and others. From a judgment in favor of the plaintiff against the defendant Getty in his personal capacity only, the defendant R. W. Getty, individually, appeals.

Reversed and remanded with instructions.

Thomas Whelan, Dist. Atty., and Duane J. Carnes, Deputy Dist. Atty., both of San Diego, for appellant.

Ruel Liggett, of San Diego, for respondent.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, and Joel E. Ogle, Co. Counsel, of Santa Ana, amici curiae for appellant.

HAINES, Presiding Judge.

The record discloses the following state of facts:

On April 9, 1941, plaintiff and respondent, Credit Bureau of San Diego, a California corporation, recovered against one Theodore T. Osborne a Judgment in the Municipal Court of the City of San Diego in the amount of $513.03, which is still in force and wholly unsatisfied, and the judgment debtor appears to be insolvent. On April 29, 1943, however, in a criminal action then pending against him, Osborne deposited with the Clerk of the Superior Court of the State of California, in and for the County of San Diego, cash bail amounting to $500. The criminal action was, on May 13, 1943, dismissed and a written order made on May 14, 1943, by the Superior Court, exonerating said bond. Meantime, the money had been deposited by the Clerk with the County Treasurer in pursuance of the provisions of Section 4292a of the Political Code. There was presented to the Superior Court an affidavit made on May 13, 1943, by Osborne's attorney, reciting that the money was due to Osborne, pursuant to which that Court, on May 17, 1943, by order directed the appellant Getty, the County Auditor, to draw a warrant in Osborne's favor on the County Treasurer for the said $500 and directed the Treasurer to pay the same. The warrant was pursuant to said order, and on a requisition from the Clerk dated May 18,

1943, accordingly so drawn and the money paid to Osborne on May 19, 1943.

On May 14, 1943, however, the respondent Credit Bureau of San Diego had tendered to one Graves, a supervising account clerk and Deputy County Auditor, an abstract of said Municipal Court Judgment, issued by the Clerk of the Municipal Court on May 7, 1943, with the affidavit of respondent's president, dated on that day and captioned in said Municipal Court case, to the effect that there was then due on the Judgment $590.60 and "That there is now due on this judgment (including interest to date, accrued costs and costs of this abstract and the filing thereof and deducting all payments and credits) the total sum of $590.60; That there is money, wages or salary owing and unpaid to Theo T. Osborne a judgment debtor; from the County Clerk (for bail deposited) department of the County Treasurer and the judgment creditor desires to avail himself of the provisions of section 710, C.C.P. and have said money, or enough thereof to satisfy this judgment, paid into the above Court."

On the advice of a Deputy District Attorney, the Deputy Auditor, Graves, refused to accept said abstract of judgment and affidavit. Thereafter and on May 28, 1943, respondent corporation, Credit Bureau of San Diego, instituted in the Municipal Court the present action against Getty, both personally and in his capacity as County Auditor, and subsequently recovered judgment against him in said action in his personal capacity only, for the said sum of $500, and it is from this judgment that the present appeal is taken.

The first proposition relied on by appellant is: "That money deposited in an official trust fund pursuant to the provisions of Political Code, Section 4292a is not money owing and unpaid from the County and therefore Section 710 of the Code of Civil Procedure can have no application."

It is true that the procedure authorized by Section 710 is applicable, by the terms of that section, only when the judgment sought to be enforced is rendered "against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city or municipality, quasi municipality or public corporation." The test, then, of its applicability, in any particular case, is whether the State, or the political subdivision of the State involved, owes the judgment debtor money, that is, at the time involved, unpaid. It is, on appellant's behalf, urged that in contemplation of law if anybody "owed" the $500 to Osborne when the plaintiff presented its abstract of judgment at the Auditor's office, it was the Clerk of the Superior Court, or at all events, not the County, and that there never was money "owing and unpaid" to Osborne by the County, and that, therefore, whatever other procedure may have been open to the plaintiff for reaching the $500, the procedure contemplated by Section 710 was not available to accomplish that purpose. It must, we think, be conceded that Osborne was not a creditor of the County in the sense of having any claim upon any of its public funds. As noted in the opening brief for appellant, the Supreme Court, in Pacific Mutual Life Insurance Co. v. San Diego County, 112 Cal. 314, 41 P. 423, 424, 44 P. 571, in dealing with an action purporting to be brought under Section 3819 of the Political Code, as then existing, to recover from a County taxes paid under protest in pursuance of what was claimed to be an illegal assessment for the benefit of a school district, held that the demurrer to the complaint ought to have been sustained, since, though the County Treasury was the depositary for the school district's funds, yet: "The funds of the school district are not subject to the control of the county so as to allow a reimbursement of the county for the amount of the judgment, if it should be paid." So, also, in Elberg v. County of San Luis Obispo, 112 Cal. 316, 41 P. 475, 44 P. 572, involving an action to recover taxes paid for the benefit of a high school district, under protest, where the action was brought against the County, it was said (112 Cal. at page 318, 41 P. at page 476): "The county, as such, has no interest in the funds of the high-school district, nor any control over the same in the county treasury. St. 1893, p. 272. And we do not think it was the legislative intent, by the enactment of section 3819, Pol.Code, to permit an action against a county to recover taxes paid to and held by its officials, not for the benefit of the county, nor subject to its disposition, but for the use of, and to be disbursed by, a distinct organization,—a local district within the county. If judgment is obtained in such an action against the county, then it must be paid by the county; and no provision is made by which it may have recourse upon the district for the amount thus paid, as it has against the state in the

case of enforced repayment of taxes which have already reached the state treasury. Pol.Code, § 3819. Manifestly, this would be unjust to those parts of the county not within the district, and we should not attribute to the legislature a design to allow such a result unless that construction is required by the terms of the statute,—as it is not in this instance."

It will be noted that in each of these cases, although the taxes were actually paid into the County treasury, the law provided that, while there, they should be part of a specific fund belonging to the school district, not the County, and subject to disbursement, not upon the order of the Board of Supervisors, but only upon warrants drawn under order of the Board of Trustees of the school district and by its officers. In these circumstances it would seem obvious that the school districts were necessary parties to the litigation and that the action could not properly proceed in their absence since they only had any real interest in the funds involved, though it was arguable that, nevertheless, the County and the County Treasurer might, by reason of the actual presence of the moneys in the County treasury, have also been proper parties, as custodians of the same.

Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 609, 38 P.2d 442, 446, cited by counsel for appellant, involved a different situation. There money introduced as an exhibit in the trial of a case had disappeared under circumstances indicating an embezzlement by a deputy in the clerk's office. The owner thereupon sued the County for it. No claim was made that it had ever reached the County treasury. It was held that no action against the county lay for its recovery. The Court, inter alia, said: "Herein the money in question was received in evidence as an exhibit under order and direction of the court, and by the court given into the custody of the clerk for safe-keeping and subject to further order of the court. The court alone had power to order disposition of the money after the purpose of such legal custody had been accomplished." Again: "And under the allegations it is made clear that the clerk of the court did not receive it as the agent of the county nor in any way for it, or on its behalf. Therefore the county did not become the debtor for this money, nor liable to recovery thereof as of moneys had and received to and for its use and benefit."

In Leach v. Dinsmore, 22 Cal.App.2d Supp. 735, 65 P.2d 1364, 1369, it appeared that Dinsmore, the clerk of the Municipal Court of the City of Los Angeles, had wrongfully refused to draw his requisition upon the County Auditor of Los Angeles County for refund to the plaintiff's assignor of $1,500 of certain cash bail deposited by the latter with said Court, a forfeiture of which had been set aside by the Court within the ninety days allowed by law for that purpose after it had been adjudged, so that the money never, as a matter of law, reached the final status of a "collected forfeiture." The money had, however, been deposited with the County Treasurer and was on deposit with him at the time when the requisition should have been drawn. Afterwards, but prior to the institution of the action, according to the construction placed by the Court on what had been done, this money was apportioned to the City of Los Angeles to which it would have belonged had its forfeiture become final. The plaintiff was, in these circumstances, held entitled to proceed as against the Clerk, Dinsmore, and the City of Los Angeles as the ultimate recipient of the money, but not as against the County of Los Angeles or its fiscal officers, the Court citing Union Bank & Trust Co. v. Los Angeles County, supra, and saying, inter alia, that: "The county was in legal effect but a governmental agency of the state in this matter and the various county officers were, so far as responsibility is concerned, not agents of the county but merely servants of the law, under the direction of which, rather than of the county, they were required to act, and the county therefore would not be liable for any torts committed by them in that connection, even if they disobeyed the law."

No case, indeed, expressly construing the expression "a defendant to whom money is owing and unpaid by this State or by any county * * *," as used in the particular enactment, Section 710 of the Code of Civil Procedure, now under consideration, has come to our attention. We recognize, moreover, that there is considerable factual distinction between such cases as Pacific Mutual Life Insurance Co. v. San Diego County, supra, Elberg v. County of San Luis Obispo, supra, Union Bank & Trust Co. v. Los Angeles County, supra, and Leach v. Dinsmore, supra, as well as the various cases cited for appellant to like

effect from other jurisdictions, on the one hand and the case at bar on the other. The gist of the opinions in these cited cases is an insistence on the immunity of funds belonging generally to the County or other governmental subdivisions involved from claims of persons having the right to payment only out of special funds of one sort or another, including funds at some time actually in the treasury of the County or other governmental subdivision sued, but really belonging to some other agency such as a school district or a city, in its nature and organization more or less distinct from the nature and organization of the County or other governmental agency sued. In the present case there is no contention that the general funds of the County were ever liable for the plaintiff's claim and the plaintiff asserts no right to resort to them. For all of that, however, we cannot lose sight of the fact that the applicability or nonapplicability of Section 710, supra, to the instant case must be determined by the meaning to be given to the particular words "owing and unpaid * * * by any county," and that, therefore, construction in these cases of similar language may not be disregarded.

It is urged on respondent's behalf that "after the bail-deposit has been exonerated so that it has ceased to function as bail, an obligation arises upon the part of the County officials to repay the money to the person who deposited it originally; and that said obligation is one for money which 'is owing and unpaid' within the intent and meaning of the statute."

In support of this interpretation, counsel cite from Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 P. 518, 520, 12 L.R.A. 508, 22 Am.St.Rep. 331, the following: "Any kind of obligation of one man to pay money to another is a debt. 'A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which * * * it is to be paid, or the means of coercing payment, do not enter into the definition.'"

Counsel call our attention to the following language from Melvin v. State, 121 Cal. 16, 24, 53 P. 416, 419: "The term 'debt,' however, has a much broader popular significance than the foregoing technical definition, and includes that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability."

[1] Though all that is thus said be conceded, however, and though it be, for the sake of the argument, admitted that, from the moment that the criminal case was dismissed the deposit in effect ceased to function as bail and the obligation to return the money to Osborne could be properly described as a debt, it still remains to inquire from whom it was "owing and unpaid." Was it owing and unpaid from the County? Or if, from any County officer or official, from whom? It is pointed out in the briefs for appellant that where someone occupying the position of a trustee deposits trust funds with a bank, the bank does not thereby become a debtor to the beneficiary of the trust, but only to the trustee, and it is urged that similarly, when trust funds are for safekeeping deposited in the County treasury the County does not become a debtor to anyone except the officer charged with making and controlling the deposit. It seems to us that there is force in this position. The authority having ultimate power over the funds of the County as such, the Board of Supervisors, had no function whatever in connection with the moneys here involved. They were subject to a special and distinct form of control. It is true that they could only be removed from the treasury by virtue of warrants to be drawn by the County Auditor, but it was not the Auditor who was authorized to determine in whose favor such warrants should be drawn. So far as the persons making deposits of cash bail are concerned their dealings are with the Court and its Clerk and it is to them that the Auditor is required to look for direction as to the disbursement of such moneys. In Dunsmoor v. Furstenfeldt, supra, it was distinctly held that when funds had been deposited in Court, the Clerk, as soon as the Court had determined who was lawfully entitled to them, was subject to an ordinary garnishment at the suit of a creditor of such beneficiary. This was tantamount to deciding that, at that stage of the proceeding, the Clerk was the debtor of the beneficiary. Dunsmoor v. Furstenfeldt, indeed, was decided before the enactment of Section 4292a of the Political Code providing for the deposit of trust funds in the County Treasury. That the Clerk remains accountable however, for bail money, despite its deposit with the County Treasurer, was

as has been seen, expressly decided in Leach v. Dinsmore, supra, wherein his liability was held to persist, even after the (wrongful) allocation of the money for the use and benefit of a city. Reciprocally it seems to us logical to hold that, Section 4292a being thus ineffectual to relieve the Clerk of his obligation to the depositor of the bail, the section is equally ineffectual to give rise to any privity between the County and such depositor and that by that token, inasmuch as the County Auditor is a mere agent of the County and not the Court, from the fact that nothing is "owing and unpaid" from the County to the depositor of the bail, it necessarily follows that the Auditor owes such depositor no duties in connection with the same until some action on his part is invoked, either by the Court or its Clerk. The effect of this reasoning is not to deprive the one who has deposited bail in Court of his remedy in the event he becomes entitled to its return. His right is at the proper time and after it has served its purpose as bail to claim its return from the Clerk, and it follows that the creditors of such depositor may reach it by levying upon it as being to all intents and purposes in the possession of the Clerk, though it in fact be placed physically for safekeeping in the County Treasury. The situation would, notwithstanding the actual presence of the money in the treasury, appear to be one governed by the authority of such cases as Dunsmoor v. Furstenfeldt; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 387, 43 P. 1111; Colver v. W. B. Scarborough Co., 73 Cal.App. 455, 238 P. 1110, and City of Los Angeles v. Knapp, 22 Cal.App.2d 211, 70 P.2d 643.

[2] It is in appellant's behalf further urged that respondent's attempt, under Section 710 of the Code of Civil Procedure, to sequester the money here involved was also ineffectual for the reason that it was, at the time respondent presented at the Auditor's office the affidavit and abstract of judgment, in custodia legis. There can, of course, be no question that so long as the money was serving the purpose of cash bail it was in custodia legis and, therefore, incapable of being reached either under Section 710, or by any sort of garnishment or levy on the part of the depositor's creditors. Whether, in theory, it remained in custodia legis until the Court, on May 17, 1943, in pursuance of Section 4292a of the Political Code, made the order directing its repayment to Osborne or ceased to be in custodia legis instanter upon the dismissal of the criminal cause on May 13, 1943, or ceased to be in custodia legis upon the Court's making the order of May 14, 1943, exonerating the bail, we need not here decide. Neither are we called upon to here decide whether a levy upon it through service of process on the Clerk would have been effectual immediately on the dismissal of the criminal case, or not until the Court order of May 14, 1943, exonerating the bail had been made, or not until the Court order of May 17, 1943, for its repayment to Osborne had been made.

[3-5] The case, in deed, of Dunlop v. Patterson Fire Insurance Co., 74 N.Y. 145, 30 Am.Rep. 283, relied on for respondent, goes farther than any California authorities that have come to our attention in sanctioning garnishments affecting funds that have been paid into Court. The reasoning there employed admits of such garnishments even though the money (in that instance cash deposited in lieu of an appeal bond) was definitely and still in custodia legis. This was permitted on the theory that what was garnished was not the money but the right of the depositor to the money which was held to be absolute except for being subject to the rights of the respondent in the appeal. Even if the Courts were to adopt that reasoning in this State, however, it would not avail the plaintiff here, because it would only go to his right to garnish the Clerk. As to that phase of the matter, the decisions in this State go only so far as to hold that though money be still technically in custodia legis, it is subject to a levy after the substantial reason for its continuance in that status has ceased. City of Los Angeles v. Knapp, 22 Cal.App.2d 211, 70 P.2d 643, supra. See from other jurisdictions; Gaither v. Ballew, 49 N.C. 488, 69 Am.Dec. 763; Wilbur v. Flannery, 60 Vt. 581, 15 A. 203; Russell & Co. v. Millett, 20 Wash. 212, 55 P. 44. There are in some jurisdictions authorities which refuse to go even that far, (Dale v. Brumbly, 98 Md. 468, 56 A. 807, 64 L.R.A. 112; In re Chakos, D.C., 36 F.2d 776; Bankers Mortg. Co. v. McComb, 10 Cir., 60 F.2d 218); in which two latter cases the permission of the Court to garnish was held necessary. See also Gottwals v. Manske, 60 Nev. 76, 99 P.2d 645, 100 P.2d 580. Regardless of that proposition, however,

this money was certainly subject to levy, as in the hands of the Clerk, after the Court made its order definitely determining that Osborne was entitled to it on May 17, 1943, two days before it was actually paid to him. Dunsmoor v. Furstenfeldt, supra, Langdon v. Lockett, 6 Ala. 727, 41 Am. Dec. 78; Wiant v. Hays, 38 W.Va. 681, 18 S.E. 807, 23 L.R.A. 82. Whether the remedy thus afforded to a creditor of a depositor is or is not altogether adequate is a question for the Legislature and not the Courts. But, as to the action here attempted, unless the plaintiff has brought itself within the scope of the statutory privilege afforded by Section 710 of the Code of Civil Procedure it is not entitled to succeed in the instant case. As is well pointed out in the brief of the Amici Curiae, prior to the enactment of Section 710 of the Code of Civil Procedure, a public agency such as a County was not subject to garnishment (Ruperich v. Baehr, 142 Cal. 190, 75 P. 782; Lay v. Hammond, 212 Cal. 665, 300 P. 10; Vaughn v. Condon, 52 Cal.App. 713, 199 P. 545; Weiser v. Payne, 110 Cal.App. 378, 294 P. 407) from which it inevitably follows that the remedy afforded by that section, being purely statutory, can have no broader scope than the grant of the statute. This does not mean that the enactment shall not have a liberal construction but it does mean that it can be given no operation not fairly within the ordinary meaning of the terms used in it. In our opinion it would unduly stretch the meaning of this legislation to construe it as applying to funds which the County as such does not owe and never did owe to the judgment debtor. Section 710 provides for no levy by service upon any officer in respect of any other funds than such as are owing and unpaid from the County or other public agency involved.

The views above expressed render it unnecessary to consider the other contentions made in appellant's behalf.

The judgment is reversed and the cause remanded to the Municipal Court with instructions to dismiss the action.

Appellant will recover his costs.

THOMPSON and KELLY, JJ., concur.

23 Cal.2d 68

CITY OF LOS ANGELES v. CITY OF GLENDALE.

SAME v. CITY OF BURBANK.

L. A. 18154, 18155.

Supreme Court of California.

Oct. 14, 1943.

Rehearing Denied Nov. 8, 1943.

1. Waters and water courses ⇐190

City of Los Angeles, as successor to the pueblo of Los Angeles, has a right, superior to that of a riparian or appropriator, to satisfy its needs from the waters of the Los Angeles river which right extends to the waters in the San Fernando Valley Basin upon which the flow of the river is dependent.

2. Waters and water courses ⇐190

The pueblo rights of the City of Los Angeles to the normal waters of the Los Angeles river affords no basis for an objection by city to any use of water that does not decrease city's supply since such uses do not diminish the pueblo rights.

3. Levees and flood control ⇐10
Waters and water courses ⇐190

Under pueblo right of City of Los Angeles to all of the waters of the Los Angeles river and waters supplying it, water impounded by the Los Angeles County Flood Control District by dams across tributaries of the Los Angeles river and such waters as were released by the Flood Control District continued subject to the pueblo right.

4. Waters and water courses ⇐190

The pueblo right of the City of Los Angeles to take such water as needed from the Los Angeles river includes the right to take from the river to the extent of the needs of the city when the flow is at its peak as well as at any other time.

5. Waters and water courses ⇐142

Waters that are released from flood control dams to rejoin body of water of which they are naturally a part are treated as natural parts of such stream, as respects right thereto.

6. Waters and water courses ⇐182

The pueblo right of the City of Los Angeles to take waters from the Los Angeles river being measured by the needs of the city to insure a water supply for an expanding city with minimum of waste by leaving surplus water accessible to others until city needs it, the right is not violative of constitutional provisions against waste of water and limiting right to waters to amount reasonably necessary for beneficial use served. Gen.Laws 1937, Act 9091, §§ 11, 20a; Const. art. 14, § 1 and § 3 adopted in 1928.

7. Waters and water courses ⇐37

Constitutional provision against waste of water and that no one has right to more water than is reasonably necessary for beneficial use to be served was designed primarily to destroy the right to object to use of water not presently needed and does not destroy riparian right to meet future as well as present needs. Gen.Laws 1937, Act 9091, §§ 11, 20a; Const. art. 14, § 1 and § 3 adopted in 1928.

8. Waters and water courses ⇐130, 151, 190

Provision of Water Commission Act that portion of waters of stream not put to useful or beneficial purpose upon riparian lands for ten years shall be a use of the state and subject to appropriation refers solely to non-user on riparian lands and does not apply to pueblo rights. Gen.Laws 1937, Act 9091, § 11.

9. Waters and water courses ⇐190

Provision of Water Commission Act that failure to use all or part of water claimed for purpose for which it was appropriated or adjudicated for period of three years shall effect a reversion of water to public had no application to rights of City of Los Angeles in waters of Los Angeles river since pueblo rights to which city succeeded are not based on appropriation or adjudication. Gen.Laws 1937, Act 9091, § 20a.

10. Waters and water courses ⇐190

Where City of Los Angeles brought water from distant watersheds by aqueduct and spread water in San Fernando Valley so that it found its way into underground lake forming part of Los Angeles river, and in due course reached diversion works by which the city takes water into its distributing system, the city in spreading waters in valley with knowledge that water could in due time be recaptured did not "abandon" the water nor turn it free to be taken by

others, and retained title to and could recapture the spread waters.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

11. Waters and water courses ⇐144½

The enactment of statute designed to encourage the use of natural facilities for transportation of water did not indicate legislative intent to abrogate right to use natural reservoirs for transportation and storage of water hence maxim "expressio unius alterius exclusio est" was inapplicable to construction of such statute. Civ.Code, § 1413.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Alterius Exclusio Est".

12. Waters and water courses ⇐190

Where City of Los Angeles made water, which had been transported to San Fernando Valley by aqueduct, available to farmers of valley for irrigation with knowledge that certain percentage of water would sink into natural underground reservoir and flow to city's diversion works where it would be recovered, city did not abandon water so as to permit its appropriation by others.

13. Waters and water courses ⇐190

One who brings water into a watershed may retain a prior right to the water after permitting others to use the water for irrigation.

14. Waters and water courses ⇐190

Where City of Los Angeles imported water by aqueduct and made water available to farmers in San Fernando Valley which contains a natural subterranean reservoir with knowledge that certain percentage of water used by farmers would seep into reservoir and be reclaimed at city's diversion works at lower end of valley, in determining city's prior right to water after use by farmers, it was immaterial whether farmers acquired their right to use water through transfer of land that included a water right or by other means or that city's contract indicated a sale of water to farmers.

15. Waters and water courses ⇐190

In action by City of Los Angeles to quiet title to Los Angeles river water in San Fernando Valley in which defendant cities of Glendale and Burbank claimed an interest, and in which litigation question of injunction had been withdrawn, defendant's offer to prove that plaintiff's supply of water from Owens Valley aqueduct was sufficient to meet all present and future needs of plaintiff and its inhabitants was properly rejected as bearing only on injunction issue and as not pertinent to quiet title issue.

16. Waters and water courses ⇐190

City's action to quiet title to water does not embrace determination of any particular quantity of water to which city is entitled since subject matter of action is establishment of priority of rights and not quantity of water to be taken.

17. Waters and water courses ⇐190

Where pueblo rights of City of Los Angeles to waters of Los Angeles river authorized city to take only water that it needed, use by cities of Glendale and Burbank of waters which City of Los Angeles did not need did not give cities of Glendale and Burbank a prescriptive right to take waters from Los Angeles river which City of Los Angeles might thereafter require.

18. Waters and water courses ⇐138

An appropriation of water must invade the rights of another before it can destroy them by the establishment of a prescriptive title.

19. Waters and water courses ⇐190

Where cities of Glendale and Burbank had at no time taken from waters in subterranean reservoir in San Fernando Valley forming part of Los Angeles river system more than their rightful portion under their right to take all waters of Los Angeles river in valley not needed by City of Los Angeles they acquired no prescriptive right to Owens Valley waters transported by City of Los Angeles to San Fernando Valley reservoir by aqueduct.

20. Waters and water courses ⇐190

Where cities of Glendale and Burbank had at no time taken from waters in San Fernando Valley subterranean reservoir forming part of Los Angeles river system more than their rightful portion under their right to take all waters of Los Angeles river in valley not needed by City of Los Angeles, such cities could not assert that City of Los Angeles was estopped or barred by laches from asserting its paramount right.

21. Eminent domain ⇐279(2)

The intervention of a public use does not bar suit by owner of a water right but merely limits his remedy to damages in place of an injunction.

22. Eminent domain ⇐279(2)

Under rules that an intervening public use limits remedy of owner of water right to damages, that acquisition by municipality of water right for which owner of right recovers only damages is an "inverse condemnation", and that ordinarily property belonging to one municipality cannot be condemned for benefit of another, cities of Glendale and Burbank could not rely on their taking of waters to which City of Los Angeles had prior right as establishing an "intervening public use." Code Civ. Proc. § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Intervening Public Use" and "Inverse Condemnation".

23. Judgment ⇐743(2)

Where some of the land from which City of Glendale pumped water from San Fernando Valley was previously involved in actions in which pueblo rights of City of Los Angeles to such water were affirmed, judgments in such actions were res judicata as to such land except as events since the judgments were relied upon to establish rights of City of Glendale.

24. Waters and water courses ⇐190

Where City of Glendale was enjoined from pumping water from San Fernando Valley subterranean reservoir only while there was not a surplus of water at diversion works maintained by City of Los Angeles at lower end of valley acquiescence by Los Angeles in diversion by City of Glendale and City of Burbank while there was a surplus of water at diversion works was a mere compliance with decree establishing rights of City of Los Angeles against Glendale, and the reasonable supposition that in any future litigation the City of Burbank would be awarded same right to pump on its lands that Glendale had, and did not create an estoppel against Los Angeles or prescriptive rights in favor of Glendale or Burbank.

25. Waters and water courses ⇐190

Where judgment stated without qualification that City of Los Angeles was owner in fee simple of a paramount right to surface and subsurface waters of Los Angeles river, provision therein allowing pumping of water to satisfy needs of unincorporated village of Burbank was not a determination that city of Burbank could meet its needs for water from San Fernando Valley basin holding subsurface waters of Los Angeles river paramount to rights of Los Angeles.

26. Action ⇐6
Waters and water courses ⇐190

The retention of jurisdiction to meet future problems is an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when adjustment of substantial public interests is involved, hence such retention of jurisdiction is not the granting of relief in excess of that available in an action for declaratory relief.

27. Action ⇐6

In giving declaratory relief, a court has the powers of a court of equity.

28. Action ⇐6

A declaratory judgment may be obtained against municipal corporations.

In Bank.

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Actions by the City of Los Angeles against the City of Glendale and against the City of Burbank to quiet title to waters of the Los Angeles River and water brought from distant watersheds by means of the Los Angeles aqueduct and added to the river. From portions of judgment favorable to plaintiff, defendants appeal, and from portions of judgment favorable to defendants, plaintiff appeals.

Modified and affirmed.

Prior opinion, 132 P.2d 574.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., Samuel Poorman, Jr., Asst. City Atty., and Robert E. Moore, Jr., Deputy City Atty., all of Los Angeles and A. E. Chandler, Sp. Counsel, of San Francisco, for plaintiff and appellant.

Aubrey N. Irwin, City Atty., of Glendale, Ralph W. Swagler, City Atty., of Burbank, and Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for defendants and appellants.

TRAYNOR, Justice.

Between bedrock and the surface soil and sand, on the floor of the San Fernando Valley, there is a layer of gravel and rocks into which most of the water reaching the floor of the valley sinks. As a result, the subsurface of the valley holds a large mass of water that fills the interstices between the rocks and flows toward the lower end of the valley, eventually rising to become part of the surface flow of the Los Angeles River. This water has four sources: (1) the waters normally present in the valley; (2) the flood waters of Pacoima Creek and Tujunga Creek, which formerly flowed violently into the Los Angeles River and thence into the Pacific Ocean during periods of heavy rainfall, but which are now dammed by the Los Angeles Flood Control Authority and released slowly during dry seasons to become part of the mass of water beneath the surface of the valley; (3) spread waters from the Owens River Valley, brought by plaintiff, city of Los Angeles, to the San Fernando Valley where they are spread on the gravels of the valley so that they can be stored in the subsurface thereof and reclaimed when they reach the lower end of the valley; (4) return waters, which comprise 27 per cent of certain water from the Owens River Valley sold to the farmers of the San Fernando Valley, and which settle after use beneath the surface and join the mass of water below, as anticipated when sold.

Before 1913, when plaintiff completed its aqueduct from the Owens River Valley, plaintiff used substantially all of the water in the San Fernando Basin for the needs of its inhabitants. Thereafter, plaintiff used only part of the water in the valley, and defendants city of Glendale and city of Burbank were able to pump sufficient water from the valley to satisfy their needs. In 1914 and subsequent years, the city of Glendale spent $5,602,075.94, in the acquisition of lands, drilling of wells, and installation of a distribution system. The amount of water taken by the city of Glendale steadily increased through this period. Meanwhile, the city of Burbank expended $2,090,160 for similar purposes, and took water in constantly increasing amounts from the valley. Both cities took the waters under a claim of right. Both cities have available other sources of water, since they are members of the Metropolitan Water District, and can purchase Colorado River water from it. A substantial part of defendants' investment in distribution systems would presumably be useful for the distribution of water from this source as well as from the present source. In 1936 the city of Los Angeles commenced suits against these cities to enjoin them from using the water in the San Fernando Valley and to have its rights therein, to the extent of its needs, declared prior to theirs. It later amended the complaint and withdrew the request for an injunction. The suits were consolidated for trial and the facts were for the most part determined by stipulation. Findings were made and judgments given for plaintiff in both actions, except that each defendant was declared to have a right superior to that of plaintiff to the reclaimed flood waters. From this part of the judgment plaintiff appeals; from the remainder of the judgment defendants appeal.

[1] It has long been established that as successor to the pueblo of Los Angeles, the city of Los Angeles has a right, superior to that of a riparian or an appropriator, to satisfy its needs from the waters of the Los Angeles River. Lux v. Haggin, 69 Cal. 255, 329, 4 P. 919, 10 P. 674; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 P. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585; Hooker v. Los Angeles, 188 U.S. 314, 23 S.Ct. 395, 47 L.Ed. 487, 63 L.R.A. 471; Devine v. City of Los Angeles, 202 U.S. 313, 26 S.Ct. 652, 50 L. Ed. 1046. Because the flow of the river is dependent on the supply of water in the San Fernando Valley, it has also been held that the pueblo right includes a prior right to all of the waters in the basin. City of Los Angeles v. Hunter, 156 Cal. 603, 105 P. 755. Since these cases were decided, however, water from new sources has been added to the basin. It has been imported from other watersheds by plaintiff, to which the pueblo right concededly does not attach, although plaintiff claims a prior right to it on other grounds. Water has also flowed into the basin from dams maintained by the Los Angeles Flood Control District impounding water from streams tributary to the Los Angeles River. Some of this water would in any case have reached the subterranean basin through the natural flow of the tributary streams, and is concededly subject to the pueblo right. In time of flood, however, much of the water from these streams flowed through the valley and into the Pacific

Ocean. Plaintiff relies on its pueblo right in claiming a prior right to this reclaimed flood water also.

[2–5] The fact that this water was made available by the Los Angeles Flood Control District does not determine its ownership. The District makes no claim to the water, and plaintiff's pueblo right affords no basis for an objection to any use of water that does not decrease plaintiff's supply, for such uses do not diminish the pueblo right. City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 108, 287 P. 475; see Vernon Irr. Co. v. Los Angeles, supra. If this water was subject to the pueblo right before it was impounded by the District, it remained pueblo water despite the erection of the dams, so that the water abandoned by the District was subject to the right. The source of this water was the Los Angeles River. The past decisions of this court have stated unequivocally that the pueblo right includes the right to all of the waters of the Los Angeles River and the waters supplying it. City of Los Angeles v. Hunter, supra; City of Los Angeles v. Pomeroy, supra, 124 Cal. at pages 635, 636, 57 P. 585; Vernon Irr. Co. v. Los Angeles, supra. There is no reason to suppose that this right did not include the right to take from the river, to the extent of the needs of the city, when the flow of the river was at its peak as well as at any other time. Moreover, waters that are released to rejoin the body of water of which they are naturally a part are treated as natural parts of such streams. Crane v. J. J. Stevinson, Inc., 5 Cal.2d 387, 400, 54 P.2d 1100; Southern Cal. Investment Co. v. Wilshire, 144 Cal. 68, 73, 77 P. 767. The judgment of the court below was therefore erroneous in declaring that the water from this source is not subject to the plaintiff's pueblo right and that the defendants have a prior right to that source of supply.

[6, 7] Defendants contend that insofar as the pueblo right includes a potential right to waters not presently needed, it is inconsistent with article XIV, section 1 of the California Constitution, as amended in 1928, and sections 20a and 11 of the Water Commission Act. Stats. 1913, p. 1012; Stats. 1917, p. 746; Deering's Gen.Laws, 1937, Act 9091. Section 3 of article XIV of the Constitution provides: "* * * the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served * * * provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian * * *." The declared policy of the constitutional amendment against waste of water is thus implemented by its rule that no one has the right to more water than is reasonably necessary for the beneficial use to be served. Such a rule in no way diminishes the rights of the successor to the pueblo, for the pueblo right has always been measured, and therefore circumscribed, by the needs of the city. It thus insures a water supply for an expanding city (see City of Los Angeles v. Pomeroy, supra, 124 Cal. at 649, 57 P. 585) with a minimum of waste by leaving the water accessible to others until such time as the city needs it. The contention that the water will be wasted because others who need it will have no interest in making the outlay necessary to divert it is at odds with the fact that defendants did not hesitate to use the water that plaintiff did not need. See City of San Diego v. Cuyamaca Water Co., 209 Cal. at page 140, 287 P. 475. The same contention could be made against the existence of a riparian right to meet future as well as present needs, yet it is settled that the constitutional amendment did not destroy such a right. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 531, 45 P.2d 972, 1014. The amendment was designed primarily to destroy the right to object to the use of water not presently needed, a right that the pueblo or its successor never had. Gin S. Chow v. Santa Barbara, 217 Cal. 673, 698 et seq., 22 P.2d 5; Peabody v. Vallejo, 2 Cal.2d 351, 365 et seq., 40 P.2d 486.

[8] Section 11 of the Water Commission Act provides that all flowing waters in any channel are subject to appropriation, "excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such

waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated * * *. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years * * * such portion of the waters of any stream * * * unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act." Even assuming that this statute could constitutionally apply to plaintiff (cf. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d at pages 530, 531, 45 P.2d 972; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 117, 252 P. 607; Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 68, 259 P. 444, 56 A.L.R. 264; Scott v. Fruit Growers Supply Co., 202 Cal. 47, 54, 258 P. 1095), it is apparent from the face of the statute that it has no application to pueblo rights. Had the Legislature intended to destroy such rights, it would hardly have couched its strictures on the nonuse of water solely in terms of nonuse on riparian lands.

[9] Section 20a of the Water Commission Act provides that "When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him * * * for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public * * *." Since pueblo rights are not based on appropriation or adjudication, this section also is inapplicable to plaintiff. See Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 296 P. 616. Moreover, in City of San Diego v. Cuyamaca Water Co., supra, the existence of the pueblo right was reaffirmed at a date many years after the enactment of sections 11 and 20a of the Water Commission Act.

The water transported to the San Fernando Valley from the Owens River Valley in plaintiff's aqueduct travelled two routes in joining the subsurface mass. Part of it was spread by plaintiff in gravel pits and "spreading grounds" with the object of having it sink beneath the surface to join the other water in the valley and flow with it down the valley until it reached plaintiff's diversion works. This method was adopted as the most practical for storing the water. The remainder of the water was sold to the farmers of the San Fernando Valley, and as foreseen by the parties at the time of sale, 27½ per cent of it also sank beneath the surface and joined the normal and spread waters. There was evidence that plaintiff sold water in the San Fernando Valley because the water would have seeped underground in other valleys without reaching a destination where it could be recovered.

[10, 11] Plaintiff had a prior right to the use of the water brought to the San Fernando Valley. It did not abandon that right when it spread the water for the purpose of economical transportation and storage. It used a similar storage system at the source of this supply in the Owens River Valley. By availing itself of these natural reservoirs, it spared its citizens the cost of financing the construction of additional dams, if, indeed, appropriate sites were available at the lower end of the aqueduct. Early in the history of the state, this court recognized the advantage of permitting the use of natural surface facilities, stream beds, dry canyons and the like, for the transportation of water (Hoffman v. Stone, 7 Cal. 46; Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am.Dec. 769) for "It would be a harsh rule * * * to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or cañon." Hoffman v. Stone, 7 Cal. at page 49. The rule of these cases was incorporated into section 1413 of the Civil Code. In codifying this rule, designed to encourage the use of natural facilities, the Legislature could hardly have intended to abrogate the right to use other natural facilities for similar purposes. Under these circumstances, the maxim expressio unius alterius exclusio est is inapplicable. Strand Improvement Co. v. Long Beach, 173 Cal. 765, 772, 161 P. 975; People v. Hinderlider, 98 Colo. 505, 57 P.2d 894. It would be as harsh to compel plaintiff to build reservoirs when natural ones were available as to compel the construction of an artificial ditch beside a stream bed. In making water available for irrigation, plaintiff sought not only to increase cultivation of the land, but to convey some of the water into the underground reservoir of the valley. Thus, in

selling water to the farmers, as in spreading water, plaintiff was interested in its economical transportation and storage.

[12, 13] The use by others of this water as it flowed to the subterranean basin does not cut off plaintiff's rights. In Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 90 P.2d 58, it was recognized that one who brings water into a watershed may retain a prior right to the water after permitting others to use the water for irrigation. That case, involving water used in irrigation and then reappearing in a creek bed within the district, held that the district's rights to the water were superior to those of a lower landowner who had appropriated it. Defendants seek to distinguish this case on the ground that the water reappeared and was recaptured within the district's boundaries and was therefore within its control. The water sold by plaintiff in the instant case, however, reappeared in the basin of the San Fernando Valley, used by plaintiff for the storage of other imported waters and containing natural waters to which plaintiff had a prior right. Once within the basin, en route to plaintiff's diversion works, it was in effect within plaintiff's reservoir. Moreover, in United States v. Ide, 263 U.S. 497, 44 S.Ct. 182, 68 L.Ed. 407, it was held that a reclamation district had the right to retake seepage, even though the water had left the boundaries of the district (accord, United States v. Haga, D.C., 276 F. 41), where such recapture had been planned when arrangements for importing the water were made. See Wiel, Mingling of Waters, 29 Harv.L.Rev. 137, 147.

[14] It is immaterial whether the farmers who use the imported water acquire their rights through a transfer of land that includes a water right (United States v. Ide, supra) or by some other means. See Stevens v. Oakdale Irr. Dist., supra. In any event the importer brings the water to the land of the farmer, and the farmer uses it. Nothing would be gained by requiring plaintiff to change the form of its contracts from a "sale" of the water to a transfer of the right to its use. In making water available, plaintiff selected an area where it could recover as much water as possible from seepage, and it should not be deprived of the benefit of its foresight. United States v. Ide, supra, 263 U.S. at page 506, 44 S.Ct. 182, 68 L.Ed. 407; United States v. Haga, supra, 276 F. at page 43; Stevens v. Oakdale Irr. Dist., supra, 13 Cal.2d at page 351, 90 P.2d 58; see Wiel, Mingling of Waters, 29 Harv.L.Rev. 137, 147.

[15, 16] The defendants allege in a separately stated defense that the plaintiff acquired title to all the water in Owens Valley and has for some time been taking by means of its aqueduct all of the water necessary for the needs of the plaintiff and its inhabitants. The defendants offered to prove these allegations and also that the aqueduct source could amply meet not only the plaintiff's present but also its future needs "for all time to come." The defendants complain of the rejection of this offer of proof. While the offered evidence would have been pertinent to the question whether an injunction should issue against the defendants, that question was no longer present when the offer of proof was made. The evidence, if received for the purpose intended by the defendants, would have required the court to determine the amount of water necessary, and the amount available, for the plaintiff's present and future needs. It was not pertinent to the issues of an action to quiet title. In Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 226 P. 604, 33 A.L.R. 1316, in defining the issues in the action of City of San Diego v. Cuyamaca Water Co., then pending in the superior court and later decided by this court in 209 Cal. at page 105 et seq., 287 P. 475, this court said: "In the pending quiet title action it will not, of course, be determined that the city is or is not entitled to any particular quantity of water. * * * The subject-matter of the action is the establishment of the priority of right, and not the quantity of water to be taken." 193 Cal. at page 588, 226 P. at page 605, 33 A.L.R. 1316. In the present actions the trial court was not called upon to determine the relative rights of the parties to any quantities of water or to peer into the future and detail in amounts the needs of the parties when the conceded present surplus might be exhausted and their demands then be brought into conflict. No error appears in the rejection of the proffered evidence.

[17, 18] Defendants contend that they have acquired a right to take at least part of the water in the valley through the running of the prescriptive period. Since the pueblo right entitled plaintiff to take only the water that it needed, however, it had no occasion to object to the taking of the remainder by defendants. City of San

Diego v. Cuyamaca Water Co., supra. It is settled that an appropriation must invade the rights of another before it can destroy them by the establishment of a prescriptive title. Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798; Faulkner v. Rondoni, 104 Cal. 140, 37 P. 883; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 P. 76; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645, 20 Am.St. Rep. 217; Hargrave v. Cook, 108 Cal. 72, 41 P. 18, 30 L.R.A. 390; City of San Diego v. Cuyamaca Water Co., supra; 25 Cal. Jur. 1171; 4 Tiffany, Law of Real Property, [1939] p. 575. Defendants rely on Pabst v. Finmand, 190 Cal. 124, 211 P. 11, but that case involved a controversy between riparian owners and others making a nonriparian use of the waters of a stream. Since none of the parties to this action are claiming as riparian owners, the rules announced in the Pabst case are not applicable here.

[19] In claiming rights by prescription, defendants contend that if they acquired no such rights to the pueblo water, they did acquire such a title to the water imported by plaintiff into the valley. Defendants' right to take the pueblo water, however, gave them the right to take a part of the waters in the valley, and they have not taken more than their part. Until they do, plaintiff has no cause of action and they can therefore acquire no prescriptive right. See E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417.

[20-22] For the same reasons there is no ground for defendants' contentions that plaintiff is estopped or barred by laches from asserting its paramount right. City of San Diego v. Cuyamaca Water Co., supra, 209 Cal. at page 139, 287 P. 475; Stevens v. Oakdale Irr. Dist., supra, 13 Cal.2d at page 353, 90 P.2d 58. Defendants rely upon the fact that their taking of the water constitutes an intervening public use of it. The intervention of a public use, however, does not bar suit by the owner of a water right; it merely limits his remedy to damages in place of an injunction. Hillside Water Co. v. Los Angeles, 10 Cal.2d 677, 688, 76 P.2d 681; Peabody v. Vallejo, supra, 2 Cal.2d at page 378, 40 P.2d 486. The acquisition by the municipality of the water right, for which the holder of the right receives only damages, is "inverse condemnation" (Hillside Water Co. v. Los Angeles, supra, 10 Cal.2d at page 688, 76 P.2d 681), and property belonging to one municipality cannot ordinarily be condemned for the benefit of another. Code Civ.Proc., § 1240. In any event the present case is concerned only with the existence of the rights of plaintiff and defendants and raises no question as to the remedy.

[23, 24] The contention that plaintiff is estopped and that defendants have obtained prescriptive rights must be viewed with regard to the city of Glendale in the light of the fact that some of the land on which this defendant pumps its water was previously involved in City of Los Angeles v. Hunter, and City of Los Angeles v. Buffington, both 156 Cal. 603, 105 P. 755, in which the existence of plaintiff's pueblo right was reaffirmed. As to those lands, this judgment is res judicata against this defendant, except as events since the judgment are relied on to establish its rights. Guardianship of Snowball, 156 Cal. 240, 104 P. 444; Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348. It is unlikely that this defendant acquired the property without notice of plaintiff's rights. Since acquiring the property, the city of Glendale has not violated the injunctions given in those cases, forbidding pumping only when there was not a surplus below plaintiff's diversion works, for there has consistently been such a surplus. Under the circumstances, plaintiff's acquiescence in defendant's diversions amounted to no more than compliance with the terms of the decree establishing plaintiff's rights. Plaintiff could reasonably suppose that in any future litigation the city of Burbank would be awarded the same right to pump on its lands that Glendale had.

[25] Defendants contend also that the exception in the injunction in the Hunter case, allowing pumping to satisfy the needs of the unincorporated village of Burbank, is a determination that the city of Burbank may meet its needs from the basin. The judgments in both the Hunter and the Buffington cases, however, state without qualification that plaintiff is the owner "in fee simple" of a paramount right to the subsurface and surface waters of the Los Angeles River, and that the right of the defendants in those actions to take water was in subordination of the rights of plaintiff. The opinion of this court in the appeals does not indicate that there was any issue as to the assertion of a paramount right in the village of Burbank. The de-

cree may have made the exception because there was no request for such an injunction or because it is improper to interfere with a community's water supply in a suit to which the community is not a party. Nothing in the judgment suggests that the limited right to take water allowed in the injunctions was not subject to the general declaration that the defendants in those actions could take water only in subordination to plaintiff's right. Nor is it material that plaintiff was adjudged to have a prior right only to the extent of its needs on the original pueblo lands, for the judgment was permitted to remain in that form only because plaintiff required all of the pueblo water to serve these lands. City of Los Angeles v. Hunter, supra, 156 Cal. at page 608, 105 P. 755.

[26-28] Defendants contend that the trial court granted relief in excess of that available in an action for declaratory relief when it retained jurisdiction to grant such additional relief as might be necessary. The retention of jurisdiction to meet future problems is regarded as an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when the adjustment of substantial public interests is involved. Meridian, Ltd., v. San Francisco, 13 Cal.2d 424, 452, 90 P.2d 537, 91 P.2d 105. In giving declaratory relief a court has the powers of a court of equity. Adams v. Cook, 15 Cal.2d 352, 362, 101 P.2d 484; see Gore v. Bingaman, 20 Cal. 2d 118, 120, 124 P.2d 17. The Cuyamaca Water Co. case, supra, 209 Cal. at page 150, 287 P. 475, is not to the contrary, for it merely holds that when neither the issues nor the proof entitles a party to affirmative relief, it is error to issue an injunction in his favor. Hoyt v. Board of Civil Service Commissioners, 21 Cal.2d 399, 132 P.2d 804, makes it clear that a declaratory judgment may be obtained against municipal corporations.

The judgment in the main is correct. It is erroneous only in that it declares that the prior and paramount rights of the plaintiff do not extend to the waters retarded by the dams of the Los Angeles County Flood Control District and released therefrom. Modification and not a reversal is appropriate.

The judgment is modified to provide that the pueblo rights of the plaintiff attach to waters released from storage in the reservoirs of the Los Angeles County Flood Control District and involved in these cases. As so modified the judgment is affirmed, each party to bear its own costs on appeal.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.



22 Cal.2d 818

MILLER v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al. (BROWN, Price Adm'r, Intervener).

S. F. 16905.

Supreme Court of California.

Sept. 30, 1943.

1. Officers ⇐103

Normally, the doctrine of exhaustion of administrative remedies requires parties to administrative proceeding to take full advantage of the available administrative remedy.

2. Courts ⇐518

A federal court, other than the Emergency Court of Appeals, may not pass either upon the validity of Emergency Price Control Act as written or upon its validity as applied in the form of an order, regulation or price schedule, in an action originated by party regulated. Emergency Price Control Act of 1942, § 204(b, c), 50 U.S.C.A.Appendix, § 924(b, c).

3. War ⇐4

The administrative remedy and procedure for judicial review are provided by the Emergency Price Control Act primarily to give opportunity for challenging validity of an order, regulation, or price schedule of Price Administrator. Emergency Price Control Act of 1942, §§ 203, 204(a–d), 50 U.S.C.A.Appendix, §§ 923, 924(a–d).

4. Constitutional law ⇐45

The judges of a state court may not enforce a federal statute the terms of which are clearly unconstitutional. U.S.C. A.Const. art. 6, cl. 2.

5. Constitutional law ⇐48

If a statute is susceptible of a construction which will render it constitu-

tional, and a construction which will render it unconstitutional, in whole or in part, the court will adopt construction which, without doing violence to reasonable meaning of language used, will render it valid in its entirety.

6. Constitutional law ⇐48

A presumption exists that Legislature intended not to violate Constitution, but to enact valid statute within the scope of its constitutional powers.

7. Courts ⇐489(1)

Emergency Price Control Act prohibits a court, other than the Emergency Court of Appeals, from entertaining an action brought to determine constitutionality of act but does not restrict a court in which an enforcement action has been commenced from deciding that question. Emergency Price Control Act of 1942, § 204(e), 50 U.S.C.A.Appendix, § 924(e).

8. Constitutional law ⇐46(1)

A court will ordinarily inquire into constitutionality of statute only to extent required by case under consideration, and will formulate a rule no broader than that necessitated by the precise facts in controversy.

9. Constitutional law ⇐36, 47

Extraordinary conditions do not create or enlarge constitutional power, but such conditions must be considered in determining the constitutional scope of congressional authority.

10. War ⇐2

The war power of the federal government is not created by emergency of war but is a power given to meet that emergency.

11. War ⇐4

The purpose of the Emergency Price Control Act is to further the national defense and security in time of war by checking speculative and excessive price rises, price dislocations, and inflationary tendencies. Emergency Price Control Act of 1942, § 1(a), 50 U.S.C.A.Appendix, § 901(a).

12. Constitutional law ⇐62

Where Congress states, so far as is reasonably practicable, considering nature of subject matter and regulation sought, the purpose which it seeks to accomplish, and standards by which that purpose is to be effectuated, Congress may constitutionally delegate to an administrative agency power to determine details essential to carry out the legislative purpose.

13. Constitutional law ⇐62

The exercise of judgment by administrative agency will be upheld where it is within prescribed limits and where procedure which it is directed to follow and record of its action are such that Congress, courts and public can ascertain whether agency has conformed to legislative standards.

14. Constitutional law ⇐62
War ⇐4

Emergency Price Control Act, authorizing Price Administrator to establish maximum price which will effectuate the purposes of the act, does not make an unconstitutional "delegation of legislative power". Emergency Price Control Act of 1942, §§ 1–306, 50 U.S.C.A.Appendix, §§ 901–946.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

15. Courts ⇐489(1)

The term "court of competent jurisdiction" includes state as well as federal courts, so far as suits of a civil nature arising under federal laws are concerned.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Court of Competent Jurisdiction".

16. Courts ⇐8

Apart from any effect which relationships, under Federal Constitution, of state to state and state to federal government may have upon them, under principles relating to conflict of laws, no action may be maintained upon a right created by law of a foreign state as a method of furthering its own governmental interests, nor can action be maintained to recover penalty, right to which is given by law of another state.

17. Penalties ⇐1

A "penalty" includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for legal damage done him by defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty".

18. War ⇐4

One of the primary purposes of the Emergency Price Control Act in providing for consumer action either for $50 or for

treble amount by which consideration exceeded applicable maximum price was to aid in the enforcement of the act. Emergency Price Control Act of 1942, § 205(e), 50 U.S.C.A.Appendix, § 925(e).

19. States ⇐4

The general rules of conflict of laws governing the action of the forum are subject to modification or complete abrogation in a federated nation. U.S.C.A.Const. art. 4, § 1.

20. States ⇐5½

It is within province of the United States Supreme Court in construing the full faith and credit clause of Federal Constitution to define a penal law and to determine whether statute of one state must be enforced by courts of another state. U.S.C.A.Const. art. 4, § 1.

21. States ⇐5½

Neither Congress nor United States Supreme Court has power under full faith and credit clause to take from state forum the right to decide, according to its own standards, whether a federal statute is a penal law unenforceable within its jurisdiction. U.S.C.A.Const. art. 4, § 1.

22. States ⇐5½

The full faith and credit clause of the Federal Constitution applies only to acts of sister states. U.S.C.A.Const. art. 4, § 1.

23. States ⇐4

Congress, in lawful exercise of constitutional power, by its statutes declares policy for both the people and the state.

24. Courts ⇐489(1)

A state court, otherwise competent to exercise jurisdiction over the subject matter, the parties, and amount in controversy, must assume jurisdiction of an action created by federal law enacted pursuant to a legitimate federal function, regardless of whether that action is considered either as penal or as furthering the governmental interest. U.S.C.A.Const., art. 6, cls. 2 and 3.

25. Courts ⇐489(1)

Under Emergency Price Control Act giving consumer right to bring action either for $50 or for treble amount by which consideration exceeded applicable maximum price, and authorizing such action to be brought in "any court of competent jurisdiction", a state court having jurisdiction of subject matter, parties, and amount in controversy must assume jurisdiction of consumer's action. Emergency Price Control Act of 1942, § 205(e), 50 U.S.C.A.Appendix, § 925(e); U.S.C.A. Const. art. 2, § 2, cl. 2; art. 3, § 1; art. 6.

26. Courts ⇐175

The phrase "cases for the recovery of money only", within statute limiting jurisdiction of Small Claims Court, is not limited to ordinary contract claims but includes a claim not exceeding $50 for damages due to negligence. Code Civ.Proc. § 117.

See Words and Phrases, Permanent Edition, for all other definitions of "Cases for the Recovery of Money Only".

27. Courts ⇐489(1)

Small Claims Court having jurisdiction of amount involved was a court of competent jurisdiction within Emergency Price Control Act authorizing consumer actions in any such court. Code Civ.Proc. §§ 117, 117g, 117q; Emergency Price Control Act of 1942, § 205(e), 50 U.S.C.A.Appendix, § 525(e).

28. Mandamus ⇐31

Mandamus is proper remedy where a court improperly refuses to entertain a proceeding.

CARTER, J., dissenting in part.

In Bank.

Mandamus proceeding by Bradstreet Miller, Jr., against the Municipal Court of the City of Los Angeles and others for a writ commanding the Small Claims Court, a division of the Municipal Court, to hear and determine a consumer's action authorized by the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq., wherein Prentiss M. Brown, Administrator of the Office of Price Administration, intervened.

Writ granted.

Bradstreet Miller, Jr., of Los Angeles, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., amici curiae on behalf of petitioner.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, all of Los Angeles, for respondents.

Ben. C. Duniway, John T. McTernan, and Myer C. Symonds, all of San Francisco,

and Frank S. Balthis, Jr., and John J. Ford, both of Los Angeles, for intervener.

EDMONDS, Justice.

An alternative writ of mandate issued upon the petitions of Bradstreet Miller, Jr., and Prentiss M. Brown, Administrator of the Office of Price Administration, as intervener, commanding the small claims court, a division of the Municipal Court of the City of Los Angeles, to show cause why it should not hear and determine a consumer action authorized by the federal Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A.Appendix, §§ 901–946. In response to the writ, the court, answering in its name and that of the judge who made the order complained of, asserts that it has no jurisdiction of the action, and the questions for decision concern the scope and effect of the federal statute's provisions when applied to a proceeding in a state court.

By his petition, Miller alleges that pursuant to section 205(e) of the act he filed an action in the respondent court against Earl O'Farrell to recover the sum of $50 and costs, based upon an asserted overcharge of twenty-five cents for the inspection of automobile tires. This charge was made contrary to section 1315.703 of Ration Order No. IA and Maximum Price Regulation No. 165 issued under the provisions of the act. When the case came on for trial, the petition continues, the court declared that it had no jurisdiction of such an action and ordered it off calendar.

The petitioner asserts that the small claims court, which has jurisdiction of actions for the recovery of money where the amount claimed does not exceed $50, is a proper tribunal in which to bring his action. For one may sue in a state court to enforce a right existing under federal law, and the Emergency Price Control Act of 1942 authorizes a consumer action to be brought in a state court of competent jurisdiction. Section 256 of the United States Judicial Code, 28 U.S.C.A. § 371, giving federal courts exclusive jurisdiction of suits for a "penalty" is no obstacle to the state court's jurisdiction, for, even if the action were to be regarded as one for a penalty, the Emergency Price Control Act of 1942, being later in time, operated as a pro tanto repeal of that section. But, he insists, a consumer action under section 205 (e) is not an action for a penalty, although, even if it be considered such, a state court cannot refuse to take jurisdiction of it. He also claims that section 205(e) does not make it mandatory that the consumer ask for attorney's fees; hence there is no basis for a holding that the amount sued for must, of necessity, exceed the limitation of $50 upon the jurisdiction of the small claims court.

In reply, the respondent court maintains that section 205(e) of the act is a "penal" statute because its controlling purpose is to impose a punishment for the violation of its provisions. And Congress, the argument continues, may not compel the state courts to act as penal enforcement agents of the United States. Finally, it asserts, the Price Control Act of 1942 is unconstitutional because it is an unlawful delegation of legislative power to an administrative official.

Answering the respondent's contentions, the intervener contends that, unlike actions to recover penalties in favor of the United States, penal actions brought by private parties must be enforced in state courts. And he meets the argument of unconstitutionality with the assertion that the respondent court did not refuse to proceed with the trial of the petitioner's action upon that ground but because it claimed to be without jurisdiction. In any event, he says, the constitutionality of the act is established by numerous decisions of the federal courts. Furthermore, the act is a legitimate exercise of the war power of Congress, it is sufficiently definite to satisfy the requirements of the due process clause of the Constitution, and is not invalid as an improper delegation of legislative power because it contains both a clear statement of a definite congressional policy and adequately intelligible standards to guide the administrator in fixing maximum prices. In addition, he contends, the scope of the discretion which Congress may constitutionally accord to the executive branch of the government is increased in time of war.

The challenge to constitutionality presents the most important issues in this original proceeding. And that question is complicated by certain procedural requirements of the act.

Section 203, 50 U.S.C.A.Appendix, § 923, establishes an administrative procedure by which a person subject to any provision of a regulation, order, or price schedule issued under the act may object to it. Section 204, 50 U.S.C.A.Appendix, § 924, au-

thorizes a review of the administrative determination in a specially-created Emergency Court of Appeals. The decision of that court, in turn, may be reviewed on certiorari by the United States Supreme Court. The section concludes: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 [50 U.S.C.A.Appendix, § 902], of any price schedule effective in accordance with the provisions of section 206 [50 U.S.C.A.Appendix, § 926], and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

This section was recently considered by the United States Supreme Court in Lockerty v. Phillips, May 10, 1943, 319 U.S. 182, 63 S.Ct. 1019, 1023, 87 L.Ed. 1339. In that case, wholesale meat dealers sued for an injunction in the federal district court to restrain the prosecution of criminal proceedings against them for a violation of the act including among their contentions the assertion that the statute involved an unconstitutional delegation of legislative power to the Price Administrator. A district court of three judges dismissed the suit for want of jurisdiction The Supreme Court affirmed the judgment, holding that, in view of section 204, the federal district courts have no jurisdiction to enjoin the enforcement of the act even on the ground of unconstitutionality, but that the dealers must pursue the remedy provided by the act. The court, however, withheld a decision as to whether the constitutionality of the act could be raised in a consumer action, saying: "We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it." And this reservation, which expressly includes the present proceeding, requires a determination of the question as to whether the constitutionality of the act may be here considered.

May This Court Consider the Constitutionality of the Statute?

The constitutionality of a statute may be attacked in either of two ways. The legislative act may, by its terms, disclose a constitutional violation; on the other hand, an enactment, constitutional on its face, may be unconstitutionally applied. See Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805; Yick Wo v. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220 Having in mind these fundamental principles, several constructions of section 204 are possible.

(1) It may be argued, with some semblance of merit, that section 203 provides the exclusive way in which the constitutionality of an order, regulation or price schedule, or of any provision of the act, can be questioned by one affected thereby. Consequently, following the rule of exhaustion of administrative remedies, if the defendant in the consumer's action did not challenge the constitutionality of the act and the order which he is charged with violating by the administrative procedure prescribed in the act, he is now foreclosed from raising the question of constitutionality either of the act or of the order.

(2) A contrary interpretation would be that the exclusive jurisdiction provisions of section 204 apply only to a case where the person affected seeks affirmatively, in a proceeding originated by him, to challenge either the validity of an order or the act.

(3) An intermediate view is that the exclusive jurisdiction provisions apply both to a situation where one affected affirmatively challenges the act or an order issued under it and, in an action instituted either by the United States, the Price Administrator, or a consumer, to the question of the validity of an order but not of the validity of the act itself.

[1] Although normally the doctrine of exhaustion of administrative remedies requires parties to administrative proceedings to take full advantage of the available administrative remedy, the principles underlying the doctrine have been applied to one who did not invoke that remedy.

Bourjois, Inc., v. Chapman, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027; Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264; People v. Calvar Corp., 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376; see 42 Am. Jur., Public Administrative Law, sec. 199, p. 582. Judicial relief, however, has been held available without requiring exhaustion of administrative remedies where the statute providing the remedies was void on its face. Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160; Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264; Euclid v. Ambler Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; Yarnell v. Hillsborough Packing Co., 5 Cir., 70 F.2d 435, 92 A.L.R. 1475; Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642; see 42 Am. Jur., Public Administrative Law, sec. 200, p. 587. Furthermore, the United States Supreme Court has held, on at least one occasion, that the doctrine does not apply where an administrative determination is attacked in a judicial proceeding by way of defense only (Clinkenbeard v. United States, 21 Wall. 65, 22 L.Ed. 477), although such a restricted application of it has been criticized as a "narrow" one (see 42 Am. Jur., Public Administrative Law, sec. 199, p. 583).

[2] That a federal court other than the Emergency Court of Appeals may not pass either upon the validity of the act as written, or upon its validity as applied in the form of an order, regulation or price schedule, in an action originated by the party regulated must be considered settled by the decision in Lockerty v. Phillips, supra. The court also there decided that one affected by the order may question the validity of the act, apart from any question of unconstitutional application, by way of the administrative procedure and judicial review in the Emergency Court.

Many provisions of the act disclose the congressional policy that the administrative regulations be obeyed while their validity is being tested. Most significant in this respect are the limitations on the power of the Emergency Court to issue temporary injunctions and the staying of its final judgments pending opportunity for review in the Supreme Court of the United States. Sec. 204(b), (c); see Nathanson, The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review, 9 Law and Contemporary Problems 60, 73, 74. The policy underlying these and the exclusive jurisdictional provisions of the statute would in effect be defeated should a defendant be permitted to raise the constitutional questions in an action to enforce the regulations. For if that could be done, in order to avoid resort to administrative review and subsequent judicial review in the Emergency Court, one need only disobey the order, regulation, or price schedule which he wishes to challenge. On the other hand, consistent with this policy, it might well be urged, Congress intended that one who has failed to contest the validity of either the act or order through resort to the statutory remedy has waived his right to object to its enforcement against him.

[3] So far as the language of the act is concerned, it would seem that the administrative remedy and the procedure for judicial review are provided primarily to give opportunity for challenging the validity of an order, regulation, or price schedule. Thus section 203 includes no mention of an attack upon the statute but specifies as subject to challenge, rulings made by the Price Administrator applying its provisions. And subdivisions (a), (b), and (c) of section 204 refer only to the validity of a regulation, order, or price schedule.[1] Again the exclusive jurisdiction provision of subdivision (d) declares that "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 * * *, of any price schedule effective in accordance with the provisions of section 206 * * *, and of any provision of any such regulation, order, or price schedule." The first mention of the power to pass upon the validity of the act itself comes in the succeeding and concluding sentence of subdivision (d), that no other court "shall have jurisdiction or power * * * to stay, restrain, enjoin, or set aside, in whole or in part, any provi-

[1] Subdivision (b), however, authorizes the Emergency Court to enjoin or set aside, in whole or in part, any "regulation, order, or price schedule * * * [which] is not in accordance with law."

sion of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The decision in Lockerty v. Phillips, supra, that this provision prevents a federal district court from considering the validity of the act on the ground of unlawful delegation of congressional power, was based, in part, upon the fact that the "congressional power to 'ordain and establish' inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Accordingly, said the court, Congress could constitutionally restrict equity jurisdiction to restrain enforcement of the act or of regulations under it, to the Emergency Court, and could require a plaintiff seeking such equitable relief first to pursue the prescribed administrative procedure.

[4] But the question whether the prohibitory language of subdivision (d), supra, takes from a state court the right to determine that, upon grounds of unconstitutionality disclosed by the act, the statute will not be enforced, must be decided in connection with the provision that the United States Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.Const. art. VI, cl. 2. May, then, a state court upon which, if the contentions of the petitioner and the intervener are correct, has been conferred jurisdiction to pass upon consumer actions, be foreclosed by congressional mandate from considering the constitutionality of the act which it is to enforce? If Congress, in enacting the Emergency Price Control Act, so intended to restrict the jurisdiction of the courts to which it delegated the duty to entertain such actions, there would be considerable doubt as to the statute's validity, for the decisions indicate that, under the constitutional provision, the judge of a state court may not enforce a statute whose terms are clearly unconstitutional. See Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60; People v. Western Union Tel. Co., 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; cf. State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460.

[5–7] If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. Blodgett v. Holden, 275 U.S. 142, 148, 276 U.S. 594, 48 S.Ct. 105, 72 L.Ed. 206; 16 C.J.S., Constitutional Law, § 98, pp. 242–246; 2 Sutherland on Statutory Construction, 3d Ed.1943, sec. 4509, p. 326. The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers. That this presumption is supported by fact, so far as the act here challenged is concerned, is indicated by the Senate Report on the bill.[2] This declaration of legislative intention lends certainty to the language of the enactment and compels the conclusion that the words "stay, restrain, enjoin, or set aside" in the closing sentence of subdivision (d) of section 204 prohibit a court, other than the Emergency Court, from entertaining an action brought to determine the constitutionality of the act but do not restrict a court in which an enforce-

2 "Section 204(d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself." S.Rep. 931, 77th Cong., 2d Sess.

ment action has been commenced from deciding that question.[3]

[8] Because of the well-settled rule that a court will ordinarily inquire into the constitutionality of a statute only to the extent required by the case under consideration and will formulate a rule no broader than that necessitated by the precise facts in controversy (see cases collected in 16 C.J.S., Constitutional Law, § 94, p. 215, notes 65, 66), this court withholds any expression of opinion on the question whether or not the defendant in an enforcement proceeding may claim that the act, though constitutional on its face, is invalidly applied to him. Certainly, the presentation for judicial consideration of complicated data underlying the validity of the regulations, orders, or price schedules would tend to make speedy enforcement impossible and would place heavy demands upon the time of the personnel of the Office of Price Administration. (See Nathanson, op. cit., p. 75.) And it may be reasonable to conclude that the failure to exhaust an administrative remedy constitutes a waiver of the right to object to the application of the order, regulation or price schedule. On the other hand, the question of whether the act, as applied to the individual, conforms to constitutional due process in giving the one regulated adequate notice of the existence of the order for which enforcement is sought and sufficient opportunity to be heard or to exhaust his administrative remedy, under the facts of the particular case, is one which a court, particularly in a criminal proceeding, would be reluctant to ignore. The terms of the act are admittedly general in this respect (see sec. 203), and a decision as to their effect should not be made in the absence of any facts showing their application by the Price Administrator to a defendant charged with violation of them.

Delegation of Legislative Power

Proceeding, then, to a consideration of the respondent's claim that the statute on its face discloses an unconstitutional delegation of legislative power, it is necessary first to ascertain the extent of the power, in the exercise of which the Emergency Price Control Act was passed.

[9-10] The scope of the war power of Congress has been most broadly described in the dicta of United States v. Macintosh, 283 U.S. 605, 622,[4] 51 S.Ct. 570, 574, 75 L.Ed. 1302. Although counsel for the respondent are correct in their assertion that extraordinary conditions do not create or enlarge constitutional power, the Supreme Court of the United States has more than once declared that such conditions must be considered in determining the constitutional scope of congressional authority. Home Bldg. & L. Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481; Knox v. Lee, 12 Wall. 457, 79 U.S. 457, 20 L.Ed. 287; Juilliard v. Greenman, 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204; see Corwin, Constitutional Revolution, Ltd., (1941), p. 48. As was said in Home Bldg. & Loan Ass'n v. Blaisdell, supra [290 U.S. 398, 54 S.Ct. 235, 78 L.Ed. 413, 88 A.L.R. 1481], "* * * the war power of the federal government is not created by the emergency of war, but

[3] Commenting upon the Senate Report, N. L. Nathanson, Asst. Gen. Counsel O. P. A., in his article, The Price Control Act: Procedure and Judicial Review, says: "It should also be noted that the 'inherent powers' of courts to determine the validity of statutes which they are asked to enforce are in no way restricted by the exclusive jurisdiction provisions." 9 Law and Contemporary Problems, 60, 76.

[4] "From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, heretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

it is a power given to meet that emergency." It is a power "not limited to victories in the field" (Stewart v. Kahn, 11 Wall. 493, 507, 20 L.Ed. 176; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 161, 40 S.Ct. 106, 64 L.Ed. 194), and, in order to wage war successfully, "permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation." Home Bldg. & L. Ass'n v. Blaisdell, supra, 290 U.S. page 426, 54 S.Ct. page 235, 78 L.Ed. 413, 88 A.L.R. 1481. As recently stated by Chief Justice Stone, the war power "extends to every matter and activity so related to war as substantially to affect its conduct and progress." (Hirabayashi v. United States, June 21, 1943, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774.

[11] The purpose of the Emergency Price Control Act of 1942 is to further the national defense and security in time of war by checking speculative and excessive price rises, price dislocations, and inflationary tendencies. Sec. 1(a), 50 U.S. C.A. Appendix, § 901. Although the judicial precedents on wartime price control are limited in their conclusions to factors not necessarily universally present in the scheme of price-fixing embodied in that statute,[5] economic dislocation on the "home front" would vitally affect the nation's ability to maintain and supply the armed forces of the country in order to wage effective war. The power to control the inflationary rise of prices is a power to avoid the economic dislocation inherent in the special conditions of wartime economy, marked as it is by shortages of materials and machines for civilian production, shortages of labor, extraordinary additions to income from governmental expenditures, and government borrowing which does not siphon off the income and bank deposits of the public. (See discussion in Freund, The Price Control Act: Constitutional Issues, 9 Law and Contemporary Problems 77, 78.) Furthermore, although the United States Supreme Court has not yet ruled upon the constitutionality of the act, the Emergency Court of Appeals recently decided that the power to fix maximum rents under the act is within the war power conferred upon Congress by the Constitution. Taylor v. Brown, Em.App., 137 F.2d 654 (July 15, 1943); and see Henderson v. Kimmel, D.C., 47 F.Supp. 635. The right to control prices of commodities is a constitutional aspect of the same power.[6]

[12, 13] But the respondents contend that the manner in which Congress has attempted to exercise this power is unlawful in that the act unconstitutionally delegates a legislative function to an administrative officer. However, a court would be required to disregard realities were it to deny that the practice of delegated "legislation" is inevitably and inextricably involved in the scheme of governmental intervention in the economic field, where the conditions to be regulated are of infinite complexity and are constantly undergoing change. To demand that Congress should impose upon this shifting and complex scene the relatively permanent molds of statutory provision, unqualified by a large degree of administrative discretion, would nullify the effective operation of governmental regulation and render it unworkable. Opp Cotton Mills v. Administrator, 312 U.S. 126, 145, 657, 61 S.Ct. 524, 85 L.Ed. 624; United States v. Rock Royal Co-op., 307 U.S. 533, 574, 59 S.Ct. 993, 83 L.Ed. 1446; and see discussion in Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 530, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. In view of this situation, the United States Supreme Court has reduced the constitutional question to a comparatively simple formula: Congress must state, in so far as is reasonably practicable, considering the nature of the subject matter and the regulation sought, the purpose which it seeks to accomplish and the standards by which that purpose is to be effectuated. It may then constitutionally delegate to an administrative agency the powers to determine the details essential to carry out the legislative purpose. United States v. Rock Royal Co-

[5] See Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688; Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; cf. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877, and the dictum in United States v. Macintosh, supra, 283 U.S. page 622, 51 S.Ct. page 574, 75 L.Ed. 1302, recognizing a power to fix or regulate "prices of food and other necessities of life"; see Freund, The Price Control Act: Constitutional Issues, 9 Law and Contemporary Problems, 77, 82, 83.

[6] As defined by the Act, the term "commodity" includes services "in connection with * * * the operation of any service establishment for the servicing of a commodity." Section 302(c), 50 U.S.C.A. Appendix, § 942(c).

op., supra; Sunshine A. Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Opp Cotton Mills v. Administrator, supra. The exercise of judgment by an administrative agency will be upheld where it is within the prescribed limits and where the procedure which it is directed to follow and the record of its action "are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed." Opp Cotton Mills, Inc., v. Administrator, supra, 312 U.S. page 144, 61 S.Ct. page 532, 85 L.Ed. 624.

Considering the terms of the challenged statute, the purposes are specifically stated. "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war," section 1(a) reads, "and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 * * *; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes." 50 U.S.C.A., Appendix, § 901.

In section 2, 50 U.S.C.A., Appendix, § 902, are found the standards to be applied by the Price Administrator in effectuating these purposes. In general, whenever "in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." In establishing a maximum price, the Administrator shall "So far as practicable, * * * ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941" and shall make adjustments for such relevant factors as "Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941." Each regulation or order must be accompanied by a statement of the considerations involved in its issuance.

Before issuing a regulation or order, again "so far as practicable," the administrator is required to consult with representative members of the affected industry. At the request of "any substantial portion" of an industry affected by an established maximum price the administrator shall "appoint an industry advisory committee, or committees, either national or regional or both," which shall select its own chairman and meet at his call. The committee and the administrator shall consult with respect to the form and contents of the regulation or order, and as to any adjustments therein. However, the administrator is authorized to issue temporary orders or regulations, effective for no more than 60 days, without regard to the foregoing provisions, whenever "in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act." In addition to certain exceptions in favor of agriculture and "any fishery commodity," section 2 includes a limitation that the powers granted the administrator "shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." By section 301, the act provides that the "Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act." 50 U.S.C.A., Appendix, § 941.

These declared purposes and standards are as specific as, or even more definite than, many of the standards upheld in

previous decisions by the United States Supreme Court. Thus in Sunshine A. Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263, a delegation of congressional power under the Bituminous Coal Act of 1937, 15 U.S.C.A. § 828 et seq., was sustained, where the standards prescribed were that maximum coal prices are to reflect a reasonable return on the fair value of the property and that minimum prices must conform to standards requiring computation of the weighed average cost for each minimum price area and a classification of coal which is just and equitable to producers and which has due regard to the interest of the consuming public. Also in United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446, the court sustained the provision in the Agricultural Marketing Act of 1937, 7 U.S.C.A. § 601 et seq., authorizing the Secretary of Agriculture to set minimum milk prices based on parity, but adjusted if parity is unreasonable in view of the price of feed and economic conditions affecting supply and demand. Equally general standards have been approved in many other cases.[7]

And in so far as the respondent objects to the action of Congress in allowing the Price Administrator to exercise certain powers when, in his judgment, a specified state of facts exists, the decisions support just such statutory provisions. For example, in Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163, 181, 39 S. Ct. 507, 508, 63 L.Ed. 910, 4 A.L.R. 1623, the court held valid a joint resolution authorizing the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense * * * and to operate * * * [it] in such manner as may be needful or desirable * * *." Similarly, the Supreme Court approved a delegation of authority to the Secretary of War "to do everything by him deemed necessary to suppress and prevent" prostitution "within such distance" of army centers "as he may deem needful." McKinley v. United States, 249 U.S. 397, 39 S.Ct. 324, 63 L.Ed. 668. And in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 217, 81 L.Ed. 255, the court upheld congressional delegation to the President of the power to prohibit the sale of arms to a country at war, upon his determination that such an embargo would "contribute to the reestablishment of peace."

[14] Considering the detailed specification of the purposes of the act, the requirement that the Administrator establish a maximum price which "will effectuate the purposes of this Act" is a sufficiently definite standard for administrative action. For in the words of the Supreme Court, "Where the policy of an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority." Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U.S. 146, 165, 166, 61 S.Ct. 908, 918, 85 L.Ed. 1251; and see 2 Sutherland on Statutory Construction [3rd ed. 1943] § 4820, p. 363.)

Unquestionably, the control of prices by

[7] National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 1009, 87 L.Ed. 1344; Federal Radio Comm. v. Nelson Bros. Co., 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406 ("public convenience, interest, or necessity"); New York Central Securities Corp. v. United States, 287 U.S. 12, 53 S.Ct. 45, 77 L.Ed. 138 ("in the public interest"); Chesapeake & Ohio Ry. Co. v. United States, 283 U.S. 35, 51 S.Ct. 337, 75 L.Ed. 824, and State of Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878 ("certificates of public convenience and necessity"); Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524 ("just and reasonable" commissions); United States v. Chemical Foundation, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131 ("in the public interest"); Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549 ("undesirable resident"); Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435, and Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 ("unreasonable obstruction to navigation"); Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525 ("purity, quality, and fitness for consumption"); and see Cheadle, The Delegation of Legislative Functions, 27 Yale L.Jour. 892, 901.

"Equalization of costs of production" was upheld as an adequate standard for the administration of the flexible tariff (J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L. Ed. 624), although Chief Justice Taft, who delivered the Court's opinion, had declared when President that "the precise difference in cost of production sought for is not capable of precise ascertainment, and * * * all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion." See Freund, op. cit., p. 86.

Congress necessarily involves the consideration of factors subject to continual variation and, as a consequence, requires an elastic system of regulation to adjust to such changing conditions. Taylor v. Brown, supra; United States v. C. Thomas Stores, Inc., D.C., 49 F.Supp. 111, 113. Measured in the light of these circumstances, it may not be said that Congress has failed to state, insofar as is reasonably practicable, the purpose which it seeks to accomplish by the Emergency Price Control Act of 1942 and the standard by which the Price Administrator is to carry out that purpose. And the requirement that the administrator report to Congress not less frequently than every three months also serves to keep the application of the act in line with congressional intent. The act therefore is not an unconstitutional delegation of legislative powers.

Must a State Court Assume Jurisdiction of a Consumer Action?

[15] In considering whether a state court of competent jurisdiction must entertain a consumer action authorized by the Emergency Price Control Act of 1942, inquiry should first be made as to the intention of Congress in this regard. Section 205(c) provides that the federal district courts "shall have jurisdiction of criminal proceedings for violations of section 4 of this Act * * *, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act." More specifically, section 205(e), authorizing the consumer action, concludes: "Any suit or action under this subsection may be brought in any court of competent jurisdiction * * *." The term "any court of competent jurisdiction" includes state as well as federal courts, at least so far as suits of a civil nature arising under the laws of the United States are concerned. Hargrave v. Mid-Continent Petroleum Corp., D.C., 36 F.Supp. 233; Phillips v. Pucci, D.C., 43 F.Supp. 253; and see W.S.Reese, Jr., Concurrent Jurisdiction of State and Federal Courts under Section 16(b) of the Fair Labor Standards Act, 27 Va.L.Rev. 328, 332-336.

But, urges the respondent, no power exists in Congress to compel a state court to enforce a federally-created right of this nature. A consumer action under section 205(e) is in the nature of a penalty, the argument continues, and the penal laws of one sovereignty may not be enforced in another, according to State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 8 S. Ct. 1370, 32 L.Ed. 239, and Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L. Ed. 1123.

[16] Apart from any effect which the relationships, under the United States Constitution, of state to state and state to federal government may have upon them, under well-established principles relating to conflict of laws, no action may be maintained upon a right created by the law of a foreign state as a method of furthering its own governmental interests, nor can an action be maintained to recover a penalty, the right to which is given by the law of another state. (Rest., Conflict of Laws, §§ 610, 611; 3 Beale, Conflict of Laws (1935), sec. 1611.1, pp. 1639, 1640.) In addition, the forum will itself determine, in accordance with its own standards, whether a particular claim falls within these principles. (Rest., Conflict of Laws, § 610, comment a.) Because of this fact, there is considerable disagreement in the decisions concerning what is a penalty. See collection of cases in Goodrich on Conflict of Laws, 2d Ed. 1938, § 9, pp. 16-19; R.L. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv.L.Rev. 193.

[17] The test generally underlying most of the cases, however, is that a "penalty" includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former. (Goodrich on Conflict of Laws (2d ed. 1938) § 9, p. 17; R.A. Leflar, op. cit., pp. this definition, a New Hampshire statute of limitations indicates that the amount of recovery authorized is a penalty. Under this definition, a new Hampshire statute providing for the recovery of three times the amount of interest paid above the legal rate in New Hampshire was held to be penal when action for that sum was brought in Vermont. Blaine v. Curtis, 59 Vt. 120, 7 A. 708, 59 Am.Rep. 702; cf. Arnold v. Potter, 22 Iowa 194. Similarly, recovery was denied in New York upon a claim arising under a Pennsylvania statute awarding treble damages for rate discrimination. Langdon v. New York, L. E. & W. R. Co., 58 Hun 122, 11 N.Y.S. 514. And a statute allowing double damages for injuries to live stock has been held penal and recovery denied in a state other than the one where the injury took place. Bettys v. Milwaukee & St. P. Ry. Co., 37 Wis. 323. In line with this test, a New York statute making directors liable for all debts of the corporation upon failure to file a re-

quired report was held penal in character. Derrickson v. Smith, 27 N.J.L. 166. Again, a Massachusetts statute was construed as penal which provided for a "fine" of a minimum amount and increased the damages, not in proportion to the loss suffered by the plaintiff, but by the degree of culpability of the defendant. Adams, Adm'x v. Fitchburg Railroad Co., 67 Vt. 76, 30 A. 687, 48 Am.St.Rep. 800; and see cases collected in 62 A.L.R. 1330.

The title of section 205 is "Enforcement." Subdivision (a) of the section authorizes the issuance of an order, upon the application of the Price Administrator, either enjoining a violation of or compelling compliance with the act; subdivision (b) defines the criminal consequences of a wilful violation, and subdivision (c) prescribes the jurisdictional and venue requirements for a criminal action. Subdivision (d) requires the court having jurisdiction of any suit in which a party relies "for ground of relief or defense upon this Act" or any regulation thereunder, to certify such fact to the administrator, who is given the right to intervene in the action. And, "in order * * * to assure compliance with and provide for the effective enforcement of any regulation," order, or price schedule, the Price Administrator is authorized, by subdivision (f), to require a license of those subject to such directives as a condition of selling a regulated commodity and, furthermore, to secure the revocation of the license for a violation of the regulation, order, or price schedule.

Subdivision (e), under which the petitioner's action was brought, provides: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection * * * shall be instituted within one year after delivery is completed or rent is paid."

[18] A reasonable interpretation of section 205(e) compels the conclusion that one of the primary purposes of providing for consumer actions was to aid in the enforcement of the act. Referring to subdivision (e), the Senate Committee said: "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violations." (S.Rep. No. 931, 77th Cong. 2d Sess., p. 9.) [8] Furthermore, the enforcement aspect of section 205(e) is emphasized by the authorization therein given to the Price Administrator to bring an action under it "on behalf of the United States" when the buyer is not entitled to maintain such a suit. Regarding this provision, the Senate Report declares: "The further provision that the Administrator may sue on behalf of the United States not only where the United States is the consumer but also if the buyer is not entitled to bring suit will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business." S.Rep. No. 931, 77th Cong., 2d Sess. And the requirement that the recovery sought in the consumer action must be either $50 or treble the amount of the overcharge, whichever is greater, also indicates that Congress intended the minimum recovery of $50 to serve both as a deterrent to initial violations and as an inducement to the consumer to help enforce the act. For, as pointed out by the respondent, until the overcharge exceeds $16.67, it has no relation to the amount for which recovery is authorized.

The ratio of the overcharge to the minimum recovery of $50 thus varies substantially from case to case. It is true that

[8] See also Ginsburg (then General Counsel, Office of Price Administration), The Price Control Act; Authority and Sanctions, 9 Law and Contemporary Problems, 22, 55, 56; according to this writer, "Statistical data regarding a similar provision in the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 216, illustrates its enforcement value. During the first three years of administration of that Act, approximately 85% of all enforcement proceedings, about 2815 in all, were such civil damage actions."

in a well-considered case, the Court of Common Pleas of Erie County, Pennsylvania, construed this provision of section 205(e) as solely remedial in character. Pratt v. Hollenbeck (March 1, 1943), 91 Pittsburgh Leg. J. 162. "Where small sums are involved," said the court, "the double and treble damage feature is merely one way of attempting to render full restitution to the injured party for the time, trouble and delays usually attendant in enforcing his rights. So considered, treble damages are remedial in fact as well as in law." Yet, in view of the congressional history and the provisions of section 205(e), it seems very certain that one of the primary purposes of Congress in creating such a right was to further its governmental interest in the enforcement of the act.

[19] But the general rules of conflict of laws governing the action of the forum are subject to modification or complete abrogation in a federated nation. Thus in the United States, the question of the power of a state to create interests which must be recognized in other states is to be determined in the light of the full faith and credit and the due process clauses of the United States Constitution. See E. M. Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533; 3 Selected Essays on Constitutional Law (1938), pp. 1451, 1455-1463; W. W. Cook, The Powers of Congress under the Full Faith and Credit Clause, 28 Yale L. Jour. 421; 3 Selected Essays on Constitutional Law (1938), p. 1214; 11 Am.Jur. Conflict of Laws, sec. 7, pp. 304-306. Article 4, section 1 of the federal Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Pursuant to this power, Congress in 1790, 1 Stat. 122, provided the mode in which these "public Acts, Records, and judicial Proceedings" were to be authenticated and prescribed their effect in language which has remained substantially unaltered. The present statute reads: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." U.S.Rev.St. § 905, 28 U.S.C.A. § 687.

[20] Under the full faith and credit clause, it may well be that Congress could require the enforcement by one state of the penal laws of another. For history of the clause, see W. W. Cook, op. cit., pp. 1216-1219. And certainly it is within the province of the United States Supreme Court, in construing the clause, to define, as it did in the case of Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123, a penal law and to determine whether the statute under attack must be enforced by the forum.[9] It was there said that the test "whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." 146 U.S. at page 673, 13 S.Ct. at page 230, 36 L.Ed. 1123. "The test," continued the court, "is not by what name the statute is called by the legislature or the courts of the state in which it is passed, but whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." 146 U.S. at page 683, 13 S.Ct. at page 233, 36 L.Ed. 1123. It should be noted, however, that the question before the court in Huntington v. Attrill, supra, concerned the recognition of a judgment obtained in a state other than the forum, and the case was not an original action to enforce a foreign-created right not yet reduced to judgment. (See in this regard Goodrich on Conflict of Laws (2d ed. 1938) § 9, pp. 19, 20.)

[21, 22] But counsel, in relying upon Huntington v. Attrill, supra, as decisive of the question of the necessity for the respondent court to take jurisdiction of the consumer action, have fallen into a common error. For neither Congress nor the

[9] That the Supreme Court, under existing law, is not yet willing to hold that a state must enforce the penal laws of a sister state is apparent from its decision in Griffin v. McCoach, 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481, 134 A.L.R. 1462.

United States Supreme Court has the power, under the full faith and credit clause, to take from the state forum the right to decide, according to its own standards, whether a federal statute is a penal law unenforceable within its jurisdiction, since that clause of the Constitution applies only to acts of sister states. And the only express provisions of the federal Constitution which may be said to require a state to assume jurisdiction of a federally-created right are those which declare that the Constitution and the laws made in pursuance thereto "shall be the supreme Law of the Land" and that all executive and judicial officers shall be bound thereby. Const. art. VI, cls. 2 and 3.

If, in disregard of the principles of private international law, a state court must enforce a right of action created by federal statute where Congress has not restricted the enforcement of such an interest to the United States courts, such a conclusion must rest upon the character of the relationship existing between the national government and the states, and the superior position given that government when acting within the scope of its delegated powers. For obviously the state courts are not exercising federal judicial power, as that power is vested exclusively in the Supreme Court of the United States "and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, sec. 1. Furthermore, the state judges are not appointed by the president, with the advice and consent of the Senate (art. II, sec. 2, cl. 2), nor do they hold office for life. Art. III, sec. 1; and see J. D. Barnett, Delegation of Federal Jurisdiction, 43 Am.L.Rev. (now United States L.Rev.) 852; 3 Selected Essays on Constitutional Law (1938), pp. 1202, 1208, 1209.

Certainly the complete separation of federal and state administration was not contemplated by the framers of the Constitution. A. N. Holcombe, The States as Agents of the Nation, 3 Selected Essays on Constitutional Law (1938) pp. 1187, 1189; E. S. Corwin, Constitutional Revolution, Ltd. (1941), p. 97. To illustrate the manner in which federal powers could be carried out by state officers under the proposed Constitution, James Madison in The Federalist cited the case of collection of revenue, observing that "the eventual collection (of taxes) under the immediate authority of the Union will generally be made by the officers, and according to the rules, appointed by the several states." Hamilton expressed a like opinion when he wrote in The Federalist that the officers of the states would be "rendered auxiliary" to the enforcement of the laws of the Union. "* * * and I am even of opinion," said Hamilton, "that in every case in which [the State courts] were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts give birth * * * when * * * we consider the state governments and the national government, as they truly are, in the light of kindred systems, and as parts of *one whole,* the inference seems to be conclusive, that the state courts would have concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited." See Claflin v. Houseman, 93 U.S. 130, 138, 23 L. Ed. 833. And, said the younger Pinckney on the floor of the Philadelphia Convention, "They [the States] are the instruments upon which the Union must frequently depend for the force and execution of its powers."

Early congressional legislation clearly reveals that those adopting the Constitution were of the opinion that the federal government would utilize the services of state officers in the execution of federal powers by virtue of the provisions of article VI relating to the supremacy of the Constitution and laws of the Union and to the administration of oaths to the officers of the states, binding them to support the federal Constitution. For example, so far as the early internal revenue laws are concerned, the act of 1791 provides that "any action or suit to be brought against any person or persons, for any thing by him or them done in pursuance of this act, shall [under certain conditions] * * * be laid" in the state courts, and that the penalty and forfeiture named in the act (one-half going to the informer, and the other half to the United States) "shall be recoverable * * * by action of debt, in the name of the person or persons entitled thereto, or by information, in the name of the United States." Act of Mar. 3, 1791, ch. 15, secs. 42, 44, 1 Stat. 199. This was followed by acts of a similar nature. Acts of June 5, 1794, ch. 45, sec. 10, 1 Stat. 373; June 5, 1794, ch. 48, sec. 5, 1 Stat. 376; June 9, 1794, ch. 65, sec. 12, 1 Stat. 397; July 6, 1797, ch. 11, sec.

20, 1 Stat. 527; Feb. 28, 1799, ch. 17, sec. 5, 1 Stat. 622; July 24, 1813, ch. 25, sec. 6, 3 Stat. 42; Aug. 2, 1813, ch. 39, sec. 5, 3 Stat. 72. The National Bank Act of 1864 provides that, with a certain exception, "suits, actions, and proceedings, against any association under this act, may be had * * * in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Act of June 3, 1864, ch. 106, sec. 57, 13 Stat. 99, Rev. Stat. § 5198, 12 U.S.C.A. § 94; Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 320.

In addition, there can be no doubt, Congress intended that jurisdiction over federal crimes should be exercised by state courts. An act of 1806 authorized certain state courts "to take cognizance of all complaints and prosecutions for fines, penalties, and forfeitures, arising under the revenue laws" and "to exercise all and every power in the cases of a criminal nature, cognizable before them." Act of Mar. 8, 1806, ch. 14, 2 Stat. 354; Act of Apr. 21, 1808, ch. 51, 2 Stat. 489. Acts of 1815 and 1839 had a similar purpose. Act of Mar. 3, 1815, ch. 101, 3 Stat. 244; Act of Feb. 28, 1839, ch. 36, sec. 3, 5 Stat. 321. And in the post-office act of 1799, Congress directed "that all causes of action arising under this act may be sued, and all offenders against this act may be prosecuted, before the justices of the peace, magistrates, and other judicial courts of the several states * * * having competent jurisdiction by the laws of such states * * * to the trial of claims and demands of as great value, and of prosecutions where the punishments are of as great extent; and such justices, magistrates, or judiciary, shall take cognizance thereof, and proceed to judgment and execution as in other cases." Act of Mar. 2, 1799, ch. 43, sec. 28, 1 Stat. 733. Moreover, implicit in the judiciary act of 1789 is the recognition of the power in state courts to exercise jurisdiction over crimes against the United States unless forbidden by Congress.[10]

The course of judicial decision on the issue of the utilization by Congress of the states as agencies for the execution of federal powers has been a wavering and uncertain one. Thus in Prigg v. Pennsylvania, 16 Pet. 539, 10 L.Ed. 1060, the court, speaking of the constitutional provision that any person held to service or labor in any state under the laws thereof who escaped into another state should be delivered up on the claim of the party to whom such service or labor might be due, said: "The clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution." 16 Pet. 539, 615, 616, 10 L.Ed. 1060, 1089. Considering specifically the provision of the fugitive slave law of 1793, however, conferring authority upon both federal and state judges to sanction the rendition of fugitives when duly claimed by their masters, as to the authority conferred upon state magistrates, Justice Story, speaking for the court observed, "while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may if they choose, exercise that authority, unless prohibited by state legislation." In a separate concurring opinion, Justice McLean stated a different conclusion on this question. "It appears," he said, "in the case under consideration, that the state magistrate before whom the fugitive was brought refused to act. In my judgment, he was bound to perform the duty required of him by a law paramount to any act, on the same subject, in his own state." But because the majority of the court was not ready to assert even that Congress had the power to make state officers agents for the enforcement of the fugitive slave law, when enacting the more stringent fugitive slave law of 1850, 9 Stat. 462, the attempt to make the states agents of the nation was abandoned, and Congress confided the enforcement of the law entirely to federal officers. See A. N. Holcombe, op. cit., p. 1192.

The court over which Chief Justice Taney presided apparently was unwilling

[10] "The district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States * * * and shall also have exclusive original cognizance * * * of all suits for penalties and forfeitures incurred, under the laws of the United States." Act of September 24, 1789, ch. 20, sec. 9, 1 Stat. 73.

to come to any decision upholding the doctrine that the federal government could coerce a "sovereign" state. Thus in the case of Commonwealth of Kentucky v. Dennison, 24 How. 66, 16 L.Ed. 717, the court held that Article IV, section 2 requiring the delivery of a fugitive from justice upon the demand of the executive authority of the state from which he fled imposed only a moral, as distinguished from a legal, obligation upon the states which they ought, but could not be compelled to obey. This decision, together with Prigg v. Pennsylvania, supra, greatly impaired the usefulness of the states as agents of the federal government.

Other decisions of the United States Supreme Court have indicated a different trend. In Claflin v. Houseman, 93 U.S. 130, 136, 23 L.Ed. 833, for example, the court had before it the question whether an assignee in bankruptcy could sue in the state courts. Claflin argued that the cause of action arose solely under federal law and could be prosecuted only in the federal courts. "When we consider the structure and true relations of the Federal and State governments," said the court, "there is really no just foundation for excluding the State courts from all such jurisdiction."

"The laws of the United States," continued the court, "are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. * * * If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. * * * The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country." 93 U.S. 130, 136, 137, 23 L.Ed. 833.

In Houston v. Moore, 5 Wheat. 1, 5 L.Ed. 19, of Houston, a delinquent under a federal law of 1795, providing for organizing and calling forth the militia and prescribing the punishment to be inflicted upon delinquents, to be determined by a court-martial, was tried by a state court-martial. The Supreme Court decided that the state court had jurisdiction of the offense, "irrespective of the authority, State or Federal, which created it. Not that Congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts." See discussion in Claflin v. Houseman, supra, 93 U.S. page 141, 23 L.Ed. 833. And in Teal v. Felton, 12 How. 284, 13 L.Ed. 990, the Supreme Court sustained the bringing of an action in a state court against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States.

The court, in First National Bank v. Morgan, 132 U.S. 141, 10 S.Ct. 37, 38, 33 L.Ed. 282, recognized that "A suit [upon a right of action created by a federal statute] against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States." The statute in question provided that the action could be maintained in certain federal courts "or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Rev.St., § 5198, 12 U.S.C.A. § 94. In passing upon the effect of the provision, the court said that it "had the effect, so far as suits for penalties incurred under the laws of the United States were concerned, to modify the provision in prior enactments that expressly excluded suits for such penalties from the cognizance of state courts. When the present action was brought, the jurisdiction of the courts of the United States of suits for penalties incurred under the national banking act for taking usurious interest was not exclusive of, but concurrent with, the jurisdiction of such state, county, or municipal courts of the county

or city in which the bank was located, as had jurisdiction, under the local law, in similar cases." 132 U.S. 141, 144, 10 S.Ct. 37, 38, 33 L.Ed. 282. And the state courts uniformly have assumed jurisdiction of such an action. Ingraham v. Merchants National Bank, 153 Iowa 408, 132 N.W. 869; McCreary v. First National Bank, 109 Tenn. 128, 70 S.W. 821; Endres v. First National Bank, 66 Minn. 257, 68 N.W. 1092.

At the close of the nineteenth century, an act of Congress was held not to be unconstitutional because it authorized justices of the peace to issue warrants to apprehend deserting seamen and deliver them up to the masters of their vessels. Robertson v. Baldwin, 165 U.S. 275, 280, 17 S.Ct. 326, 328, 41 L.Ed. 715. The court in interpreting article III, section 2, of the Constitution, concluded: "We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the 'judicial power' as defined by the constitution, and may be lawfully conferred upon state officers. That the authority is a most convenient one to intrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the state laws." The authority of this case is weakened by the recognition of the conflict of laws rule against enforcement of penal laws and its citation of Huntington v. Attrill, supra, to that effect, as well as by its strained construction of what is included in federal judicial power, but the decision is of importance in disclosing an awareness of the necessity for state administration of federal law.

Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann. Cas. 778, involved the question whether a conviction can be had in a federal court for swearing falsely in naturalization proceedings had in a state court. Congress is invested with the power to establish a uniform rule of naturalization by article I, section 8, clause 4, of the Constitution. It passed a law authorizing naturalization proceedings in certain state courts. The court held that, although Congress may not create courts for the states, it may authorize a state court to enforce, in a prescribed manner, a federal statute relating to a matter within federal control. The court did add, however (at page 517 of 217 U.S., at page 589 of 30 S.Ct., 54 L.Ed. 861, 19 Ann.Cas. 778), that "The question is not here presented whether the states can be required to enforce such naturalization laws against their consent, for it appears that the Constitution of the state of California, in § 5, article 6, and the statutes in § 76 of the Code of Civil Procedure of that state, grant to the courts the power of naturalization, and the right to issue papers therefor."

It is true that Claflin v. Houseman, supra, was disapproved insofar as its discussion of state enforcement of federal penalties was concerned, in Huntington v. Attrill, supra, where the court, by way of dictum, declared, "the courts of a state cannot be compelled to take jurisdiction of a suit to recover a * * * penalty for a violation of a law of the United States." 146 U.S. 657, 672, 13 S.Ct. 224, 229, 36 L.Ed. 1123. But, at a later time, in the Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U.S. 1, 32 S.Ct. 169, 178, 56 L.Ed. 327, 38 L.R.A.,N.S., 44, the court reaffirmed that portion of Claflin v. Houseman, supra, which has been quoted, although it inserted after the word "penalty" the interpretation "meaning civil and remedial." As in the present proceeding, the Second Employers' Liability Cases also involved the application of a uniformly recognized principle of private international law, the one there considered being the rule that no action can be maintained upon a cause of action created in another state, the enforcement of which is contrary to the public policy of the forum. See Rest., Conflict of Laws, sec. 612; 11 Am.Jur., Conflict of Laws, sec. 11, pp. 310, 311. In one of those cases the Supreme Court of Errors of Connecticut, Mondou v. New York, N. H. & H. R. Co., 82 Conn. 373, 73 A. 762, had held that the superior courts of that state had no jurisdiction to entertain a suit for personal injuries under the federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., because that statute abrogated certain common-law defenses, such as the fellow-servant rule, which were then allowed in Connecticut. Answering this argument, the Supreme Court, through Justice Van Devanter, said: "The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Con-

gress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state." P. 57 of 223 U.S., page 178 of 32 S.Ct., 56 L.Ed. 327, 38 L.R.A.,N.S., 44. Accordingly, the court concluded, "rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." And the same conclusion was reached in McKnett v. St. Louis & S. F. Ry. Co., 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L.Ed. 1227, where the court said: "The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."

From the course of the decisions, it is apparent that the federal Supreme Court has moved slowly and with obvious reluctance, in the area of conflicting jurisdiction between the States and the Nation, to compel unwilling states to enforce federal laws. A state court, however, should willingly and unequivocally recognize a clear constitutional duty.

Considering the respective fields of authority in our federal system of government, there are two conflicting concepts of the relationship between the nation and the states—the principle of competition and that of cooperation. It has been said, on good authority, that with certain notable exceptions (Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717; Hoke v. United States, 227 U.S. 308, 322, 33 S.Ct. 281, 57 L.Ed. 523, 43 L.R.A.,N.S., 906, Ann.Cas.1913E, 905, the competitive conception of the federal relationship was dominant in the century following the death of Chief Justice Marshall. E. S. Corwin, Constitutional Revolution, Ltd. (1941) pp. 97, 98. But, particularly within the last decade, the courts have increasingly recognized the cooperative nature of our federal system and that there are, in fact, no reserved state powers, which may be asserted in hostility to the authorized exercise of federal power. United States v. Darby, 312 U.S. 100, 123, 124, 657, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430; and see W. F. Dodd, The Decreasing Importance of State Lines, 27 Am. Bar Assn. Jour. 78.

[23] A selfish and jealous assertion by state courts of nonexistent "sovereign" rights is untenable in the present case. The Restatement of Conflict of Laws, although announcing the common-law rules regarding the enforcement of foreign penalties and recognizing the right of the forum to refuse enforcement of foreign rights incompatible with the public policy of the forum observes: "The desirability of uniform enforcement of rights acquired in other states is especially strong among the States of the United States. Differences in policy among them are of minor nature, and for the most part relate to internal affairs. The social interest in uniform enforcement regardless of State lines is particularly great." Sec. 612, comment c. For an exceptionally thorough criticism of the rule against enforcing penal and governmental claims of sister states, see R. A. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv.L.Rev. 193. A fortiori, how much more imperative it is for the states to recognize and enforce rights created by federal law. Unlike the relationships of completely sovereign states giving rise to the adoption of rules of private international law, the Restatement recognizes that "In the legal sense, the United States is not a state because each State, Territory and District and each small portion of federal territory has its own law. The legislation of Congress is a portion of the law of each State, identical in each." Rest., Conflict of Laws, sec. 2, comment c. This is but a different manner of stating the views expressed in Claflin v. Houseman, supra, and in the Second Employers' Liability Cases, supra. As Congress, in the lawful exercise of a constitutional power, by its statutes declares the policy for both the people and the states (see Second Employers' Liability Cases, supra, 223 U.S., page 57, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44), so does it declare the policy of the people and of the states with regard to the enforcement of a law such as the Emergency Price Control Act of 1942. In enforcing that act by assuming jurisdiction of a consumer action pursuant to congressional mandate, in the course of the exercise of its ordinary jurisdiction, a state court is not entertaining an action created by a totally unrelated sovereign, but is merely yielding to the superior exercise of a lawful right granted Congress by the United States Constitution.

[24, 25] It is true that state courts generally have refused to assume jurisdiction to enforce acts of Congress which they have considered as "penal in an international sense." See cases collected in J. D. Barnett, op. cit., pp. 1206-1208; and see those cited in Huntington v. Attrill, supra, 146 U.S., page 672, 13 S.Ct. 224, 36 L.Ed. 1123; but see First National Bank of Charlotte v. Morgan, 132 U.S. 141, 10 S.Ct. 37, 33 L.Ed. 282; Ingraham v. Merchants Nat. Bank, 153 Iowa 408, 132 N.W. 869; McCreary v. First Nat. Bank, 109 Tenn. 128, 70 S.W. 821; Endres v. First National Bank, 66 Minn. 257, 68 N.W. 1092; and W. S. Reese, Jr., Concurrent Jurisdiction of State and Federal Courts under section 16(b) of the Fair Labor Standards Act, 27 Va.L.Rev. 328, 343. But, considering the intent of the framers of the Constitution, the acts of the early Congresses, and the provisions of article VI establishing the supremacy of federal law, it seems clear that a state court, otherwise competent to exercise jurisdiction over the subject matter, the parties, and the amount in controversy, must assume jurisdiction of an action created by federal law enacted pursuant to a legitimate federal function, regardless of whether or not that action be considered either as penal or as furthering the governmental interest.

Any argument of hardship which, it may be asserted, will result from the additional burden of litigation in state courts, must be considered settled by the Supreme Court of the United States. "We are not disposed," the court observed, "to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." Second Employers' Liability Cases, 223 U.S. 1, 58, 32 S.Ct. 169, 178, 56 L.Ed. 327, 38 L.R.A.,N.S., 44.

Is the Small Claims Court a Court of Competent Jurisdiction?

The remaining question is whether the small claims court is authorized by the laws of this state to try actions in the nature of the consumer action provided for by section 205(e) of the act.

[26, 27] The only express limitations upon the jurisdiction of the small claims court, as to subject matter, are that the action be for the recovery of money only and that the amount claimed must not exceed $50, exclusive of costs. Code Civ. Proc., sec. 117. The phrase "cases for the recovery of money only," appearing in section 117, supra, is not limited to ordinary contract claims but includes a claim not exceeding fifty dollars for damages due to negligence. Leuschen v. Small Claims Court, 191 Cal. 133, 215 P. 391. Since the relief sought by the petitioner in his action against O'Farrell is solely monetary, and as his claim does not exceed $50, the small claims court obviously has jurisdiction of the subject matter. And the action meets the other statutory requirements, for O'Farrell resides within the jurisdiction of the respondent court, and the petitioner filed and sought to prosecute his action in propria persona. Code Civ.Proc. secs. 117, 117g.

The fact that section 205(e) of the federal act in terms provides for a minimum recovery of $50, "plus reasonable attorney's fees and costs as determined by the court" does not place the amount of the petitioner's suit beyond the maximum jurisdictional limit of the small claims court. Section 117q of the Code of Civil Procedure entitles the prevailing party to costs of the action, and as the plaintiff in a small claims suit is prohibited from employing an attorney, there obviously are no attorney's fees to be "determined by the court."

[28] For the reasons stated the respondent court was in error when it refused to entertain the proceeding brought by Miller, and mandamus is the proper remedy to compel that action. Katenkamp v. Superior Court, 16 Cal.2d 696, 69[illegible] 108 P.2d 1; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726; Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862; Burdge v. Superior Court, 41 Cal.App.2d 547, 107 P.2d 290.

Let the peremptory writ issue.

GIBSON, C. J., and CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice.

I concur in the conclusion reached in the opinion prepared by Mr. Justice EDMONDS that a peremptory writ of mandate should issue in this case directing the municipal court sitting as a small claims court in the City of Los An-

geles to proceed with the trial of the case of Miller v. O'Farrell, but as I am not in accord with all of the views expressed in said opinion, I am disposed to present my views in a separate opinion.

As I see the problem presented for consideration, it is, first, whether the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A.Appendix, §§ 901–946, is constitutional, and if so, is the small claims court required to assume jurisdiction of causes arising under section 205(e) of said act.

The Emergency Price Control Act was passed on January 30, 1942, with the express statement by Congress that it was "necessary to the effective prosecution of the present war" (sec. 1), and the United States Supreme Court in commenting on the act has characterized it as "a statute borne of the exigencies of war." Scripps-Howard Radio Inc., v. Federal Communications Commission, 316 U.S. 4, 17, 62 S.Ct. 875, 883, 86 L.Ed. 1229. Referring to the provisions of the Constitution of the United States which specify the various powers of Congress, we find that the constitutional basis of the act is in the power of Congress to make all laws necessary and proper for carrying into effect its war powers.

Article I, section 8 of the Constitution specifically grants to Congress broad and plenary powers to enact legislation in the interest and furtherance of the national defense and in the carrying on of a war. It provides in part: "The Congress shall have Power To lay and collect Taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States. * * * To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; to provide and maintain a Navy; to make Rules for the Government and Regulation of the land and naval Forces; to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; * * * to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * *"

In speaking of "The Fighting Powers of the United States Under the Constitution," Hon. Charles Evans Hughes said: "The power to wage war is the power to wage war successfully. The framers of the Constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government entrusted with the common defense. In equipping the National Government with the needed authority in war they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command." Cong.Rec. Volume 55, Pt. 8, 65th Cong. 1st Sess. Appendix.

It would appear from the language of the Supreme Court of the United States in the case of United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 574, 75 L.Ed. 1302, that no boundary has been fixed beyond which the government may not go in its exercise of the war powers if the interests of the nation demand. The court there stated: "From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

And, as was likewise said by the Supreme Court of the United States in the

case of Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 235, 78 L.Ed. 413, 88 A.L.R. 1481, keeping in mind at all times: "* * * the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."

The United States Supreme Court has upheld the power of the Federal Government in the interest of national defense, to take over and operate railroads (Northern Pacific Railroad Co. v. North Dakota, 250 U.S. 135, 39 S.Ct. 502, 63 L.Ed. 897); to take over and operate telegraph and telephone systems (Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623); to place compulsory orders for materials required for national defense (Moore & Tierney, Inc., v. Roxford Knitting Co., 2 Cir., 265 F. 177, 11 A.L.R. 1415, certiorari denied 253 U.S. 498, 40 S.Ct. 588, 64 L.Ed. 1032); to draft man power for service in the armed forces (Selective Draft Law Cases (Arver v. United States), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann. Cas.1918B, 856); to prohibit the manufacture or sale of alcoholic beverages (Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194, Jacob Ruppert, Inc., v. Caffey, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260); to regulate the prices of certain commodities (Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 49 S.Ct. 314, 73 L.Ed. 688); to control rents (Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165); and to maintain the civilian morale by the lessening of "apprehension on the part of consumers in respect of their supply and the prices liable to be exacted." Highland v. Russell Car & Snow Plow Co., 279 U.S. 253, 261, 49 S.Ct. 314, 316, 73 L.Ed. 688.

The policy of Congress in the enactment of the Emergency Price Control Act and the purposes and objects to be accomplished thereby, that is, the need for price control in the interest of national defense and in the effective prosecution of the war, is disclosed by the following declaration contained in section 1(a) of the act itself: "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 * * *; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

To effectuate these purposes, maximum prices and rent regulations are to be promulgated. The procedure for issuance of Price Regulations is described in section 2(a) providing in part: "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the follow-

ing: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. * * *"

It is obvious from the foregoing that the objective sought to be accomplished by the Emergency Price Control Act was that commodity prices be fixed on a fair and equitable basis during the period of economic chaos due to the abnormal conditions created by the existence of the war. It is likewise obvious that to effectuate the purposes of this act the price administrator must give due consideration to prices prevailing during certain specific periods of normalcy and make adjustments for such relevant factors as the administrator determines to be of general applicability, including certain specific factors enumerated in the act.

In commenting upon the powers conferred upon the administrator by the provisions of this act the United States District Court for Kansas in the case of Henderson v. Kimmel, 47 F.Supp. 635, 642, said: "Here, the Act contains both a clear statement of a definite policy of Congress and adequate, intelligible standards to guide the Administrator in fixing maximum rental. The objectives of the Act are set forth in § 1(a) in meticulous detail. * * * Congress must state, in so far as is reasonably practicable, the purpose which it seeks to accomplish and the standards by which that purpose is to be worked out. It may then constitutionally delegate to an administrative agency the powers to determine the details essential to carry out the legislative purpose."

It is obvious that the intricacies and diversity of the economic problems raised in price administration are such that Congress would be attempting the impossible if it sought to enact specific price ceilings for various commodities, and an undue rigidity imparted to the act would foster injustice and might well lead to a breakdown in administration. The market behavior of a multitude of commodities presents such a variety of patterns that it would be rash to establish standards narrowly confining the discretion of the administrator and yet to expect the results that are imperative. The act provides that the administrator, after having considered so far as practicable the prices prevailing during a past period must make adjustments for such relevant factors as he holds to be of general applicability, including certain specific factors specified in the act.

While our attention has not been called to any decisions of courts of last resort passing upon the validity of the federal Emergency Price Control Act of 1942, its constitutionality has been upheld in the following cases by United States District Courts where its validity was challenged. Henderson v. Kimmel, D.C.D.Kan.1942, 47 F.Supp. 635; United States v. C. Thomas Stores, Inc., D.C.D.Minn., Feb. 26, 1943, 49 F.Supp. 111; United States v. Slobodkin, D.C.D.Mass., March 2, 1943, 48 F.Supp. 913; United States v. Hark and Yaffee, D.C.D.Mass., March 5, 1943, 49 F.Supp. 95; United States v. Charney, D. C.D.Mass., Dec. 17, 1942, 50 F.Supp. 581.

Respondents rely strongly upon the cases of Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, both involving the National Industrial Recovery Act, 48 Stat. 195, in support of their contention that the federal Emergency Price Control Act is an unconstitutional delegation of legislative power, but in my opinion these cases are clearly distinguishable, as they involved the construction of an act basicly different both as to subject matter and objectives than the Emergency Price Control Act. Furthermore, it is clear that during a period of war emergency, the scope of discretion which Congress may constitutionally accord to the Executive Branch of the government is necessarily broader than that which may be accorded in normal times.

The standards of the Emergency Price Control Act are as definite and as detailed as they can be without defeating the objectives of this legislation, when due regard is given to the needs of legislative and administrative practicability.

As was said in Opp Cotton Mills v. Administrator, 1941, 312 U.S. 126, 145, 657,

61 S.Ct. 524, 533, 85 L.Ed. 624, in upholding the delegation of power to set minimum wages under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq.: "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

That Congress need only establish standards within the realm of reasonable practicability was also stressed in United States v. Rock Royal Co-op., 1939, 207 U.S. 533, 574, 59 S.Ct. 993, 1013, 83 L.Ed. 1446: "From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable."

Likewise, in Sunshine Anthracite Coal Co. v. Adkins, 1940, 310 U.S. 381, 398, 60 S.Ct. 907, 915, 84 L.Ed. 1263, the court declared: "The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. Currin v. Wallace, 306 U.S. 1, 15, 59 S.Ct. 379, 386, 83 L.Ed. 441, and cases cited. But the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiæ would be ap to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues."

From my study and analysis of the Emergency Price Control Act of 1942, and the authorities defining the extent of the war powers of Congress, I am convinced that said act is not in violation of any of the provisions of the Constitution of the United States and is a valid exercise of the war powers conferred upon Congress by said Constitution.

Turning to the question of whether or not the small claims court is required to assume jurisdiction of actions brought pursuant to section 205(e) of the Emergency Price Control Act, I think it is clear that such court has jurisdiction of the action which is the subject of this proceeding and should be required to exercise such jurisdiction.

It is conceded by all parties to this proceeding "that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them." Minneapolis & St. Louis, R. Co. v. Bombolis, 1916, 241 U.S. 211, 36 S.Ct. 595, 598, 60 L.Ed. 961, Ann.Cas.1916E, 505, L.R.A. 1917A, 86; Carse v. Marsh, 1922, 189 Cal. 743, 210 P. 257; United States v. Stevens, 1925, 103 Conn. 7, 130 A. 249; United States v. Sumner, 1925, 125 Misc. 658, 211 N.Y.S. 705; United States v. Richards, 1930, 201 Wis. 130, 229 N.W. 657; Ex parte Gounis, 1924, 304 Mo. 428, 443, 263 S.W. 988; Mondou v. New York, N. H. & H. R. Co., 1912, 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; Holmberg v. Lake Shore & M. S. Ry. Co., 1915, 188 Mich. 605, 155 N.W. 504; State ex rel. Schendel v. District Court of Lyon County, 1923, 156 Minn. 380, 381, 194 N.W. 780.

It has also been held that an employee's suit for double the amount of unpaid wages authorized by the Federal Fair Labor Standards Act may be instituted in state courts pursuant to the provision that such actions may be commenced "in any court of competent jurisdiction." Forsyth v. Central Foundry Co., 1940, 240 Ala. 277, 198 So. 706; Duke v. Helena-Glendale Ferry Co., 1942, 203 Ark. 865, 159 S.W.2d 74, 139 A.L.R. 1404; Adair v. Traco Division, 1941, 192 Ga. 59, 14 S.E.2d 466; Harrison v. Herzig Building & Supply Co., 1942, 290 Ky. 445, 161 S.W.2d 908; Mengel Co. v. Ishee, 1941, 192 Miss. 366, 4 So.2d 878; Abroe v. Lindsay Bros. Co., 1941, 211 Minn. 136, 300 N.W. 457; Emerson v. Mary Lincoln Candies, Inc., 1941, 173 Misc. 531, 17 N.Y.S.2d 851, affirmed per curiam, 287 N.Y. 577, 38 N.E.2d 234; Id., 1941, 261 App. Div. 879, 26 N.Y.S.2d 489; Atkocus v. Terker, Mun.Ct.1941, 30 N.Y.S.2d 628; Hart v. Gregory, 1940, 218 N.C. 184, 10 S.E.2d 644, 130 A.L.R. 265; Floyd v. DuBois Soap Co., Ohio App.1941, 38 N.E.2d 919; Tapp v. Price-Brass Co., 1941, 177 Tenn. 189, 147 S.W.2d 107; Stringer v. Griffin Grocery Co., Tex. Civ.App.1941, 149 S.W.2d 158; Hargrave v. Mid-Continent Petroleum Corp., D.C.E. D.Okl.1941, 36 F.Supp. 233, affirmed Mid-Continent Pipe Line Co. v. Hargrave, 10 Cir., 1942, 129 F.2d 655.

Section 205(e) of the Emergency Price Control Act provides that: "Any suit or action under this subsection may be brought in any court of competent jurisdiction." Section 205(c), which contains the general jurisdictional provisions of the act, provides in part: "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act * * *, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act."

It is the contention of respondents that the recovery authorized by the Federal Emergency Price Control Act of 1942, by a consumer who has been overcharged for a commodity in violation of the provisions of said act is a penalty created by federal law which cannot be enforced in the California courts. They rely mainly upon the cases of State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239, and Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123. In my opinion the authorities do not support the position taken by respondents and that the recovery authorized by the Emergency Price Control Act to a consumer is not a penalty in the sense that that term has been defined by the leading authorities throughout the United States. The basic test to be applied to determine whether a statutory action is an action for a penalty, was that stated by the Supreme Court of the United States in the leading case of Huntington v. Attrill, supra, 146 U.S. at page 667, 13 S. Ct. at page 227, 36 L.Ed. 1123, where the court said: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

And at pages 673, 674 of 146 U.S., at page 230 of 13 S.Ct., 36 L.Ed. 1123: "The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

The United States Senate Committee which dealt with the Emergency Price Control Act referred to the type of action which is the subject of this proceeding as "actions to recover damages." In connection with this phase of the act, the committee stated: "Actions to recover damages—Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violations. They afford a remedy at law to persons damaged by having to pay unlawfully high prices." (S. Rep. No. 931, 77th Cong., 2nd Sess. P. 9.)

Corpus Juris Secundum classifies actions as remedial and penal. In volume 1, page 1180, Actions, § 59 of this work, it states: "Remedial and Penal: * * * A remedial action is to be distinguished from a penal action in that the former is given to, and is brought by, the party aggrieved, and the recovery allowed is in the nature of compensation or indemnity for the injury done or loss sustained, an action of this

character being remedial notwithstanding the amount recoverable may exceed the damages proved, while the latter is given to, and may be brought by, any one who will sue, such as a common informer, or a designated plaintiff who need not show that he has sustained any injury, and the recovery allowed is not to compensate plaintiff, but to punish defendant."

This subject was recently before the trial courts of New Jersey and Pennsylvania where it was exhaustively reviewed in opinions written by able jurists. The case of Watters v. Melavas was decided by the District Court of Orange, New Jersey in 1943, and is reported at page 622:91 Pike and Fischer OPA Service, and the case of Pratt v. Hollenbeck was decided by the Court of Common Pleas, Erie County, Penna., on March 1, 1943, and is reported in 91 Pittsburg Leg. J. 162, 25 Erie County L. J. 116. Both of these cases after an exhaustive review of the authorities hold that the provision in section 205(e) of the Emergency Price Control Act authorizing the recovery of the sum of $50 in lieu of treble damages for an overcharge is remedial rather than penal. Such holding is in accord with the great weight of authority throughout the United States and is supported by the following well considered cases: Whitman v. Oxford National Bank, 1900, 176 U.S. 559, 20 S.Ct. 477, 44 L.Ed. 587; Kirtley v. Holmes, 1901, 6 Cir., 107 F. 1, 46 C.C.A. 102, 52 L.R.A. 738; Chattanooga Foundry & P. Wks. v. City of Atlanta, 1906, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241; Cox v. Lykes Bros., 1927, 237 N.Y. 376, 143 N.E. 226; Younts v. Southwestern Tel. & Tel. Co., C.C., 1911, 192 F. 200; Gruetter v. Cumberland Tel. & Tel. Co., C.C., 1909, 181 F. 248; Boston & Maine R. R. v. Hurd, 1 Cir., 1901, 108 F. 116, 47 C.C.A. 615, 56 L.R.A. 193; Brady v. Daly, 1899, 175 U.S. 148, 20 S.Ct. 62, 44 L.Ed. 109; Atchison, T. & S. F. Ry. Co. v. Nichols, 1924, 264 U.S. 348, 44 S.Ct. 353, 68 L.Ed. 720; Overnight Motor Transportation Co. v. Missel, 1942, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682.

A review of the foregoing authorities convinces me beyond doubt that the recovery provided for in the Emergency Price Control Act by a consumer who has been overcharged is remedial and not penal and may be enforced in the courts of California having jurisdiction of the amount of the recovery authorized.

It must be conceded by everyone that during the present national emergency, citizens are entitled to freedom from undue economic pressure. Certainly a remedy given by Congress to a consumer injured by virtue of the violation of price ceilings fixed by the price administrator does not constitute a penalty. It is simply a civil liability fixed by statute in lieu of damages for the violation of a civil right established by a federal statute.

That section 205(e) is civil and remedial in nature rather than penal is further emphasized when it is remembered that section 205(b) of said act provides for criminal prosecution of willful violators. Obviously, a person who had suffered a judgment as the result of a consumer's treble damage action could not plead such judgment as a bar to a criminal prosecution upon the theory that the consumer's treble damage action was "penal" in nature and that, therefore, any criminal prosecution would involve double jeopardy. United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443.

In my opinion the peremptory writ of mandate prayed for should issue.



BIGGS DITCH CO. v. JONGSTE et al.

Civ. 6884.

District Court of Appeal, Third District, California.

Oct. 27, 1943.

Hearing Granted Dec. 20, 1943.

1. Easements ⇐5

General rule that claim of adverse possession requires showing of payment of taxes or that no taxes were levied and assessed does not apply to an easement which is not separately assessed.

2. Taxation ⇐533

In the absence of proof that there had been an assessment of taxes against easement or right of way for a canal or ditch, no proof of payment of taxes was necessary to sustain claim of adverse possession.

3. Waters and water courses ⇐242

Ordinary grant deed reserving right of way for main canal of irrigation company, with recital of reason for such reservation as right to take waters from canal without payment, did not grant right to use of water either presumptively or actually.

4. Appeal and error ⇐931(1)

Every presumption is in favor of findings made by trial court.

5. Appeal and error ⇐1010(1)

Where findings that owners of land through which canal or ditch passed over were not entitled to free use of water therefrom were predicated on positive testimony and total lack of evidence rebutting such testimony or establishing right by prescription, reviewing court will not disturb such findings without clear showing that conclusions cannot be supported by any rational view of testimony.

Appeal from Superior Court, Butte County; W. T. Belieu, Judge.

Action by the Biggs Ditch Company against Louise T. Jongste and another to quiet title in and to an easement or right of way for a canal or ditch over property of defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

Chas. L. Gilmore, of Sacramento, for appellants.

Jack McPherson, of Chico, for respondent.

PEEK, Justice.

The defendants appeal from a judgment quieting plaintiff's title in and to an easement or right of way for a canal or ditch over its property and enjoining and restraining defendants' use or interference therewith.

Plaintiff corporation was organized on May 22, 1908, as a mutual water company, and ever since has been engaged solely in the distribution of water only to owners of its capital stock, the shares of which are declared to be appurtenant to the lands described in the stock certificate.

The water is purchased by each user directly from a separate corporation, the Sutter Butte Canal Company. The cost of distribution and upkeep of the distributing system by plaintiff is apportioned among the users on a per acre basis. No claim is made by plaintiff that it is a public utility or that such services as it performs are impressed with a public use.

The canals, ditches and laterals used by it were acquired by plaintiff as the successor in interest to the Butte County Irrigated Lands Company of Biggs. Title to its main canal, which traverses the property of the defendants, is claimed by the plaintiff by adverse possession.

The defendant Louise T. Jongste admits that she is not a shareholder in plaintiff corporation but asserts a right to take water from the canal by virtue of a provision contained in her deed to the land as follows: "Provided however, that all of the lands that are now being used as a 'right of way' to and for the 'Main Canal' of the Butte County Irrigated Land Company of Biggs, Cal., as it is now built on, along, and over the North and West lines of the above described premises are hereby reserved from the above land and the same is so reserved for and in consideration, that the owner or owners of the above described land and premises are at all times hereafter to have the privilege and right to use water from and out of said canal, for the purpose of irrigating of any and all of the said lands and premises, without payment for a Water Right to the Butte County Irrigated Land Company or any other Company or any companies for such a right, and the said Butte County Irrigated Land Company, shall not be required to pay or give any other compensation for their right of way, for their main canal, excepting a water right to and for the above named lands."

The provision above quoted first appeared in a deed from one J. M. Hastings as grantor to C. E. Chatfield as grantee, under date of July 22, 1908, and is contained in all deeds subsequent to that date.

There is no record of the transfer from the Land Company to Hastings, nor is there a record of the conveyance of a right of way to the Land Company, although it appears that the canal was constructed in 1907, and has been used for irrigation purposes each season since 1908.

The only evidence of a conveyance or contract with or by plaintiff's predecessor in interest appears in the corporation's minute book, wherein authorization was given for the purchase of the ditches and

rights of way, and the testimony of one witness that "The Biggs Irrigated Land Company signed the ditches over to us."

[1, 2] In opposition to plaintiff's claim of adverse possession, defendants' only contention is that the record contains no showing of payment of taxes on either the canal or the water, and that under the rule as stated in Allen v. Allen, 159 Cal. 197, 113 P. 160, 161, such proof is essential, as "* * * an element to constitute such title, in addition to the showing of the other facts necessary to constitute it, he must prove, either that no taxes were levied and assessed upon the land or that he had paid all taxes which were levied thereon", and that therefore such a showing becomes a prerequisite to the acquisition of title by adverse possession. Although this is the general rule, such requirements do not apply to an easement which is not separately assessed for the purpose of taxation. Humphreys v. Blasingame, 104 Cal. 40, 37 P. 804; Bernstein v. Dodik, 129 Cal. App. 454, 18 P.2d 983. And in the absence of proof that there has been an assessment, no proof of payment of taxes is necessary. Silva v. Hawn, 10 Cal.App. 544, 102 P. 952; Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739. See, also, 112 A.L.R. 549.

Appellants also contend that the records introduced establish that their predecessor in interest, Hastings, held title in fee without either restrictions or servitudes, and that if plaintiff predicates its right to the canal by virtue of a grant from its predecessor in interest, then it must fail, for there is no record of such grant except the recognition contained in Hastings' deed and those subsequent thereto, all of which are conditioned upon the free use of the water to the various grantees of the land now owned by the defendant.

This argument is not decisive, as the trial court found that there was no grant to defendants' predecessors in interest of the right to the free use of the water from said canal, and further found that the title to the canal and ditch in question had enured to plaintiff by adverse use.

Appellants, however, advance the further contention that their right of free use of the water arises by virtue of the attachment of a presumption to the Hastings deed that the grant of the canal right of way was in consideration of the right of free use of water for irrigation purposes, and that all of the deeds introduced in evidence by plaintiff containing such reservation are admissions against interest which must be most strongly concluded against it. Under such a theory defendants cannot deny plaintiff's use of the canal for the statutory period, but on the contrary must admit such use by plaintiff in support of the contention of free use of the water by defendants' predecessors in interest, and thereby dispose of the question of such use by plaintiff.

Therefore, the sole remaining question for determination on this appeal resolves itself to a consideration of the defendants' right to such free use of the water.

[3] As regards this issue the trial court discarded completely the question of the presumptive or actual grant of a right of use to the defendants by a specific finding to the contrary, and further found that the few sporadic uses by defendants' predecessors were insufficient to establish a prescriptive right to the use of the water. That the first finding by the trial court relative to a presumptive or actual grant of a right of use of the water in plaintiff's canal could not, as a matter of law, be otherwise, is apparent from the wording of the quoted provision of the deed in question. It is an ordinary grant deed which, after describing the land conveyed, reserves a certain right of way "for the main canal of the Butte County Irrigated Lands Company of Biggs, Cal., as it is now built on, along, and over the North and West lines of the above described premises." Thereafter appears what only can be described as a recital by the grantor (Hastings) of the reason for such reservation. No words of conveyance to the grantee of the right to take water from such canal without charge, if such there were, can be found in said provision or elsewhere in the deed.

[4, 5] Every presumption is in favor of the findings made by the trial court, which in this case were predicated upon the positive testimony introduced on behalf of plaintiff that the water was used and claimed exclusively by it and its shareholders for a period in excess of thirty years, the total lack of evidence by defendants to rebut such testimony, and the insufficiency of the evidence to establish a right by prescription in defendants. Under such circumstances this court will not disturb such findings without a clear show-

ing that such conclusions cannot be supported by any rational view of the testimony. O'Brien v. Markham, 37 Cal. App.2d 381, 99 P.2d 583.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



61 Cal.App.2d 177

Ex parte RADOVICH.

3 Cr. 1835.

District Court of Appeal, Third District, California.

Oct. 27, 1943.

1. Habeas corpus ⇐56

A warden's demurrer admitted allegation of fact in petition for writ of habeas corpus.

2. Pardon ⇐5

The Board of Prison Terms and Paroles cannot, on its own initiative, provide that prisoner's terms shall run consecutively, since that involves judicial discretion.

3. Criminal law ⇐1210

At common law, court had discretion to impose cumulative or concurrent sentences, and where it failed to exercise such discretion sentences ran concurrently.

4. Criminal law ⇐993

The trial court which in 1932 imposed a sentence upon conviction of robbery and which did not within 60 days indicate whether sentence should run consecutively or concurrently with a previously imposed sentence lost jurisdiction and could not in 1943 amend its judgment to provide how sentences should run. Pen.Code, § 669, as amended by St. 1931, p. 1052.

5. Statutes ⇐220

The subsequent enactments constituted a legislative recognition that statute in effect in 1932 which required trial court to indicate whether sentences should run concurrently or consecutively had no application to a case where court pronouncing a second or other sentence had no knowledge of prior sentence, and in such case the two sentences would run concurrently. Pen. Code, § 669, as amended by St. 1931, p. 1052, as amended by St.1935, p. 1670, and as amended by St.1941, p. 2262.

6. Criminal law ⇐1210

Where trial court in imposing sentence in 1932 upon conviction of robbery made no reference to a prior sentence and did not indicate how sentences were to run, sentences ran concurrently, since it would be presumed that trial court had no knowledge of prior sentence, or that, having knowledge, it intended sentences to run concurrently. Pen.Code, § 669, as amended by St.1931, p. 1052.

In the matter of the application of Nick Radovich for a writ of habeas corpus on ground that his imprisonment was unlawful, wherein the Warden of the State Prison at Folsom filed a demurrer.

Writ granted and petitioner ordered discharged.

Nick Radovich, in pro. per., and Nathan C. Coghlan, of San Francisco, for petitioner.

Robt. W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner, who is imprisoned in the State Prison at Folsom, alleges in his petition for a writ of habeas corpus that his imprisonment is unlawful in that his lawful term of fifteen years, "with benefit of credits earned and granted by formal resolution of the Board and not forfeited," has expired. The allegations of the petition further show the following:

On September 14, 1931, defendant, after having been found guilty of the crime of robbery, was sentenced by the superior court of Los Angeles County to be imprisoned in the State Prison at Folsom for the term prescribed by law. On February 9, 1932, after having been found guilty of another robbery, he was again sentenced by the superior court of said county (but by a different judge) to be imprisoned in the State Prison at Folsom, for the term prescribed by law. In imposing the latter sentence the court made no reference to the prior judgment nor did it indicate how it was to run in relation to the former judg-

ment. On May 20, 1932, petitioner was received at the prison and on May 21, 1940, the Board of Prison Terms and Paroles fixed his terms of confinement at ten and fifteen years, respectively.

It is contended by petitioner that in this state of the case the two judgments run concurrently, and that as he has served fifteen years less credits earned and granted and not forfeited he became entitled to his release on October 20, 1941. But he alleges that the warden of the prison has erroneously interpreted petitioner's terms of confinement to be consecutive instead of concurrent and has refused and does refuse his release.

[1] In his return and answer to the foregoing petition, respondent, the Warden of the State Prison, admits the allegations of the petition as to the dates of petitioner's sentences and his delivery at the prison, attaches to his return copies of the judgments, and avers that the petition does not state facts sufficient to justify the relief prayed. It is not denied therein that petitioner has earned and been granted credits which have not been forfeited, sufficient to justify his release if his sentences run concurrently; and by reason of respondent's demurrer this fact is admitted. Respondent does not allege, either, that when the Board fixed petitioner's terms it provided that they should run consecutively.

[2, 3] It is conceded in respondent's brief that if petitioner's terms run concurrently he could apply for his release after having served nine years and five months. Penal Code, sec. 2920. It is also conceded that the Board is without authority, on its own initiative, to provide that petitioner's terms shall run consecutively, and that any attempt on its part to order them to run consecutively would be void, since this involves a matter of judicial discretion solely within the province of the courts citing People v. Sama, 189 Cal. 153, 156, 207 P. 893; In re Lee, 177 Cal. 690, 171 P. 958. Respondent also concedes that at common law the court had discretion to impose either cumulative or concurrent sentences, and that where it failed to exercise such discretion the sentences ran concurrently. 24 C.J.S., Criminal Law, § 1996, p. 1235; 15 Am.Jur., sec. 464, p. 121.

Section 669 of the Penal Code as originally enacted in 1872 provided that "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be." This statute limited the power of the court to impose cumulative sentences to cases where there were two or more convictions before sentence; and the limitation has been construed to imply that in all other cases the sentences were to run concurrently. In re Mann, 192 Cal. 393, 394, 220 P. 305; Ex parte Casey, 160 Cal. 357, 116 P. 1104; Ex parte McGuire, 135 Cal. 339, 67 P. 327, 87 Am.St. Rep. 105; Ex parte Morton, 132 Cal. 346, 64 P. 469.

Section 669 was amended in 1927, Stats. 1927, p. 1056, to provide that "when any person is convicted of two or more crimes the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be; provided, that in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently." During the effective operation of the statute as thus amended, sentences ran consecutively unless the court ordered that they run concurrently. People v. Cowen, 20 Cal.App.2d 674, 676, 677, 67 P.2d 737; People v. Hayes, 9 Cal.App.2d 157, 49 P.2d 288; In re Crawford, 109 Cal.App. 33, 292 P. 520.

But section 669 was amended again in 1931, Stats.1931, p. 1052, and, as it stood when petitioner was sentenced, provided that "When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be."

Respondent contends that since the trial court failed in this case to indicate how

the second judgment should run in relation to the prior one, this court should return petitioner to the trial court for rendition of a proper judgment. Petitioner denies the validity of such a course, urging that under the authority of People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125, and Id., 44 Cal.App.2d 155, 112 P.2d 62, the trial court has lost jurisdiction of the cause, and is powerless to amend or modify its former judgment.

Not only the Cowan case but also People v. Jones, 6 Cal.2d 554, 59 P.2d 89, supports petitioner's contention. In the latter case defendant, in 1933, pleaded guilty to a charge of forgery, admitted three prior felony convictions, was adjudged an habitual criminal and was sentenced to state prison. On December 3, 1935, upon motion of defendant, the trial court made an order modifying the judgment by deleting therefrom all reference to defendant as an habitual criminal. At that time section 644 of the Penal Code provided for the adjudication as habitual criminals of persons convicted of felonies who had been previously convicted and served terms for prior felonies; and, as amended in 1935, St.1935, p. 1699, it further provided that in exceptional cases, at any time not later than sixty days after the actual commencement of imprisonment, the court might, in its discretion, provide that the defendant was not an habitual criminal and therefore not subject to the provisions of that section. The court held that as more than sixty days had elapsed since the commencement of defendant's sentence, the trial court was without jurisdiction to amend the judgment.

[4] Section 669 of the Penal Code, which provides that where a person is convicted of two or more crimes the judgment shall direct whether the terms of imprisonment shall run concurrently or consecutively, also provides that in the event that the court at the time of pronouncing the second judgment had no knowledge of a prior existing judgment, then, upon such prior judgment being brought to its attention "at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall * * * determine how the term of imprisonment upon said second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment." The similarity of this sixty day limitation to that of section 644, supra, compels the conclusion that the trial court in the instant case has lost jurisdiction and that it cannot, at this late date, amend its judgment to provide how petitioner's sentences shall run.

This brings us to the second question, to wit, how do petitioner's sentences run in the absence of a pronouncement in the judgment?

As previously stated herein, section 669 as amended in 1931, and as it stood when petitioner's sentences were pronounced, required the trial judge to direct whether the terms should run concurrently or consecutively. However, it is obvious that the foregoing provision assumes that the court pronouncing the subsequent judgment has knowledge of the prior one. The legislature, apparently taking cognizance of the fact that said section did not apply when the court had no such knowledge, amended it in 1935, Stats.1935, p. 1670, to provide that "In the event that the court at the time of pronouncing the second or other judgment upon such person had no knowledge of a prior existing judgment or judgments, then, upon such prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of sixty days from and after the actual commencement of imprisonment upon the said second or other subsequent judgment, the court shall determine how the term of imprisonment upon said second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment." It also provided that the State Board of Prison Directors shall advise the court pronouncing the second or other subsequent judgment of the existence of all prior judgments against the defendant, the terms of imprisonment upon which have not been completely served.

[5] In 1941, St.1941, p. 2262, the section was again amended to provide: "In the event that the court at the time of pronouncing the second or other judgment * * * had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon such failure so to determine, or upon such prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment," etc., said court shall determine how the terms

shall run; and that "Upon the failure of the court so to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." These enactments are, we think, a legislative recognition that the said section as it stood in 1932, at the time of defendant's second sentence, had no application to a case where the court pronouncing a second or other sentence had no knowledge of a prior sentence; and that, in the latter case, since there could be no pronouncement of how the second sentence should run in relation to an unknown prior sentence, the two sentences would run concurrently.

[6] It is not contended here that the trial court, at the time the second sentence was pronounced, had any knowledge of the previous one; and we must assume that had it been so informed it would have conformed to the requirements of section 669 and provided how the second sentence should run in relation to the first. But since it did not so provide, the presumption is that it had no knowledge of the prior sentence, or that, having knowledge, it intended the sentences to run concurrently. It is said in 15 Am.Jur., § 465, p. 123: "In those states where cumulative sentences are permissible and the subject is not controlled by statute, if the accused is convicted of more than one offense or under more than one count, sentences of imprisonment imposed under the different counts or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise or unless for other reasons (as that the imprisonment is in different places) it clearly appears that the court intended that the sentences should run consecutively, and not concurrently. If the court inadvertently fails to have the sentence recorded in such form as to show the imposition of a cumulative sentence or from leniency intentionally omits to add such a provision, and the defendant is committed in pursuance of such sentence and another or other sentences, he is either voluntarily released by the jailer or discharged on habeas corpus at the expiration of the longest term named in any one of the sentences. No presumption will be indulged in favor of sustaining a sentence as cumulative."

We therefore conclude that since petitioner has now served fifteen years, less credits earned and granted and not forfeited, he is entitled to his discharge; and it is so ordered.

PEEK and THOMPSON, JJ., concur.



61 Cal.App.2d 213

PEOPLE v. POLLOCK.

Cr. 3746.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1943.

1. Criminal law ⇐250(11)

In prosecution for committing lewd and lascivious acts on or with body of nine year old girl, whether defendant touched prosecutrix was fact question for trial court, sitting without jury. Pen.Code, § 288.

2. Infants ⇐20

Evidence *held* sufficient to support conviction of committing lewd or lascivious acts on or with body of nine year old girl. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Leslie R. Still, Judge.

Dave Pollock was convicted of committing lewd or lascivious acts on or with the body of a nine year old girl, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with the violation of section 288 of the Penal Code and was convicted by the court, sitting without a jury. Appellant admitted

a prior conviction of violation of the same section, for which he served a term of imprisonment in the State Prison. This appeal is taken from the judgment of conviction and from the order denying appellant's motion for a new trial.

The prosecutrix is a nine year old girl. She testified that on the afternoon of February 15, 1943, she accompanied appellant to his room in an apartment house and that appellant there pulled down her pants and placed his private parts "beside" hers. The testimony also clearly permits an inference that appellant then had a seminal emission in the presence of the child, catching the fluid in his handkerchief. Appellant was arrested in his room on the evening of the same day and the arresting officer testified at the trial. Appellant's only defense appears to be that he was so drunk he did not remember what happened on the afternoon in question. Appellant testified in effect that he remembered being in his apartment or elsewhere up until about noon and going out to eat about that time and that he remembered nothing more until he was awakened in his room by the arresting officers that night.

[1, 2] The sole ground of appeal is that the judgment is contrary to the law and the evidence. Appellant contends that the evidence fails to show satisfactorily that he touched the prosecutrix and in that connection attempts to stress certain testimony of the prosecutrix as to the distance she stood from appellant when the acts in question were said to have been committed, which testimony, appellant argues, is "potent evidence that in truth and in fact she was not touched." There is, however, testimony on the part of prosecutrix of equal or of even greater potency that she was in very close proximity to appellant when the alleged acts were committed. The question was one for the determination of the trial court in judging the facts of the case. It is not necessary to decide here whether the crime denounced by section 288 of the Penal Code is complete without any actual physical contact. In considering the evidence of the removal or pulling down of the child's underclothing by appellant reference may be had to People v. Lanham, 137 Cal.App. 737, at page 740, 31 P.2d 410, at page 412, wherein it is stated: "The testimony shows that the defendant placed his hands under the clothing of the child and removed from her person the panties she was wearing. It is common knowledge and common experience to conclude that in removing the panties of the child the hands of the one removing the panties would necessarily and undoubtedly come in contact with the body of the child so outraged." Appellant alludes to inconsistencies in the testimony of the prosecutrix. The record reveals that the prosecutrix was carefully examined not only by the prosecutor and defense counsel but also by the court. The child was nervous and upset by her ordeal upon the witness stand; and many of the claimed inconsistencies occurred under cross examination. None of the instances to which appellant alludes serves to do more than to present a question of fact for the determination of the trial court and the testimony as a whole was ample to support the judgment of the court.

The facts in People v. McCullough, 38 Cal.App.2d 387, 101 P.2d 531, cited by appellant, are markedly distinct from those presented here. In that case the child was very uncertain as to the time and place when the acts complained of occurred, and was also uncertain as to the manner in which the crime was accomplished. There was no such uncertainty in the testimony of the prosecutrix in the present case. Any discrepancy in the child's judgment of the measurement of a relatively small space was not of such a nature or so great as to prevent credence being given to the rest of her testimony. Furthermore, in the McCullough case, supra, the defense was an alibi of a substantial character. In the present case the only defense was a lapse of memory brought on through alleged drunkenness. It should be stated that the arresting officer at the trial gave his opinion that at the time of his arrest appellant did not appear intoxicated, though his breath smelt of what the arresting officer considered to be beer. The facts in People v. Harden, 24 Cal.App. 522, 141 P. 1075, also cited by appellant, are equally distinguishable from those of the present case. The appeal is devoid of merit.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

YORK, P. J., and WHITE, J., concur.

61 Cal.App.2d 159

ANDERSON v. FREIS.

FREIS v. LINNEY.

Civ. 12484.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1943.

Hearing Denied Dec. 20, 1943.

1. Automobiles ⇐242(3)

In action for injuries sustained in automobile collision, plaintiff's prima facie showing of defendant's negligence by uncontradicted evidence that defendant's automobile crossed to wrong side of road and there collided with plaintiff's automobile cast on defendant burden of showing that he drove his automobile across center of road without negligence.

2. Automobiles ⇐245(13)

In action for injuries sustained in collision between automobiles driven by plaintiff and defendant, who filed cross-complaint against driver of third automobile, defendant's evidence that collision was caused by previous collision, due to cross-defendant's negligence, between defendant's and cross-defendant's automobiles, *held* insufficient, as matter of law, to overcome plaintiff's prima facie showing of defendant's negligence in driving automobile onto wrong side of road.

3. Appeal and error ⇐981

Newly discovered evidence, merely tending to impeach testimony of appellee's witness in trial court, is insufficient basis for review of such court's order denying appellant's motion for new trial.

4. Automobiles ⇐246(20)
Trial ⇐296(3)

In action for injuries sustained in automobile collision, instruction that it is motorist's duty to keep his automobile always under control, so as to avoid collisions with others using public highway, was erroneous as reasonably susceptible of construction as placing on motorist absolute duty to avoid collisions, but not prejudicial to defendant, in view of instructions on negligence, burden of proof, and proximate cause.

5. Appeal and error ⇐216(2)

In action for injuries sustained in automobile collision, defendant, on appeal from judgment on verdict for plaintiff, may not complain of correct instruction as to plaintiff's right to assume that other users of highway, including defendant, would obey law and exercise ordinary care, on ground that such instruction singled out plaintiff as sole recipient of its benefit and defendant as only victim of its penalty, in absence of request by defendant for similar instruction respecting his rights.

6. Appeal and error ⇐1066

In action for injuries sustained in collision between automobiles driven by plaintiff and defendant, who filed cross-complaint against driver of third automobile, instructions on damages, covering generally damages alleged by both plaintiff and defendant and commencing with instruction authorizing award of such damages to plaintiff or cross-complainant as would compensate him for pecuniary damages proved to have been sustained by him, were not prejudicial to defendant as covering elements of damage not proved by plaintiff.

7. Trial ⇐217

In action for injuries sustained in automobile collision, instruction that jury must entirely discard from their minds any impression that any insurance company was interested in case was not erroneous even if plaintiff, rather than defendant, requested such instruction.

8. Trial ⇐296(8)

In personal injury suit, refusal of defendant's requested formula instructions, specifying conditions under which jury should return verdict for defendant, was not error, in view of given instructions sufficiently covering defendant's theory of case.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by O. G. Anderson against Charles F. Freis for injuries sustained in a collision between automobiles driven by plaintiff and defendant, who filed a cross-complaint against James F. Linney for injuries sustained by defendant in such collision. Judgment for plaintiff and cross-defendant, and defendant appeals.

Affirmed.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for appellant.

James R. Agee and J. Adrian Palmquist, both of Oakland, for respondent Anderson.

Raymond A. Ferrario, of Oakland, for respondent Linney.

SPENCE, Justice.

Plaintiff brought this action against defendant Freis seeking damages for injuries sustained when the automobile driven by defendant Freis crossed the double white line in the center of the highway on the San Francisco Bay Bridge and crashed head-on into the automobile driven by plaintiff. Defendant Freis filed an answer denying any negligence and alleging that the collision was due solely to the negligence of one Linney. Defendant Freis also filed a cross-complaint bringing in Linney as a cross-defendant and seeking damages against said cross-defendant for the injuries sustained by defendant Freis. Upon a jury trial, a verdict upon the complaint was rendered in favor of plaintiff and against defendant Freis in the sum of $12,500 and a verdict upon the cross-complaint was rendered in favor of cross-defendant Linney and against defendant Freis. Judgment was entered accordingly and, after the denial of defendant Freis' motion for a new trial, defendant Freis appealed from said judgment.

The collision occurred at about 7 a. m. on September 20, 1941. Plaintiff was driving in a westerly direction from Oakland to San Francisco. Defendant Freis and cross-defendant Linney were driving in an easterly direction from San Francisco to Oakland. Plaintiff was at all times driving his car in the most southerly lane designated for westbound traffic, being the lane immediately north of the double white line in the center of the highway. There is a conflict in the evidence as to the exact courses taken by the cars of defendant Freis and cross-defendant Linney but all the evidence shows that immediately before the collision, defendant Freis' car crossed the double white line and collided with plaintiff's car in the lane in which plaintiff had been driving at all times. There was no claim made by any party that plaintiff had been negligent in any manner.

Plaintiff's case was presented upon the theory that the collision was caused solely by the negligence of defendant Freis. Said defendant's case was presented upon the theory that said defendant was free from negligence and that the collision was caused solely by the negligence of cross-defendant Linney. The general verdict in favor of plaintiff and against defendant Freis on the complaint necessarily implied a finding by the jury of negligence on the part of defendant Freis. But as plaintiff had not sued cross-defendant Linney and as the general verdict on the cross-complaint was in favor of cross-defendant Linney and against defendant Freis, it is impossible to determine therefrom whether the jury found that cross-defendant Linney was not negligent or that both defendant Freis and cross-defendant Linney were negligent.

[1, 2] Defendant Freis first contends that the evidence was insufficient to sustain the implied finding of negligence on his part. In support of this contention, defendant cites and relies upon certain language used in the opinion in Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220. We are of the opinion, however, that the record before us presents ample evidence to sustain said implied finding. Defendant concedes that plaintiff established a prima facie case of negligence on the part of defendant by the uncontradicted evidence that defendant's car crossed to the wrong side of the road and there collided with plaintiff's car. Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51; Parker v. Auschwitz, 7 Cal.App.2d 693, 47 P.2d 341; Trowbridge v. Briggs, 140 Cal.App. 554, 35 P.2d 426; 2 Cal.Juris. Ten-Year Supp. 308. But he refers to the testimony of certain witnesses and to a photograph showing a dent in the left rear fender of cross-defendant Linney's car claiming that said evidence was clear, positive and uncontradicted and that it established that a collision occurred between defendant's car and cross-defendant's car and that as a result of said collision, defendant's car "was impelled across the center of the highway and into the path of plaintiff's car." He argues that this evidence met the standard prescribed in Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868, and that it was "sufficient to fully meet and overcome as a matter of law the prima facie case."

The evidence to which defendant refers indicated quite clearly that there had been at least some contact between defendant's car and cross-complainant's car before the occurrence of the collision between defendant's car and plaintiff's car. But even if it be assumed that said evidence was clear, positive and uncontradicted and that it showed that such contact caused defendant's car to cross the center of the highway and to collide with plaintiff's car, such evidence was insufficient to meet the burden

cast upon defendant. Plaintiff's prima facie showing of negligence on the part of defendant cast upon defendant the burden of showing that he had driven his car across the center of the highway and on the wrong side of the road without negligence on his part. As was said in Trowbridge v. Briggs, 140 Cal.App. 554, at page 557, 35 P.2d 426, at page 428: "Herein such prima facie proof operated in law to cast the burden on appellants to explain that they drove their automobile to the wrong side of the highway without want of care." Defendant attempted to meet the burden thus cast upon him by presenting evidence which tended to show that defendant was not negligent and that the contact between defendant's car and cross-defendant's car was due solely to the negligence of the cross-defendant. But the evidence upon which defendant relies was contradicted in some of its material aspects by the witness Edwards, who was called by plaintiff, and by the witnesses Beckmann and Linney, who were called by defendant. For example, the evidence was conflicting as to which of said cars swerved toward the other and as to which of said cars was passing the other. Considering all of the evidence presented upon the vital issue of alleged negligence on the part of defendant, it cannot be said that such evidence was clear, positive and uncontradicted or that it was sufficient as a matter of law to overcome the prima facie case of negligence on defendant's part. On the contrary, we are of the opinion that the record presents a situation where the question of alleged negligence on the part of defendant was essentially a question of fact for the determination of the jury and that the implied finding of the jury that defendant was negligent is supported by substantial evidence.

[3] Defendant Freis further contends that the trial court abused its discretion in denying his motion for a new trial, which motion was made upon the ground of newly discovered evidence. The alleged newly discovered evidence consisted of a written statement made by the witness Edwards shortly after the accident occurred. Defendant claimed that said written statement was at variance in one particular with the testimony given by the witness upon the trial. We find no material variance between the written statement and the testimony of the witness and therefore find no abuse of discretion on the part of the trial court in denying the motion for a new trial but, in any event, it has been held that where the alleged newly discovered evidence merely tends to impeach the testimony of a witness of an adverse party it is "insufficient on appeal as the basis of review of a motion for a new trial." Waer v. Waer, 189 Cal. 178, 181, 207 P. 891, 892; see, also Hanton v. Pacific Electric R. Co., 178 Cal. 616, 174 P. 61; Smith v. Schwartz, 14 Cal.App.2d 160, 57 P.2d 1363; Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105, 148 P. 951; 20 Cal.Jur. 98.

Defendant Freis finally contends that the trial court committed prejudicial error in the giving and refusing of certain instructions.

[4] The trial court gave an instruction which read: "It is part of the duty of the operator of a motor vehicle to keep his automobile always under control so as to avoid collisions with other persons using the public highways. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and expect the presence of others." The first sentence of this instruction is criticized upon the ground that while the law places upon the operator of a vehicle the duty to use ordinary care at all times, the law does not place upon such operator an absolute duty, regardless of the amount of care exercised, to avoid collisions with others. We believe that the wording of the first sentence of the instruction may be justly criticized. While the same instruction was before the court in Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471, 472, the attack there was levelled at the "last part of the instruction". The facts of that case are not set out in detail in the opinion but it appears the collision between defendant's car and plaintiff's car occurred on a rainy night at the intersection of two heavily travelled highways in a residence district in Sacramento. The court held that the instruction "did not invade the province of the jury" saying that it demanded the "proper attitude" of an operator and that "The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that the correlative right of others may not be unnecessarily impaired or destroyed." The court further stated that "the instructions were full and accurate as to the doctrine of negligence."

Since the decision in Meyers v. Bradford, supra, similar instructions have been

attacked upon the ground which is the basis of defendant's criticism. In Hilton v. Carey, 41 Cal.App.2d 375, 106 P.2d 944, 946, where the substance but not the exact language of the challenged instruction is set forth in the opinion, the court said: "The rule as therein set forth does not, as argued by appellants, require a driver to exercise such control over his vehicle as to absolutely avoid all collisions. If there could be any doubt as to the validity of the instruction it was amply cured by other related instructions given." See also Butcher v. Thornhill, 14 Cal.App.2d 149, 58 P.2d 179; Schatte v. Maurice, 116 Cal. App. 161, 2 P.2d 489. And in Angelo v. Esau, 34 Cal.App.2d 130, 93 P.2d 205, 209, the court considered a criticism directed particularly at the first sentence of the instruction saying that it was a "plausible contention" that said sentence was tantamount to telling the jury that a driver must "at all times and under all circumstances avoid a collision of his car with another." The court discussed Meyers v. Bradford, supra, and then said, "While in its literal construction the language used in this instruction may be in some sort ambiguous, all the instructions given must, of course, be read together * * *", and that "* * * it is entirely clear that the proper construction of the language under consideration is that it is descriptive of the attitude which the law expects the driver of a motor vehicle to have, that is, the effort he is required to make to avoid collisions, and that it is not at all intended to suggest or state that he is always or necessarily responsible for results."

We have discussed this instruction at some length for the reason that despite the fact that it has been frequently attacked, the trial courts have continued to give it without changing its wording. Standing alone, the first sentence of the instruction may reasonably be construed as placing upon the operator of a vehicle the absolute duty to avoid collisions with others. All possibility of such construction could be obviated by changing the first sentence by the addition of the words "to use ordinary care" so that said first sentence would read: "It is part of the duty of the operator of a motor vehicle to use ordinary care to keep his automobile always under control so as to avoid collisions with other persons using the public highways." We believe that the making of such change would avoid the frequent attacks made upon said instruction in the appellate courts.

But here, as in the authorities cited, we find no prejudicial error in the giving of said instruction. The jury was fully instructed upon the subject of negligence. The trial court instructed the jury on the definition of negligence; that plaintiff affirmatively alleged in his complaint that defendant Freis negligently operated his automobile; that the "affirmative of the issues must be proved by a preponderance of the evidence"; that "the affirmative here is upon plaintiff * * * as to all affirmative allegations of the complaint"; and that in order to impose liability upon the defendant, "his negligence must have been the proximate cause of plaintiff's * * * injuries". Reading all of the instructions together, it appears impossible that the jury could have understood that there was any absolute duty on defendant to avoid a collision and it appears certain that the jury must have understood that in order to impose liability upon defendant, it must have been shown by a preponderance of the evidence that he failed in his duty to exercise ordinary care.

[5] The trial court also gave an instruction, the correctness of which is not challenged, on the right of plaintiff to assume that other users of the highway, including defendant, would obey the law and exercise ordinary care. The only objection made to the giving of said instruction is that "it singles out plaintiff as the sole recipient of its benefit and appellant as the only victim of its penalty." But defendant did not request any similar instruction with respect to defendant's rights and may not now complain because a correct instruction was given with respect to plaintiff's rights. This is particularly true in the present case as it was not alleged by any party that plaintiff had been negligent.

[6] The trial court also gave instructions on damages and defendant contends that the trial court committed prejudicial error therein. The alleged error consisted of giving instructions covering elements of damage upon which defendant claims there was no evidence or upon which defendant claims the evidence was lacking in figures so that the jury had no basis for computing plaintiff's loss. These elements included damage to plaintiff's car, damage by reason of loss of time and damage by reason of the

expense of medical and hospital care. We find no prejudicial error in the giving of the challenged instructions. Plaintiff was seeking redress against defendant Freis and, in turn, defendant Freis was seeking redress against cross-defendant Linney. The instructions on damages covered generally the damages which both plaintiff and defendant had alleged they had sustained. These instructions commenced with an instruction reading: "If you find that either the plaintiff or cross-complainant is entitled to recover, you may award him such damages, within the amounts claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused by the wrong complained of." Under the instructions, it cannot be assumed that the jury included in its award any sums for elements of damage which plaintiff had not proved that he had sustained.

[7] The trial court instructed the jurors to the effect that if they had gathered from any source the impression that any insurance company was interested in the case, they must entirely discard the same from their minds in arriving at a verdict. Defendant concedes that insurance had been mentioned in the voir dire examination and that the above mentioned instruction contained a correct statement of the law. Defendant complains that he did not request said instruction but that it was requested by plaintiff. The record does not disclose that plaintiff requested said instruction but, in any event, we find no error in the giving thereof under the circumstances.

[8] Defendant requested several formula instructions specifying in varying terms certain conditions under which the jury should return a verdict in favor of defendant. He now complains of the refusal of the trial court to give several of said requested instructions but we find no error in such refusal. As above indicated, the jury was fully instructed on the subject of negligence. In addition and by way of formula instructions, the trial court, at the request of defendant, instructed the jury as follows on defendant's theory that the negligence of cross-defendant Linney was the sole proximate cause:

"If the accident in question was caused solely and proximately by reason of the carelessness and negligence of the cross-defendant James F. Linney, your verdict will be against the plaintiff O. G. Anderson as to his complaint and in favor of Charles Freis on his cross-complaint and against the cross-defendant James F. Linney for such damages, if any, as you may find from a preponderance of the evidence that the cross-defendant (sic) Charles Freis sustained as a result of the accident.

"If you find from a preponderance of the evidence in this case that the cross-defendant James F. Linney carelessly and negligently operated his automobile at the time and place alleged in the cross-complaint of Charles Freis, you will award the cross-complainant Charles Freis such damages, if any, on said cross-complaint as he may have sustained by reason of said carelessness or negligence on the part of said cross-defendant, provided that he, the cross-complainant Charles Freis, was not contributorily negligent."

The given instructions sufficiently covered defendant's theory of the case and it was not necessary for the trial court to give the further formula instructions requested by defendant.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



61 Cal.App.2d 125

SEARS v. SCHWARTZ.

Civ. 13959.

District Court of Appeal, Second District, Division 3, California.

Oct. 25, 1943.

1. Appeal and error ⇐1011(1)

A finding of trial court on conflicting evidence will not be disturbed on appeal if there is substantial evidence to support the judgment.

2. Evidence ⇐588

A trier of facts may accept part and reject part of witness' testimony.

3. Husband and wife ⇐279(2)

Evidence warranted judgment refusing to rescind property settlement for di-

vorced husband's alleged breach in failing to maintain divorced wife as beneficiary of his life policy, on ground that he did not agree to keep wife as his sole beneficiary beyond the term of note executed by husband in wife's favor as part of the settlement.

4. Husband and wife ⇐278(5)

A husband's promise to secure wife's loan to business by keeping operative husband's life policy in which wife was the beneficiary was a valid consideration for property settlement executed before wife obtained divorce.

5. Husband and wife ⇐278(1)

A wife was not entitled to rescission of property settlement effected before she obtained divorce on ground that she did not have advice of counsel, where it was her fault and not that of her husband that wife was not fully advised by her counsel.

6. Husband and wife ⇐279(2)

Evidence sustained finding that property settlement executed before wife obtained divorce was not inequitable as to wife and did not constitute a constructive fraud upon her so as to justify rescission of the settlement.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Myrtle E. Sears against Charles Schwartz to rescind a property settlement entered into before plaintiff obtained a default decree of divorce from defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Chas. L. Nichols, of Los Angeles, for appellant.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1] A principle of law bars appellant from success on this appeal. It is expressed in Hoppe v. Robb, 1851, 1 Cal. 373, 374, in these words: "We have frequently held that we would not review the verdict of a jury upon a question of fact, where there was conflicting or contradictory evidence, upon which the verdict was based. The same rule applies to the finding of a Judge, to whom a question of fact is submitted, and upon which he has passed." Ninety years later we find the principle still in vogue. "A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment." Fewel & Dawes, Inc., v. Pratt, 1941, 17 Cal.2d 85, 89, 109 P.2d 650, 652.

This action was brought by the plaintiff, a Los Angeles school teacher, to rescind a property settlement entered into in December, 1934, two months before the plaintiff obtained a default decree of divorce from the defendant. By the settlement, the plaintiff surrendered her interest in the community property which consisted of a merchandising venture in the city of Glendale, entered into by the defendant in 1931, in return for which she was to, and did, receive a promissory note executed by the defendant, by which he bound himself to pay, in installments, the sum of $4,600, that being the sum which plaintiff claimed, and the defendant did not dispute, she had loaned him in the early days of his business. In addition, according to plaintiff's contention, the defendant agreed to keep in good standing during his lifetime a ten thousand dollar life insurance policy in which he was the assured and the plaintiff was named as beneficiary, and in which she was to continue to be named as the sole beneficiary. There is no dispute about the facts that the defendant paid off the note; that he kept the life insurance policy in good standing, with the plaintiff named as sole beneficiary, until May, 1940, but that then a new beneficiary was substituted for the plaintiff.

Plaintiff, in her complaint, took two positions: First, that the change of beneficiary was a breach of defendant's promise to keep her as the sole beneficiary of the policy, a breach which constituted a failure of the most substantial part of the consideration she was to receive for entering into the settlement; and second, that if there was no such promise, then the agreement as to her was so unfair and inequitable that it constituted a constructive fraud upon her. With respect to the latter position plaintiff now argues that her community interest in the business was quite valuable, as her husband knew, but she did not; that she did not have the benefit of the advice of counsel; that as the note did not constitute legal consideration, because it was only a promise to pay that to which she was already entitled, it followed that that

which she surrendered, by the agreement, greatly exceeded in value anything which she received.

Around the point of pivotal interest, the question of the terms of defendant's promise respecting the insurance policy, a sharp conflict appears in the evidence. We find the plaintiff's first statement on the subject to be in the equivocal language: "I told Charles; that I * * * wanted only one more thing, that I wanted him to keep his insurance policy in my favor for life, and he agreed to do that under certain circumstances, as far as the loan was concerned, he agreed to keep the policy in my name, and I give up all claim to the store under that agreement." Later on in her testimony she was more positive that the defendant had agreed to carry the policy permanently, although he did at first express a desire not to be bound beyond the term of the loan.

[2, 3] The defendant's testimony was quite positive that he never said that he would keep her as the beneficiary beyond the life of the loan. Indeed he stated that during the first two conversations, upon which the plaintiff relied, no mention was made of the insurance policy, but that about two weeks later the plaintiff told him that she wanted him to assign the policy to her so that he could not change the policy, because she wanted her note protected, to which he replied: "Well, that's an idea. I think that's a good idea. But I won't assign anything to you or to anyone else, but I will agree to keep this policy in force until I have finished paying you this $4600." The plaintiff expressed her satisfaction at this arrangement by saying: "That's perfectly all right, and that's all I wanted in the policy." Discharging the task which was peculiarly his, that of determining from conflicting evidence what the facts were, the trial court found that the defendant agreed to maintain plaintiff as sole beneficiary of the policy "so long as and until" the said note had been paid in full, but that he did not agree that he would not at any time thereafter change beneficiaries. In arriving at these conclusions the trial court was privileged to believe that the policy was discussed during the first two conversations, as the plaintiff testified, and at the same time to accept the defendant's version of what was said, and so of the agreement that was reached; for a trier of fact may accept part and reject part of the testimony of a witness. Whitechat v. Guyette, 1942, 19 Cal.2d 428, 435, 122 P.2d 47. It is a fact, therefore, settled for all purposes on this appeal, that the defendant did not agree to keep the plaintiff as his sole beneficiary beyond the term of the note.

This fact cuts the ground from under plaintiff's first position. The second has no better foundation. The evidence shows without conflict tha the matter of a settlement was first broached by the appellant. According to her own story she made the offer to give up such interest as she had in her husband's business if he would give her the note for $4,600 and keep the insurance policy alive for her benefit. His testimony was positive that the conversations which resulted in the property settlement were opened by her with the presentation of a note for $4,600 which she had had an attorney in San Diego County prepare. Plaintiff did not object to the principal that the note called for, but objected to its six per cent interest and to some other of its terms. An understanding was reached, following which she went to the San Diego attorney to have a new note written. He prepared one, and mailed it to her. She presented it to the defendant at their second conversation respecting the settlement and the defendant signed it.

In order to obtain her divorce the plaintiff engaged a Los Angeles lawyer. In her complaint she alleged that there was no community property. She mentioned to her San Diego attorney and to the attorney who drew her divorce complaint that there had been a property settlement, but, according to her statement, neither asked for nor received from either of them any legal advice about it, nor did she discuss its details with them.

Respecting plaintiff's community interest in defendant's business, which she voluntarily exchanged for the note and insurance protection, the trial court was entitled to conclude, as it did, that it was not of great monetary value and that its value was not unknown to the plaintiff. We refrain from noting all the evidence on the subject. Referring, doubtless, to the days before December, 1934, these answers of the plaintiff to the questions which elicited them are pertinent:

"Q. You were always discussing money matters with Mr. Schwartz? A. Well, be-

cause he was always getting money. I had to.

"Q. And you were rather cognizant all the way along as to what he was putting into the business and how the business was progressing? A. I was interested in it, yes."

According to the defendant, he operated at a loss each year until 1933, when there was a profit of $129.31, followed the next year by a profit of $922.05. The net value of the business, in December, 1934, counting the $4,600 note as a liability, was minus $2,850, the defendant testified. In 1937, in order to let the defendant have a badly needed vacation, she took a power of attorney and ran his business "for awhile."

[4-6] The facts we have related plainly do not justify plaintiff's attempt, made not earlier than 1941, to rescind her agreement and to reassert that she has a community interest in defendant's store. The bargain made was largely her own proposal. The promise, faithfully kept, to secure her loan by keeping operative the insurance policy in which she was the beneficiary, was not only valid consideration, as an abstract matter of law, but, as the trial court could see, it was fair consideration, all that plaintiff sought. To argue that the agreement may be avoided because she did not have the advice of counsel has two possible answers: First, the trial court may well have disbelieved plaintiff's story that she told her two lawyers of the property settlement, but did not discuss its terms with them. Second, if her story is true, it was her fault, not that of her husband, that she was not fully advised by her counsel. There is no rule of law that requires one, in a confidential relation, not only to take the trusting one to a legal fountain but also to make her drink. Lastly, if plaintiff had been overreached, as it does not appear that she was, in that she had given up a more valuable interest in the store than she suspected, she must have discovered that she had made a bad bargain when she ran the store in 1937. The excuse offered for her failure to rescind until some four (or five) years later is this: "So long as she was beneficiary of the policy, she had no right of action." To the last, appellant, although having given lip service to the power of the court to find the facts contrary to her testimony, in view of the contradictory testimony of the defendant, nevertheless disparagingly characterizes that testimony as his ipse dixit, and argues her case on the theory that her ipsa dixit prevails. It did not and does not.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



61 Cal.App.2d 188

In re THOMPSON'S ESTATE.

KELLY v. VAN SCOY.

Civ. 14237.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1943.

Courts ⇐202(5)

Under statutory provision setting forth matter in probate proceedings from which appeal might be taken, appeal from order granting partition and appointing referee to make partition was dismissed as not within the statute. Probate Code, § 1240.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Proceeding in the matter of the estate of Elva Mathews Thompson, deceased, between Blanche Kelly and Guy Van Scoy. From an adverse order Kelly appeals.

Appeal dismissed.

Charles F. Gerard and Walter J. Fourt, both of Ventura, for respondent.

William E. Ginder, of Santa Paula, and Frank C. Shoemaker, of Los Angeles, for appellant.

PER CURIAM.

In her notice of appeal appellant states that the "appeal is made from the findings of fact and conclusions of law filed December 18, 1942, and the order granting petition for partition and appointing referee to make partition filed December 18, 1942." The matters from which an appeal may be taken in probate proceedings are set forth in section 1240 of the Probate Code. The

matters from which appellant has attempted to appeal are not included therein. Respondent's motion to dismiss the appeal must be granted.

The appeal is dismissed.



61 Cal.App.2d 204

WOODSON et al. v. EVERSON.

No. 12413.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1943.

1. Automobiles ⇐244(20)

Evidence sustained finding that driver of automobile, which left highway and rolled down embankment when driver was blinded by headlights of approaching automobile while driving at high speed at night on four-lane paved highway with which he was unfamiliar, was not guilty of "willful misconduct" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Automobiles ⇐181(1)

"Willful misconduct", within automobile guest statute, implies at least the intentional doing of something either with a knowledge that serious injury is a probable as distinguished from a possible result or the intentional doing of an act with a wanton and reckless disregard of its possible result, and does not mean either the sort of misconduct involved in any negligence or the mere intent to do the act which constitutes negligence. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles ⇐181(1)

"Willful misconduct" within meaning of automobile guest statute involves deliberate, intentional, or wanton conduct in doing or omitting to perform with knowledge or expectation of likelihood of resulting danger and means something more than negligence however gross. Vehicle Code, § 403, St.1935, p. 154.

"Willfulness" necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences, and "misconduct" is defined as wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance.

See Words and Phrases, Permanent Edition, for all other definitions of "Willfulness" and "Misconduct".

4. Automobiles ⇐181(1)

Mere failure to perform a statutory duty amounts only to simple "negligence" and is not in itself "willful misconduct" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

5. Automobiles ⇐181(1)

A motorist must have actual knowledge, or its equivalent, both of peril to be apprehended from his failure to act and that injury to a guest will be a probable result, coupled with conscious failure to act to end of averting injury, to be guilty of "willful misconduct" within automobile guest statute. Vehicle Code, § 403, St. 1935, p. 154.

6. Automobiles ⇐181(1)

"Gross negligence" is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while "willful misconduct" within automobile guest statute involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence".

7. Appeal and error ⇐1010(1)

District Court of Appeal could not hold as a matter of law that motorist was guilty of willful misconduct within automobile guest statute contrary to trial court's findings, where trial court's findings were not lacking in evidentiary support. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Joel Woodson and others against Beverly Everson to recover damages for personal injuries sustained by plaintiffs while riding as guests in defendant's automobile. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Charles H. Epperson, of Stockton, for appellants.

Honey & Mayall, of Stockton, for respondent.

KNIGHT, Justice.

Plaintiffs appeal from an adverse judgment in an action to recover damages for personal injuries sustained by them while riding as guests in defendant's automobile. The cause was tried by the court without a jury, and the issue involved was whether defendant was guilty of wilful misconduct. The trial court found against plaintiffs on that issue, and as sole ground for reversal they contend that the evidence established as a matter of law that the defendant was guilty of wilful misconduct and that therefore they were entitled to recover damages under the "guest law." Sec. 403, Vehicle Code, St.1935, p. 154.

The accident occurred about 11 o'clock at night on April 12, 1941, on the main Los Gatos-Santa Cruz highway. The defendant Everson was driving the car, and the other occupants thereof were the plaintiffs. One of the plaintiffs, Miss Nelson, was riding in front with the defendant, and the other two, Woodson and Miss Egan (who subsequent to the filing of the action and prior to trial became Mrs. Woodson), occupied the rear seat. They were all residents of Stockton, and were en route to Los Angeles, but were going by way of Santa Cruz to attend a dance. They had been friends for several months, and on previous occasions had taken social trips together, around Stockton and Sacramento. On the night of the accident they left Stockton about 7:30 o'clock in the evening, stopped once in Livermore and again outside of San Jose, and the accident happened when they reached a point about half way between Los Gatos and Santa Cruz. The car left the road at a curve, turned over and rolled down the bank for approximately 200 feet, and all three plaintiffs were injured. The highway has four lanes, is well surfaced, and has broad, sweeping curves; and it was a clear, dry, moonlight night. There had been several slides along the highway, which were marked by warning signs and red lanterns, and up to the point of the accident they had passed six or more of them. Due to the injuries Miss Nelson received she was unable to tell what happened, and Woodson stated that he was not watching the road at the time the accident occurred. The defendant claimed that the accident was due to the fact that he had been blinded by the headlights of a car approaching in the opposite direction. In this regard he testified that he had not driven over the highway before, and that he was driving in the center lane to the right of the double line; that he saw a car approaching a block away, coming with bright headlights, so he "started pulling to the right * * * to pull away from it," and that as the oncoming car came closer the lights thereof blinded him; that immediately his car hit loose gravel, turned over and went over the bank on the right side; that he had been watching the white lines, but as the car approached from the opposite direction he watched the car lights and could not see the white lines because the lights blinded him; that when he went over the bank he was travelling 45 or 50 miles an hour. Miss Egan testified that at the time of the accident defendant was travelling at least 60 miles an hour; that she was watching the road but did not remember any particular car approaching with headlights especially bright; that it seemed to her that they "just went off into space and started to roll."

During the early part of the trip, over the Altamount Pass and on the Mission San Jose grade, the defendant drove at an average speed of 55 miles an hour, without protest from the plaintiffs, and the same is true of prior trips made by the parties. However, testimony was given by two of the plaintiffs concerning two incidents they claimed occurred on the road between San Jose and Los Gatos, along which defendant travelled about 55 miles an hour. It is a two lane highway, and two of the plaintiffs testified that at one point defendant accelerated his speed and attempted to pass another car travelling in the same direction, but on account of oncoming traffic was unable to do so; that thereupon he applied the brakes suddenly and with full force, and swung back into the line, barely avoiding a collision with the approaching traffic; that at that time Woodson asked defendant to slow down. Later on, while

making a right angle turn "fairly fast" defendant "slammed" on the brakes and the rear end of the car skidded, almost sideswiping an oncoming truck. Woodson and Miss Egan testified that after this incident happened they asked defendant if he would let Woodson drive, but that the only response made by defendant was that he "guessed" he made that curve too fast; that he made no comment as to Woodson driving. Defendant denied any knowledge of the first incident, and as to the second he testified that after it happened Miss Egan remarked that they were going too fast around the curve; that he replied "I guess so" but that he did not remember anything being said about Woodson driving.

[1, 2] We are of the opinion that the conclusion reached by the trial court that the facts failed to establish a case of wilful misconduct under the guest law is not at variance with the settled law of this state, as declared by the decisions of the reviewing courts. "The most acceptable definition of willful misconduct [as that term is employed in Section 403 of the Vehicle Code]," says the Supreme Court in People v. Young, 20 Cal.2d 832, 129 P.2d 353, 355, "is stated in Howard v. Howard, 132 Cal. App. 124, 129, 22 P.2d 279, 281, as follows:

"'But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.' See, also, Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447; Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430."

[3-5] In Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447, 448, which will be noted is another late case, the court cited and quoted from earlier decisions, among them being Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430, and the court there said: "In Parsons v. Fuller, supra, 8 Cal.2d at page 468, 66 P.2d page 432, this court approved the following definitions of wilful misconduct:

"'"Wilful misconduct" is defined in the case of Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, * * * as follows:

"'"Wilful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, 512; Olson v. Gay, 135 Cal.App. 726, 27 P.2d 922; Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279. Webster's New International Dictionary, p. 1379, defines misconduct as 'wrong or improper conduct; bad behavior; unlawful behavior or conduct, malfeasance.' 40 C.J. p. 1221. Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. In Helme v. Great Western Milling Co., supra, it is said: '"Wilful misconduct" means something different from and more than negligence, however gross. The term "serious and wilful misconduct" is described by the Supreme Judicial Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." Burns' Case, 218 Mass. 8, 105 N.E. 601, Ann.Cas. 1916A, 787. The mere failure to perform a statutory duty is not alone, willful misconduct. It amounts only to simple negligence. To constitute "wilful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792.'"' To this must be added the element included in the definition approved in Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, and cases following it, of actual knowledge or its equivalent that an injury to a guest will be a probable result."

[6] In Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, the court also cites and quotes from the same earlier decisions. In doing so the court says: "The case of Howard v. Howard, 132 Cal.App. 124, 128, 22 P.2d 279, 281, after defining gross neg-

ligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, declares that: '"The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

"'While the time between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be wilful. While the word "wilful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.'

"Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence, for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of willful misconduct. As has been repeatedly declared, '"wilful misconduct" means something more than negligence—more, even, than gross negligence.' North Pac. S. S. Co. v. Industrial Acc. Comm. 174 Cal. 500, 502, 163 P. 910, 911; Kastel v. Stieber, 215 Cal. 37, 47, 8 P.2d 474."

[7] In deciding the present case the trial judge expressed his conclusions in a letter addressed to counsel for the respective parties, a copy of which is presented as an appendix to appellants' opening brief. As will be seen therefrom, the trial judge was doubtless of the opinion that the evidence would justify a finding of negligence, but not of wilful misconduct. In part he said: "It appears that the defendant in the above entitled case was guilty of negligence but not wilful misconduct. Although the highway was wide, his speed was dangerous, but it cannot be said that he was wanton or that he was utterly indifferent to the consequence to himself or his guests. There was no suggestion in the evidence that the driver had been drinking or that he was guilty of an act sometimes referred to as 'showing off.' He merely took a chance in the belief that he was capable of negotiating the turns in the highway, and his failure so to do must be attributed to carelessness." In view of the facts hereinabove narrated, it cannot be said that the trial court's conclusions are wanting in evidentiary support, and that being so this court would be wholly unwarranted in holding as a matter of law, contrary to the trial court's findings, that defendant was guilty of wilful misconduct.

Plaintiffs contend in effect that it appears from the views expressed by the trial judge in his letter that in deciding the issue of wilful misconduct he took into account only the matter of the speed at which defendant was operating his car at the time of the accident, and overlooked "defendant's failure to watch the edge of the road, his disregard of the dangerous condition of the highway and the amount of the traffic, his failure to yield the wheel to Woodson upon the unanimous vote and demand of his guests." It will be noted, however, from reading the entire letter that the trial judge gave careful consideration to all elements which might have had any tendency to establish wilful misconduct. In answer to the specific elements mentioned by plaintiffs it may be

pointed out that according to defendant's explanation of the cause of the accident, his failure to watch the edge of the road at the moment thereof was because he was blinded by the bright headlights of a car approaching in the opposite direction. Ir those circumstances, and since he was not familiar with the highway, he was doubtless guilty of negligence in failing to reduce his speed upon observing the approach of the other car; but as already pointed out, even gross carelessness does not of itself constitute wilful misconduct. Nor can it be said that the evidence shows that the highway was in a dangerous condition. It is true, there had been several slides, but admittedly the presence thereof had nothing whatever to do with the cause of the accident. Furthermore, fairly construed the evidence does not show that any demand was made upon the defendant that he let Woodson drive the car. According to the testimony given by two of the plaintiffs it had been so suggested, but this occurred between San Jose and Los Gatos, which was some time before the party started over the broad, four lane highway running from Los Gatos to Santa Cruz. Therefore in the final analysis it would appear that the accident was caused by the defendant's carelessness in driving his car at an excessive rate of speed, at night, over a highway with which he was not familiar, and in failing to reduce his speed upon observing the approach of the car with the blinding lights.

An examination of the cases cited and relied on by plaintiffs in support of the appeal shows that they are obviously not here controlling. In Marchi v. Virone, 42 Cal.App.2d 124, 108 P.2d 469, the appeal was from a judgment of nonsuit, and the facts of the case were entirely different from those here presented. There the accident happened within the city limits of Sacramento, in a 20 mile an hour zone, and the defendant was travelling 55 to 60 miles an hour on a wet, slippery street. In reversing the judgment of nonsuit it was held that the evidence was such as would have supported a finding of wilful misconduct and that therefore the issue should have been submitted to the determination of the jury. In Rawlins v. Lory, 44 Cal.App.2d 20, 111 P.2d 973, there was evidence not only of excessive speeding, but of "skylarking," and a knowledge of the absence of any brakes. The trial court found from all the facts that there was wilful misconduct, and in affirming the judgment the reviewing court merely held that the evidence was sufficient to support the judgment. In Van Fleet v. Heyler, 51 Cal. App.2d 719, 125 P.2d 586, the plaintiffs, as here, were the appealing parties, but they did not contend, as do these plaintiffs, that as a matter of law the evidence established a case of wilful misconduct. Their whole claim of error was directed against the instructions to the jury, and the defendant contended that even though the instructions were erroneous they were not prejudicial for the reason that the evidence wholly failed to establish a case of wilful misconduct. On the appeal it was held that the evidence would have been legally sufficient to support a finding of wilful misconduct if the jury had seen fit so to find; that therefore the instructions being erroneous were prejudicial; and the reversal was placed on that ground. Moreover, as said by the court in Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, 174, "Wilful misconduct depends upon the facts of a particular case," and a comparison of the facts of the Van Fleet case with those here presented shows that they are essentially different.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice (concurring).

I concur, but do so on the sole ground that the evidence, and the reasonable inferences therefrom, support the finding that it is not true that defendant was guilty of wilful misconduct. I disagree with the majority opinion insofar as it holds or implies that a contrary finding would not be supported by the evidence. I am of the opinion that a finding of wilful misconduct, had such a finding been made, would have been amply supported by the record. Under the rules laid down in the many cases cited in the majority opinion, if the defendant is guilty of performing an intentional act with a wanton and reckless disregard of its possible result, he is guilty of wilful misconduct. On the other hand, if the act was performed negligently, wilful misconduct does not exist. In the present case the evidence, as fully recounted in the majority opinion, and the reasonable inferences therefrom, support either conclusion. The trial court, in the exercise of its proper fact finding powers, weighed the evi-

dence and found in favor of defendant. In my opinion, the case presents nothing more than a situation where the evidence, and the reasonable inferences therefrom, are in conflict. That being so, the finding of the trial court is conclusive on this court.



61 Cal.App.2d 168

Ex parte SCHENK.

Cr. 1831.

District Court of Appeal, Third District, California.

Oct. 27, 1943.

1. Habeas corpus ⇐30(2)

Where it appeared that information, under which defendant was adjudged an habitual criminal, alleged prior conviction but failed to allege that terms were served therefor, but minutes of court sufficiently disclosed that proof of prior terms served related to prior crimes alleged in information, and prisoner did not deny having served prior terms, failure of informations to allege service of such prior terms of imprisonment did not authorize prisoner's discharge by habeas corpus. Const. art. 6, § 4½.

2. Criminal law ⇐1202(6)

Where prisoner was convicted of robbery and adjudged an habitual criminal in 1936, trial court's attempted amendment of judgment in 1941 by striking therefrom the portion declaring prisoner an habitual criminal was ineffective in view of statute limiting time within which such amendments may be made to 60 days after actual commencement of imprisonment. Pen. Code, § 644, as amended by St.1935, p. 1699.

3. Criminal law ⇐991(2)

Where prisoner was sentenced in 1936, that portion of judgment purporting to sentence prisoner to life, and providing that he should not be eligible for parole until he had served 12 years, was in excess of power of court, as invasion of authority of state board of prison directors, but such portion of judgment could be dealt with as surplusage and disregarded by state board in fixing term of prisoner's imprisonment if judgment was otherwise sufficient. Pen. Code, § 1168, as amended by St.1935, p. 1700.

4. Criminal law ⇐1202(6)

A judgment which, when surplusage was disregarded, recited that defendant was duly convicted of robbery, first degree, and three prior convictions of felony, and that defendant was an habitual criminal to be imprisoned in state prison and that sentence should run consecutively with sentences imposed in certain other causes, was not void for uncertainty or as invading province of state board of prison directors in determining length of sentence. Pen. Code, § 1168, as amended by St.1935, p. 1700.

5. Criminal law ⇐1210

Where defendant was convicted of several felonies, it was within power of court to provide that defendant's sentences should run consecutively. Pen.Code, § 669.

6. Habeas corpus ⇐111(1)

Where defendant was found to be an habitual criminal and as such subject to imprisonment for life and it further appeared that defendant had not served minimum sentence under each of four crimes of which he was convicted, and board of prison terms and paroles had not fixed his term of imprisonment, defendant was not entitled to discharge on habeas corpus. Pen.Code, § 644.

Proceedings in the matter of the application of Robert Schenk for a writ of habeas corpus, opposed by Clyde I. Plummer, Warden of the California State Prison at Folsom.

Petition denied and writ discharged.

Robert Schenk, in pro. per., and A. J. Hennessy, of San Francisco, for petitioner.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner alleges that he is unlawfully imprisoned and restrained of his liberty by the warden of the California state prison, that he has served his legal and lawful term of imprisonment without benefit of good time credits, and that the judgment-commitments held by said warden are

void for uncertainty. He further alleges that on October 28, 1936, he was charged in four informations filed in the Superior Court of the City and County of San Francisco with four separate offenses, two being robbery, one assault with a deadly weapon, and the other a violation of section 2, ch. 339, of the Statutes of 1923 (gun law); that the informations also charged certain prior felonies, but did not allege that defendant had served terms of imprisonment in penal institutions therefor; that on arraignment he admitted having suffered three prior convictions of felony, but pleaded not guilty to the charges in the informations; that after trial he was found guilty as charged, and that judgment pronounced on the first charge of robbery was that defendant be adjudged an habitual criminal, that he be punished by imprisonment in the State prison for life and that he not be eligible for release on parole until he had served a minimum of twelve years, said sentence to run consecutively with sentences imposed on the other three charges; that judgments on the second robbery charge and the assault charge were the same as that on the first robbery charge, and that judgment on the gun law charge was that he be imprisoned in the state prison, said sentence to run consecutively with sentences on the other three charges, but this latter judgment did not adjudge him an habitual criminal; that in 1941 he filed a motion in the trial court to annul and vacate the habitual criminal adjudication in the foregoing judgments, and on September 11, 1941, the trial court made and entered an order which recited that the prior convictions in the informations had been improperly pleaded, and which ordered that the judgment and sentences in said actions be modified "by striking therefrom the portion thereof declaring said Robert Schenk an habitual criminal," but that said judgments in all other respects remain unchanged.

A writ of habeas corpus having issued, respondent, the warden of the state prison, produced the prisoner in court, and filed an answer and return to the writ, denying that petitioner's imprisonment is illegal, and attaching to said return as a part thereof the minutes of the trial court showing that at the time of the pronouncing of sentence upon Schenk, *proof* was made that he had served terms of imprisonment on his prior convictions.

It is the contention of petitioner that the informations in which he was charged with robbery and assault with a deadly weapon were insufficient as a basis for adjudging him an habitual criminal, in that they did not charge that he had served terms of imprisonment on said prior convictions; that the trial court had no power to fix the term of imprisonment, as jurisdiction so to do was vested in the Board of Prison Directors; that in sentencing him to serve consecutive sentences the court violated section 669 of the Penal Code; and that the sentences, except that under the gun law, are void for uncertainty.

Respondent contends that since *proof* was made that defendant had served terms of imprisonment under his prior convictions, the failure to allege such service in the informations does not render the sentences imposed invalid; that defendant was properly sentenced as an habitual criminal; that the attempted modification of the judgments by the trial court was in excess of its jurisdiction and its order modifying them was invalid and can be ignored; and that if the trial court was without power to fix the term of defendant's imprisonment or provide that he should not be released on parole until he had served a minimum of twelve years, such portion of the judgments can be considered as surplusage without invalidating the judgments.

In support of his contention that the portion of the judgments adjudging him an habitual criminal are invalid because of the failure of the informations to allege that he had served terms of imprisonment on the alleged prior convictions, petitioner cites and relies upon People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748, In re Boatwright, 216 Cal. 677, 15 P.2d 755, and People v. Dawson, 210 Cal. 366, 292 P. 267. He alleges that he admitted the prior convictions, but only as charged in the informations. He does not contend that he did not serve terms thereon, nor does he allege that proof was not made in the trial court as to such imprisonment.

While in People v. Murray, supra, there is language which might be construed as requiring that service of terms of imprisonment on prior convictions must be both alleged and proven, in that case there was neither allegation nor proof. The court said at page 218 of 42 Cal.App.2d, at page 753 of 108 P.2d: "* * * the record does not show that any evidence was offered to

prove that appellant served terms of imprisonment for any of said prior convictions nor that he admitted having done so; nor does the judgment contain any finding to that effect; therefore, under the doctrine of the cases above cited, unless it appears that the informations contain appropriate affirmative allegations that as a result of the prior convictions of robbery and burglary appellant served terms of imprisonment, the adjudication that he is an habitual criminal cannot be sustained." The inference from the foregoing is that had there been proof in that case that the prior sentences had been served, that would have been deemed sufficient.

In the Boatwright case, where the information did not allege that the petitioner had served time upon each of the prior convictions charged therein, the court said that section 969 of the Penal Code did not make such an allegation an essential part of the pleading, and added, 216 Cal. at page 681, 15 P.2d at page 756:

"It was essential, however, that *proof* of service under said prior convictions in a penal institution be shown, in order to give the court jurisdiction to adjudge the defendant an habitual criminal. At least three felonies having been alleged against petitioner, for each of which he admitted, before the pronouncing of judgment, that he had served a term in a penal institution, as required by section 667 of said Penal Code, as it stood at the time of conviction, we are of the view that the fact that the information was silent on this subject would not entitle him to his discharge. It may be observed that the better practice would be to allege service of time under said prior convictions, but inasmuch as the petitioner admitted before the court pronounced its sentence upon him that he had served a term in a penal institution upon three of said prior convictions, we are at a loss to understand how he could have suffered any prejudice by a failure of the information to contain the matter which was necessary to give the court jurisdiction to adjudge him to be an habitual criminal.

"Section 4½, article 6, of the Constitution provides: 'No judgment shall be set aside, or new trial granted, in any case, * * * for an error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" (Italics ours.)

In People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223, the information did not allege that defendant had served terms of imprisonment on prior felonies charged therein, but the court said that since the informations complied with the provisions of Section 969 of the Penal Code, they were not void merely because the service of terms in connection with the prior convictions was not alleged therein. It held, however, that it was necessary that the fact that terms had been served should be established *either by evidence or by the admission of defendant* before judgment was pronounced; and as the record there failed to show either admissions or proof, the cause was remanded for a new trial and the production of such proof.

Again, in People v. Spalis, 56 Cal.App.2d 869, 133 P.2d 679, the information did not allege that defendant had served terms of imprisonment on prior convictions alleged therein; defendant denied said prior convictions, but proof of same was made, and the jury found that he had suffered the three priors as charged. No appeal was taken, and some ten years later defendant moved to set aside the judgment, contending that the trial court had no jurisdiction to adjudicate him an habitual criminal in the absence of an allegation that he had served terms of imprisonment on said prior convictions. The court said that in 1931, at the time of defendant's sentence, it was not necessary under the law to allege, prove or find, under Section 644 of the Penal Code, that a defendant had served terms on the charged priors in order to adjudicate him an habitual criminal. In re McConnell, 5 Cal.2d 436, 55 P.2d 205. It also said, 56 Cal.App.2d at pages 873, 874, 133 P.2d at page 682: "If it be assumed that since the 1931 amendment to section 644 of the Penal Code it is necessary to allege and prove that separate terms were served on the prior convictions, it is well settled that an information that is deficient in this respect can be cured by evidence of the fact, or by the admission of the defendant. People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Nicholson, 34 Cal. App.2d 327, 93 P.2d 223. Although the reporter's transcript of the original trial was not produced, at the hearing on the present motion the district attorney read into the record a portion of the minutes of the main

trial. Those minutes showed that the state had introduced into evidence three certified copies of commitments against defendant, together with his fingerprints, photographs, and Bertillion cards. Those commitments showed that defendant had served one term in San Quentin and two terms in Folsom. The record on the present appeal does not show any direct connection between those commitments and the priors charged in the information. Even if this evidence did not show service of terms on the priors, and assuming such proof was jurisdictional, it must be remembered that the burden of proof on the present motion was on defendant. Through no fault of his own, but equally through no fault of the prosecuting officials, he has been forced to appeal on a transcript of what amounts to a judgment roll. Under such circumstances, it is the law that in support of the judgment, and in the absence of a contrary showing, this court must presume that evidence was introduced or defendant admitted the service of time on the priors. People v. McGee, 24 Cal.App.2d 391, 75 P. 2d 533." Petition for hearing in the Supreme Court was denied in the foregoing case.

[1] In the case before us the minutes of the court sufficiently show that the prior terms served were for the prior crimes alleged in the informations; and upon the authority of the cases above cited, and in view of Section 4½ of Article VI of the Constitution, we do not believe that the failure of the informations to allege the service of terms of imprisonment on such prior convictions resulted in a miscarriage of justice, or justifies petitioner's discharge from custody.

[2] As to petitioner's contention that the amendment of his sentences as made by the trial court when it struck out the portions thereof adjudging him an habitual criminal rendered all judgments but that upon the gun law charge void for uncertainty, and respondent's contention that the trial court's attempted amendment was ineffective and should be disregarded, the latter contention must be sustained.

On October 28, 1936, when petitioner was sentenced, section 644 of the Penal Code, as amended in 1935 (Stats.1935, p. 1699), provided that "every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison * * * of the crime of robbery, * * * assault with intent to commit murder, * * * felonious assault with a deadly weapon, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years * * * provided that in exceptional cases, *at any time not later than sixty days after the actual commencement of imprisonment,* the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section." (Italics ours.)

In People v. Jones, 6 Cal.2d 554, 59 P.2d 89, defendant pleaded guilty to a charge of forgery committed while on parole, and admitted three prior felony convictions. He was adjudged an habitual criminal and sentenced to state prison. Some months later, on defendant's motion, the trial court made an order modifying the judgment by deleting therefrom all reference to defendant as an habitual criminal. The People appealed and the court held that the trial court was without authority to so amend, since more than sixty days had elapsed after defendant began the serving of his sentence before the order amending was made.

The next question, then, is whether the judgments as originally pronounced are valid judgments. The significant portion of the judgment in cause No. 27001 is as follows: "That whereas, the said Defendant Robert Schenk having been duly convicted in this Court of the crime of Felony, to-wit: Robbery, first degree, and three prior convictions of a Felony—It is therefore ordered, adjudged and decreed that the said Defendant Robert Schenk be adjudged an habitual criminal, and shall be punished by imprisonment in the State Prison of the State of California for life, and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years, said sentence to run consecutively with sentence imposed in causes 27002–27014–27015." Judgment in cause numbered 27002 is the same, and that in cause numbered 27014 differs only in that the felony is described as "Assault with a deadly weapon." The fourth judgment, in cause numbered 27015, does not adjudge defendant an habitual criminal, but it recites that defendant has been

convicted of a felony (describing it) and two prior convictions of a felony, and adjudges that he be imprisoned in the State Prison, "said sentence to run consecutively with sentence imposed in case 27001–27002–27014."

[3] Petitioner contends that the trial court had no power to fix his term of imprisonment as was done in the first three of the foregoing judgments, as jurisdiction so to do was vested in the Board of Prison Directors under section 1168 of the Penal Code. That section, at the time of petitioner's sentence in 1936, provided (Stats.1935, p. 1700) that: "Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." The fixing of the term was by said section made the duty of the State Board of Prison Directors. It is obvious, then, that in so far as the judgments under consideration are concerned, the portions thereof purporting to sentence petitioner for life, and providing that he should not be eligible for parole until he had served twelve years, were in excess of the power of the court. If, however, the judgments are otherwise sufficient, such portions thereof as are in excess of the power of the court may be dealt with as surplusage, and disregarded by the State Board in fixing the term of petitioner's imprisonment. People v. Valdez, 3 Cal.App.2d 700, 702, 40 P.2d 592.

[4] If we disregard such portions of the judgments as surplusage, they provide: That whereas, the said Defendant Robert Schenk having been duly convicted in this Court of the crime of Felony, to-wit: Robbery, first degree, and three prior convictions of a Felony—It is therefore ordered, adjudged and decreed that the said Defendant Robert Schenk be adjudged an habitual criminal, and shall be punished by imprisonment in the State Prison of the State of California, said sentence to run consecutively with sentence imposed in causes 27002–27014–27015.

While not recommended as a model, such a judgment is, we believe, sufficient and not void for uncertainty. Petitioner says that the matter of determining the length of his sentence is for the Board of Prison Terms and Paroles; and by treating as surplusage that portion of the judgments which fixes his sentence at "life" and provides that he shall not be eligible for parole until he has served at least twelve years, the matter of determining his sentence is left to that Board.

As for the further contention of petitioner that the trial court was without power to adjudge that his sentences should run consecutively, section 669 of the Penal Code, at the time of petitioner's sentence (and, apparently, at the time his offenses were committed), provided: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment *shall* direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be." (Italics ours.)

[5, 6] It was, therefore, within the power of the court to provide that petitioner's sentences should run consecutively. But since petitioner was found to be an habitual criminal, and as such is subject to imprisonment for life under section 644 of the Penal Code; and, furthermore, since even if the habitual criminal factor were disregarded petitioner would be compelled to serve the minimum sentence under each of the four crimes charged, and since he has not served such length of time, he is not entitled to his discharge, particularly since he alleges that the Board of Prison Terms and Paroles has not fixed his term of imprisonment.

The petition is denied and the writ discharged.

PEEK and THOMPSON, JJ., concur.

61 Cal.App.2d 119

THORNDYKE v. JENKINS.

McKENNEY v. JENKINS, Inc., et al.

Civ. 13928, 13929.

District Court of Appeal, Second District, Division 3, California.

Oct. 25, 1943.

Hearing Denied Dec. 20, 1943.

1. Process ⇐149

Process server's affidavit, that defendant attempted to evade service of summonses and that the summonses were thrown over the fence at defendant who was then told that the papers were court summonses, when considered with other affidavits of officers as to unsuccessful attempts to make service on defendant, furnished substantial evidence to support orders denying motions to quash service on ground that no service had been made.

2. Judgment ⇐143(6)

Where motions to quash service of summonses were denied on accepted showing that defendant had attempted to evade service and that service made was sufficient, defendant's subsequent motions to set aside default judgments on ground of mistake and excusable neglect were properly denied, where it was apparent that defendant's failure to appear was due solely to his denial that service had been made. Code Civ.Proc. § 473.

3. Appeal and error ⇐900, 945

All intendments are in favor of the correctness of the orders appealed from which cannot be reversed except upon a showing of an abuse of discretion.

4. Appeal and error ⇐880(3)

Where defendant was correctly named in judgment entered against him, he could not complain that judgment was also entered against a clinic and a hospital under which he was allegedly doing business.

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, William J. Palmer, and Frank G. Swain, Judges.

Separate actions by Maude Thorndyke against R. B. Jenkins, doing business under the fictitious name of Angelus Hospital, and by Edna D. McKenney against R. B. Jenkins, Inc., and others, wherein default judgments were rendered against R. B. Jenkins. From orders denying motions to quash service of summonses and to vacate the default judgments, the defendant R. B. Jenkins appeals.

Affirmed.

Hunter & Liljestrom and J. D. Willard, all of Los Angeles, for appellants.

Kimpton Ellis, of Los Angeles, for respondent Maude Thorndyke.

Benjamin Lewis, of Los Angeles, for respondent Edna D. McKenney.

SHINN, Justice.

In separate actions default judgments for damages were rendered against appellant R. B. Jenkins in favor of Maude Thorndyke and Edna D. McKenney. Defendant made a motion in each case, after judgment, to quash service of summons and to vacate the judgment on the ground that no service had been made and, after denial of these motions, moved in each case before a judge of another department to vacate the defaults and judgments under section 473 of the Code of Civil Procedure, on the grounds of alleged mistake and excusable neglect. These motions also were denied. Appeals from the several orders have been consolidated and are presented upon a single set of briefs.

[1] The proof as to service was the same in each case, the motions to quash were heard together and may be treated by us as a single motion. Affidavits were filed on behalf of plaintiffs by deputy sheriffs to the effect that they had made repeated unsuccessful efforts to make service upon defendant Jenkins before the process was placed in the hands of one Yetta Price for service. Yetta Price stated in her affidavit that, after several attempts to serve the papers, she stationed herself near defendant's residence, that as defendant emerged from the rear door and started toward his garage she entered the adjoining yard with the summonses, complaints, and two subpoenas duces tecum in her hand; that when defendant saw her he exclaimed, "I won't take it, I won't take it; you're too smart, but I won't take it," and that affiant then threw the papers, which were folded together and had a rubber band around them, over an openwork wire fence between the two yards and that they landed at the feet of defendant, as she said to defendant, "It doesn't make any difference to me, Dr. Jenkins, whether you take them or not, they are court sum-

monses." It is not contended by appellant that the acts of Yetta Price, as stated in her affidavit, were insufficient to constitute legal service. The contention is that the court, upon the motion to quash, should have rejected the foregoing averments in the affidavit of the process server because they were denied in the affidavit of defendant and contradicted as to the manner in which the papers were thrown over the fence, in an affidavit by a neighbor who witnessed the proceedings. There is little more than a token argument upon the point. Counsel for appellant in their opening brief state, "* * * appellant recognizes that when an order or judgment finds support in facts determined by the trial court upon any substantial evidence, such order or judgment will not be disturbed on appeal." The affidavit of the process server, stating in unequivocal terms the facts we have recited, considered with other evidence which tended to prove that defendant had been evading service, furnished substantial evidence to support the orders denying the motions to quash, and the implied finding that the facts were as stated in the affidavit is conclusive upon appeal.

Upon the motions to set aside the defaults and judgments, additional affidavits and counter affidavits were filed in support of and against defendant's contention that his failure to appear in the action resulted from his mistake and excusable neglect. These motions were presented together and upon the records and files in both cases. In his affidavit on these motions defendant stated that he had received letters from counsel for the respective plaintiffs stating that summons had been served on March 3, 1942, and notifying him that unless he made appearance within a stated time, which was in excess of that allowed by law, his default would be entered, that he had answered the letters, denying that the papers had been served, and had thereafter received other letters from the attorneys informing him that default judgments had been taken against him. The affidavit further stated that defendant, after learning of the judgments, consulted his attorneys and told them that at no time had any person served or attempted to serve him with process. By affidavit of one of defendant's counsel it was shown that defendant had told his attorneys that no papers of any sort relating to said actions had been served upon or received by him. (It was after they had been so informed that his counsel, relying upon his statement, moved to quash service of summons.) However, defendant did not make his motions under section 473 of the Code of Civil Procedure until four and a half months after service of summons and 44 days after the motions to quash had been denied. The motions to set aside the defaults and judgments were filed more than three months after the judgments were rendered.

[2] The facts we have stated, considered with the court's decision that defendant had been personally served on March 3, 1942, show no abuse of discretion in the denial of the motions to vacate the defaults and judgments. When the second motions were presented defendant was relying in part upon his affidavit that service had not been made and he did not admit the truth of the foregoing statements of the Yetta Price affidavit. Since the court, in denying the first motions, had accepted as true the facts stated in the Yetta Price affidavit, and as no application was made to vacate the first orders, the judge who heard the second motions properly concluded that defendant had not truly or fully informed his attorneys of the acts of the process server and of his own remarks to her, which the court had held constituted valid service.

Upon the second motions the only question was whether defendant's failure to appear had resulted from his mistake or excusable neglect. It is insisted that the court should have found that defendant and his attorneys were acting under a mistake of law but there was no evidence that they were mistaken upon any point of law, and it does not appear that any question of law could have arisen under defendant's version of the facts. We do not see how the court could have failed to hold, in passing upon the second motions, that defendant's failure to appear was due solely to his denial that service had been made. If he had given his attorneys a complete and accurate statement of the facts and if it had been shown that they had believed that under those facts there had not been valid service, an entirely different question would have been presented, for it would then have appeared that they had acted under a mistake of law. We also would have a different question to determine, and the case of Waite v. Southern Pacific Co., 1923, 192 Cal. 467, 221 P. 204, relied upon by appellant, would be in point.

In that case defendant's counsel failed to appear in a state court after the action had been removed to the United States District Court and defendant's default had been entered while the matter was pending in the latter court, although it was later remanded to the state court. The court reversed an order denying a motion to vacate the default and judgment, but this was done upon the sole ground that defendant had acted under a mistake of law as to the jurisdiction of the state court, which the court held was a reasonable one and excusable under the circumstances. We have no such situation here. When defendant based his right to relief upon an issue of fact he could not, after the issue was decided against him, assert a mistake of law which, if meritorious, would have to be founded upon facts which were contrary to his sworn statements and necessarily contrary to his belief. He asserted no mistake of law whatever but persisted in his denial that he had been served at all. His predicament resulted from his failure to acquaint his attorneys with the true facts, and from their belief in his misstatements.

[3] The foregoing conclusions have been reached by the application of the familiar rules that all intendments are in favor of the correctness of the orders appealed from and that such orders cannot be reversed except upon a showing of an abuse of discretion. Since the motions to vacate were without merit, it is unnecessary to determine whether the orders denying the second motions should be affirmed upon the additional ground urged by respondents that the applications were not made within a reasonable time, as required by section 473, Code of Civil Procedure.

The further point is made that the judgment in the Thorndyke case was against defendant "R. B. Jenkins, doing business under the fictitious name of Angelus Hospital." It was alleged in the complaint that defendant conducted a hospital under the fictitious name of Angelus Hospital.

In the McKenney case the judgment was against "Dr. R. B. Jenkins, Dr. R. B. Jenkins Clinic, and Angelus Hospital, which is owned and operated by defendant R. B. Jenkins." The complaint in that case had named as defendants Dr. R. B. Jenkins, Dr. R. B. Jenkins Clinic, and Angelus Hospital Association of Los Angeles. By amendment the complaint named as a defendant "Angelus Hospital, which is owned and operated by defendant R. B. Jenkins." The amended affidavit of service of summons in this case stated that service had been made on "Dr. R. B. Jenkins Clinic, by serving Dr. R. B. Jenkins, owner, Angelus Hospital, sued herein as John Doe One, by serving Dr. R. B. Jenkins, owner."

[4] It is contended that the court had no jurisdiction to render judgment in the McKenney case against R. B. Jenkins Clinic or Angelus Hospital because the record does not show whether they were separate entities or merely names under which Dr. Jenkins was doing business. If either is a separate entity and if either judgment should be construed as being against them or either of them, and not simply against appellant Jenkins, neither the clinic nor the hospital moved to quash service of summons or to vacate the defaults and judgments, and neither of them appealed from any order that was made or from the judgments. Since these supposed entities are not before us, we refrain from expressing an opinion as to the construction which should be given the judgments. Upon the other hand, if the clinic and the hospital were only names used by Dr. Jenkins, the scope of the judgment against him is no greater because it names them also. Dr. Jenkins has not appealed from the judgment. He is correctly named in it and we cannot see how he could be aggrieved by the addition of unnecessary labels.

Defendant received fair and courteous treatment at the hands of counsel for the respective plaintiffs. In neither case was a default entered until after he had been given additional time for an appearance and counsel had received a letter from him denying that service had been made. He was notified that default judgments would be taken against him if he refused to appear and he chose his course advisedly. We find no reason to disturb the orders complained of.

The respective orders appealed from in each case are affirmed.

DESMOND, P. J., and BISHOP, Justice pro tem., concur.

61 Cal.App.2d 183

Ex parte BERTRAND.

Cr. 4506.

District Court of Appeal, Third District, California.

Oct. 27, 1943.

1. Habeas corpus ⇐85(1)

Where conviction of felony contained no finding that petitioner had served time on four prior felony convictions, determination that petitioner's term of imprisonment should be life as an habitual criminal was solely that of Board of Prison Terms and Paroles, and petitioner's allegation that no proof was made that he had served terms on the prior convictions was not denied, due regularity was not presumed in support of petitioner's sentence and burden was no upon petitioner to show error, notwithstanding absence of testimony upon which his conviction of felony was based. Pen. Code, § 644; St.1923, p. 696.

2. Criminal law ⇐1208(9)

The duties of the Board of Prison Terms and Paroles are purely ministerial and the board has no power to impose sentences, but its authority to fix a life term must be based upon a judgment authorizing such imprisonment, and presumptions are not indulged to support its action in absence of a judicial determination authorizing it.

3. Criminal law ⇐995(1)

Before a sentence of life imprisonment can be upheld, it should affirmatively appear that the sentence is supported by a record which conforms to all of the essential requirements of the law.

4. Criminal law ⇐1202(6)
Habeas corpus ⇐28

Where information upon which petitioner was charged for possessing a blackjack merely alleged that he "was received" at various prisons "having been convicted" of four felonies and judgment merely recited that petitioner admitted "having suffered" the prior convictions "charged in the information" and petitioner's service of terms on the prior felony convictions was not claimed to have been proven, Board of Prison Terms and Paroles was not authorized to fix petitioner's term at life imprisonment as an habitual criminal, and, hence where petitioner had been imprisoned for a period in excess of the maximum term for possession of a blackjack, petitioner was entitled to release by habeas corpus. Pen.Code, § 644; St.1923, p. 696.

Proceeding in the matter of the application of Edward Bertrand for a writ of habeas corpus, opposed by Clyde I. Plummer, as Warden of the State Prison at Folsom, Cal.

Writ granted and petitioner discharged.

Edward Bertrand, petitioner in pro. per.

Robt. W. Kenny, Atty. Gen., and D. K. Lener, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

On April 27, 1938, an information was filed in the Superior Court of the City and County of San Francisco charging petitioner herein with a violation of section 1, chapter 339, of the Statutes of 1923, in that on or about April 11, 1938, he did, in said City and County of San Francisco, "wilfully, unlawfully, knowingly and feloniously possess an instrument and weapon of the kind commonly known and designated as a blackjack." Said information also alleged that on or about July 18, 1920, the said Edward Bertrand had been "received at San Quentin Penitentiary, having been convicted in the County of Imperial, State of California, of the crime of felony, to wit: Forgery," that on December 9, 1921, defendant "was received at" San Quentin having been convicted of burglary in San Diego, that on December 19, 1924, he "was received" at the Idaho State Penitentiary having been convicted in Idaho of grand larceny, and that on March 2, 1934, he "was received at" Folsom, after conviction in Los Angeles County of "Petty Theft with Prior Convictions."

There was no allegation that defendant had served terms of imprisonment on any of the prior convictions. On arraignment defendant pleaded not guilty of the offense charged, but admitted that he had suffered the prior convictions "charged in the information." He was tried and convicted of the offense charged, and judgment was thereafter rendered which, after reciting that defendant had admitted having suffered the prior convictions, provided as follows: "That whereas, the said Defendant Edward Bertrand having been duly convicted in this Court of the crime of Felony to-wit: Violating Section 1, Chapter 339, Statutes of 1923, and four prior

convictions of a Felony—It is therefore ordered, adjudged and decreed that the said Defendant Edward Bertrand be punished by imprisonment in the State Prison of the State of California, at Folsom."

He was received at the State Prison at Folsom on June 22, 1938, and on January 9, 1940, the Board of Prison Terms and Paroles fixed his term at "Life, in accordance with Penal Code sec. 644, subdivision 2." He now asks for his discharge on the ground that he has served the maximum term for the crime of which he was convicted, alleging that the information did not allege that he had served terms of imprisonment upon the prior convictions, that his admission as to said prior convictions was only an admission that he had suffered said prior convictions and not that he had served terms of imprisonment thereon, that no proof was made to the court that he had ever served such terms of imprisonment, that the trial court did not adjudge him to be an habitual criminal, and that the Board of Prison Terms and Paroles acted without authority of law in fixing his term at life imprisonment.

These contentions of petitioner appear to be sustained by the decisions of the courts of this State.

Section 1, Chapter 339, of the Statutes of 1923, Stats. 1923, p. 696, provides that punishment for possession of a blackjack shall be imprisonment in a state prison for not less than one year or for more than five years. Petitioner has now been imprisoned for a period in excess of the maximum term.

Respondent, denying that petitioner is unlawfully detained, relies solely upon the judgment and commitment of the superior court. He attaches to his return copies of the judgment and information, and, at the time of the hearing herein, filed a copy of the judgment roll as an exhibit. His counsel argues that section 644 of the Penal Code as it read at the date of the offense charged in the information against petitioner did not require that one convicted of any felony, who had previously been three times convicted and served terms for prior offenses, must be adjudged an habitual criminal; that the material portion of that section provided that "Every person convicted in this state of any felony who shall have been previously three times convicted, upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison * * * either in this state or elsewhere, of the crime of * * *, burglary, * * * grand theft, * * * forgery * * *, shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole * * *"; and that it does not appear therefrom that an affirmative adjudication was essential. Citing People v. Lyle, 21 Cal.App.2d 132, 135, 68 P.2d 378, and People v. Vaile, 2 Cal.2d 441, 444, 445, 42 P.2d 321.

Conceding, on the authority of the cited cases, that, if the judgment was otherwise sufficient, an affirmative adjudication by the trial court that the petitioner was an habitual criminal was not essential in order to justify the imposition of a life sentence by the Board, the fact remains that said section 644 did provide that to justify life imprisonment service of terms on the prior convictions was requisite. Such service was here neither alleged nor found; nor is it contended by respondent that such service was proven. The information upon which petitioner was charged merely alleges that he "was received" at the various prisons "having been convicted" of the various felonies. The judgment merely recites that petitioner admitted "having suffered" the prior convictions "charged in the information."

In People v. Murray, 42 Cal.App.2d 209, 217, 108 P.2d 748, 752, it was held that since the amendment of section 644 of the Penal Code in 1931, which inserted a clause making actual servitude for a prior conviction prerequisite to an adjudication that an accused is an habitual criminal, it has become the settled law of this state "that in order to invoke the operation of the habitual criminal statute the prosecution in addition to alleging and proving the fact of the prior conviction must allege and prove that the accused has served a term of imprisonment in a state prison or federal penitentiary for the particular felony of which he is charged with having been previously convicted, *and that the failure to allege or prove such servitude is fatal to the adjudication, unless it appears from the record in some manner that the accused has admitted having served such term of imprisonment or that the court in its judgment has so found.* In re Fontino, 135 Cal.App. 466, 27 P.2d 413; In re McConnell, 5 Cal.2d 436, 55 P.2d 205; People v. Birdsell, 21 Cal.App.2d 682, 70 P.2d 231; People v. Nicholson, 34 Cal.App. 2d 327, 93 P.2d 223." (Italics ours.)

While In re Boatwright, 216 Cal. 677, 15 P.2d 755, holds that the failure of an information specifically to allege that a defendant had served time on each of the prior convictions alleged against him is not necessarily fatal, the court said, 216 Cal. at page 681, 15 P.2d at page 756: "It was essential, however, that proof of service under said prior convictions in a penal institution be shown, in order to give the court jurisdiction to adjudge the defendant an habitual criminal." Again, in People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223, it was held that it was necessary that the fact that such terms had been served should be established either by evidence or by the admission of the defendant before judgment was pronounced.

[1, 2] Respondent admits the force of the foregoing decisions, but contends that since the testimony introduced in this case has not been transcribed, in the absence of same due regularity must be presumed *in support of the sentence imposed,* and that the burden is upon petitioner to show error. Citing People v. McGee, 24 Cal.App.2d 391, 394, 75 P.2d 533. There might be some merit in this contention if the judgment of the court contained any finding that petitioner had served time on said priors. But there is no such finding. The determination that petitioner's term of imprisonment shall be life is solely that of the Board of Prison Terms and Paroles, whose duties are purely ministerial and which has no power to impose sentences. In re Lee, 177 Cal. 690, 171 P. 958; People v. Sama, 189 Cal. 153, 207 P. 893. Its authority to fix a life term must be based upon a judgment authorizing such imprisonment, and presumptions are not to be indulged to support its action in the absence of a judicial determination authorizing it. Furthermore, it is alleged by petitioner, and not denied by respondent, that no proof was made that he had served terms on the priors charged.

[3, 4] The court said in People v. Murray, supra, 42 Cal.App.2d at page 219, 108 P.2d at page 754, that since service of time after previous conviction is made one of the essential elements of the habitual criminal statute, it would be violative of one of petitioner's substantial rights to punish him therefor without charging and proving this element of the offense—that "before a sentence of life imprisonment be upheld, * * * it should affirmatively appear that the sentence is supported by a record which conforms to all of the essential requirements of the law." Also see concurring opinion of Judge Curtis in Re Boatwright, 216 Cal. at page 685, 15 P.2d 757. The facts in the Murray case are practically identical with those here shown; and, as there said, petitioner "is entitled to the benefit of the record as thus made."

It appearing that petitioner has served a term greater than five years, the writ should be granted and the prisoner discharged from custody.

It is so ordered.

THOMPSON and PEEK, JJ., concur.



61 Cal.App.2d 194

NORINS REALTY CO., Inc., v. HOYTT.

Civ. 13966.

District Court of Appeal, Second District, Division 3, California

Oct. 28, 1943.

Hearing Denied Dec. 20, 1943.

1. Vendor and purchaser ⇐307

Under contract for sale of land from one broker to another, which provided that purchaser's failure to continue to make continuous efforts to resell the land to the public for thirty consecutive days should be deemed a breach by purchaser, purchaser's failure for thirty days to make continuous efforts to resell would give vendor right to refuse further performance but would not relieve purchaser of his obligation to purchase.

2. Contracts ⇐317

Where parties to contract have undertaken reciprocal obligations and performance on each side is obligatory, provisions for termination in case of nonperformance are construed for benefit only of the one who has performed.

3. Appeal and error ⇐1010(1)

The court's implied finding as to intention of parties with regard to allegedly ambiguous provision of contract, is conclusive when supported by reasonable inferences drawn from the evidence.

4. Vendor and purchaser ⇐307

A contract for sale of land by one broker to another which required vendor not to sell any of land to others during life of contract was not breached because deed tendered to purchaser included acreage sold to vendor's customers, where contract authorized vendor to use acreage conveyed to purchaser to reinstate previously executed contracts with vendor's customers, and reinstated contracts were cancelled.

5. Vendor and purchaser ⇐307

A contract for sale of land by one broker to another was not breached so as to preclude vendor's recovery of balance of purchase price because vendor owned considerably less than number of acres recited in contract, where vendor owned more land than purchaser was willing to pay for, and it did not appear that vendor could not convey the quantity recited.

6. Appeal and error ⇐878(6)

Where plaintiff did not appeal, inadequacy of judgment in favor of plaintiff would not be considered.

7. Vendor and purchaser ⇐305

Under contract for sale of land by one broker to another, which included only those portions of land covered by permit of real estate commissioner, purchaser who paid for acres which were not described in permit could not deduct that acreage from number of acres which he was required to pay for under contract, where mutual mistake was not alleged, and purchaser could have ascertained the facts.

8. Vendor and purchaser ⇐307

A purchaser could not escape liability for balance of purchase price on ground that vendor failed to drill an oil well as required by contract, where purchaser made no attempt to exercise the right to be excused from further performance because of vendor's fault.

9. Appeal and error ⇐173(2)

A purchaser required to pay balance of purchase price for land could not claim for first time on appeal that vendor was at fault in failing to drill an oil well as required by contract.

Appeal from Superior Court, Los Angeles County; Meyer B. Marion, Judge pro tem.

Action by Norins Realty Company, Inc., against Samuel W. Hoytt to recover the balance of the purchase price of land which defendant agreed to purchase from plaintiff. From a judgment for plaintiff, defendant appeals.

Affirmed.

Zagon, Aaron and Fink, Ben L. Blue, Robert Kingsley, and Louis B. Minter, all of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Defendant appeals from a judgment in the sum of $7,889.36, as the balance of the purchase price of several thousand acres of land contained in Pajarito Spanish Grant, in the County of Bernalillo, New Mexico, which he agreed to purchase from plaintiff at a price of $8 per acre. Plaintiff and defendant were real estate brokers engaged in the business of selling in California and elsewhere subdivided lands situated in New Mexico. The nature of the business which they conducted, and in which defendant had been employed as a salesman for plaintiff, is frankly described in appellant's opening brief as follows: "For many years, however, both parties had been engaged in the business of selling land of a kind similar to that herein involved, and located in the same vicinity as this land. The general mode of operation was to commence the drilling of an oil well, either upon a portion of the land to be sold or upon land immediately adjoining it, and then to sell land to the general public in small blocks upon the inducement that large speculative profits would be made if the oil well then being drilled resulted in commercial production." As defendant acquired title from plaintiff he made resales in small parcels to the public; he made payments until he had acquired some 4,000 acres, when the parties fell out, and defendant refused to make further payments. Plaintiff tendered a deed to 2,056.26 acres, which it contended was yet to be acquired and paid for, and sued for $16,250.48 as the balance due at $8 per acre.

The judgment for $7,889.36 was based upon a finding that defendant was required to purchase and pay for only 986.17 acres in addition to 3,889.97 acres which he had already acquired and was conditioned upon the conveyance to defendant of 986.17 acres to be selected by defendant or by plain-

tiff if defendant failed to make a selection.

Defendant relies upon certain special defenses, which were rejected by the trial court. These are: (1) That by the terms of the agreement he had a right at any time to withdraw from it and, upon quitclaiming his rights thereunder, be relieved from all further obligation. (2) That plaintiff had breached the agreement in the following respects: (a) That it had failed to keep in force a permit of the real estate commissioner of California authorizing sales of said land to be made in California; (b) that it had sold parcels of land covered by the agreement to persons other than defendant, in violation of the agreement; (c) that while it had agreed to sell defendant approximately 6,000 acres in the grant, it owned and could have delivered to defendant no more than about 4,000 acres; (3) that defendant purchased and paid for 776.28 acres which were not covered by the agreement, without knowing that they were not so covered, and that that acreage should have been deducted from the 986.17 acres which the court held he was obliged to pay for, which would have reduced his obligation to the purchase of only 209.89 acres, for which he would owe only $1,679.-12.

The paragraph of the contract upon which defendant founds his right to excuse himself from further performance reads as follows: "12. It is agreed by the Buyer that it is his primary intention to re-sell said land to the public, and in the event that he does not continue to make honest, conscientious and continuous efforts to sell said property to the public for a period of thirty (30) consecutive days, then and in that event such failure shall be deemed to be a breach of this contract by the Buyer, and further, the Buyer agrees to waive his rights to purchase any land from Seller, (excepting, of course, land necessary in order to complete his installment contracts) and upon receipt of quitclaim from Buyer to Seller, the Seller waives any claims that he might otherwise have against said Buyer, and Seller shall no longer be bound by the provisions of paragraph '6' herein." (Paragraph 6 bound plaintiff not to sell to others while defendant's contract was in effect.) The trial judge, deeming the provisions of this paragraph to be ambiguous, received evidence of conversations between the parties during their negotiations upon the matter of the possible failure of defendant to carry on a continuous sales campaign for resale of the land. Defendant had alleged as a special defense that the real estate commissioner in November, 1939, refused to keep in force the permit or to issue another permit for the sale of said land and that because thereof defendant was obliged to and did discontinue the resale of the land and sold none thereafter, and that defendant on November 30, 1940, offered in writing to quitclaim to plaintiff all the unsold portion of the land, but was unable to prepare a quitclaim deed because he did not know and could not ascertain a correct description of said land.

The defense based upon said paragraph 12 was held to be unavailing for two reasons. The court construed the provisions of the paragraph to mean that the failure of defendant for 30 days to continue "honest, conscientious, and continuous efforts to sell said property to the public" would give plaintiff the right to refuse further performance under the agreement, but that such failure on defendant's part would not relieve him of his obligation to purchase and pay for the remainder of the acreage. The second ground for the rejection of this defense was that the court found it to be untrue in fact, that is to say, the court found it to be untrue that the real estate commissioner refused to keep in force the permit or issue a new one; or that defendant was obliged to and did discontinue selling land in California after the month of November, 1939, for the reason that a permit had been refused; that it was untrue that it was or became impossible for said defendant to sell said real property to the public, but that he continued to sell land until November 30, 1940, which was one day before the balance of the purchase price fell due, and that it was untrue that defendant for any reason was unable to prepare and deliver to plaintiff a quitclaim deed to the unsold portion of said land.

[1, 2] The court placed a proper construction upon the provisions of said paragraph 12, regardless of any supposed ambiguity. Defendant's argument is by no means a new one. It has frequently been contended under similar circumstances that one of the contracting parties could at will relieve himself of the obligation to render further performance, but these arguments have been held unavailing where they would defeat the purpose of the agreement. Where the parties to a contract have undertaken reciprocal obligations for the accom-

plishment of a final purpose, such as the transfer of title to property or for the use and occupancy of it for a definite term, and where from the entire contract it is clear that performance on each side is obligatory and not optional, the courts have consistently construed provisions for termination in case of nonperformance to be for the benefit only of the one who has performed. The party for whose benefit the right of termination is given is of course the only one who can exercise it. Defendant did not take an option to buy the property; he made an unqualified agreement to buy it. He could not evade his obligation by defaulting therein and then claim for himself a right to terminate the contract which was intended solely for the benefit of the seller.

In Central Oil Co. v. Southern Refining Co., 1908, 154 Cal. 165, 97 P. 177, the defendant relied upon a provision of its purchase agreement as excusing its refusal to continue purchase of oil, which was in the following language: "This contract shall commence with the 1st day of July, 1904, and continue monthly thereafter for the period of one year and the violation of any of the terms or conditions thereof by either party hereto shall work a forfeiture thereof, and this agreement shall thereupon become void and of no effect." Defendant having appealed from an adverse judgment, the court said (154 Cal. at page 166, 97 P. at page 177.): "Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect,' that this provision means that the violation terminated the contract, and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That langauge means that, by a violation of the terms of the contract, the rights of the party violating it cease, and, as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' 9 Cyc. of L. & P., p. 618. Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. Civ.Code, §§ 1511, 1512, 1514. Such has uniformly been the construction put upon language such as this when found in contracts. [Citing cases.]" The principle is restated in Bank of America, etc., Ass'n v. Moore, 1937, 18 Cal.App.2d 522, 64 P.2d 460, where additional authorities are cited.

The construction placed upon the paragraph is supported by other provisions for termination in case of failure of either party to perform, which expressly give the right to the party not at fault and make it clear that performance by defendant was obligatory. We refrain from quoting them since our conclusion is otherwise fully supported.

[3] So far we have considered paragraph 12 as being unambiguous, but if it be considered ambiguous, the court's implied finding as to the understanding and intention of the parties, arrived at after a consideration of extrinsic evidence, is conclusive upon appeal because it is supported by reasonable inferences drawn from the evidence. Eastman Oil, etc., Corp. v. Lane-Wells Co., 1943, 21 Cal.2d 872, 136 P.2d 564.

Appellant does not question the sufficiency of the evidence to support the findings hereinbefore referred to, which negative the alleged refusal of the real estate commissioner to continue in force a permit or to issue a new one. These findings bear directly upon the next contention, namely, that plaintiff had an obligation to keep the permit in force, had failed to do so, and thus breached its contract in a material respect. The court also found that it was not true that it was understood or agreed between the parties that plaintiff would keep in force a permit at all times while defendant was engaged in the sale of said real property to the public. Appellant has not directed our attention to any provision of the contract which placed upon plaintiff the duty to keep in force a permit and we have found none. For this reason and also because of the facts as found upon this issue, the contention is unsound.

[4] The next alleged breach of the contract relates to the sale of land in the grant to others than defendant. The agreement

provided specifically that plaintiff would not sell any of the land to others during the life of the agreement. It is contended that plaintiff sold 255 acres in violation of its agreement. The only reference to this acreage in the findings is one to the effect that the deed which plaintiff tendered to defendant and which embraced 2,056.26 acres included "acreage sold to customers of plaintiff other than defendant between May 23, 1938, and August 10, 1938, which sales were thereafter cancelled, 255 acres." The agreement provided that respondent should have the right to use acreage in the grant sufficient to reinstate contracts entered into between plaintiff and its customers prior to April 8, 1938, the date of its first contract with defendant, and which contracts had theretofore been cancelled by plaintiff. Plaintiff directs attention to an auditor's report furnished to the court and which was in evidence, from which it appears that the 255 acres in question were used by plaintiff to reinstate old contracts, that the reinstated contracts covering this acreage also were cancelled, and that the 255 acres were actually deeded to defendant. Plaintiff's statement of the evidence is not challenged by defendant in his closing brief, and upon these facts defendant has no cause for complaint.

[5] The next contention is that, although the contract recited that plaintiff's holdings in the grant approximated 6,000 acres, plaintiff owned considerably less than that. It is conceded that defendant purchased and received deeds for 3,889.97 acres. Defendant computes the acreage in the grant which was owned by plaintiff and which was subject to the contract at 4,137.56 acres. In this computation defendant excludes 776.28 acres which plaintiff admittedly owned, but which were not covered by the permit of the real estate commissioner which authorized the sale of the land in California. The computation also excludes 1,027.65 acres which were used by plaintiff for the reinstatement of contracts which it had issued and cancelled prior to the date of its first agreement with defendant. The fact of the matter appears to be that plaintiff owned in excess of 2,000 acres in the grant in addition to the quantity for which defendant paid and received deeds, although, as we have stated, and as will be hereafter explained, defendant by the judgment is required to pay for only 986.17 acres as the balance of the unsold land. Defendant received deeds to all of the acreage which he sought to acquire under the contract; he at no time demanded a conveyance of acreage which plaintiff was unable to furnish. While plaintiff may not have owned all of 6,000 acres, the parties were satisfied to use an estimated figure for the purposes of their contract. Defendant testified that he had been furnished a plat book and cards which described plaintiff's holdings and it would appear that he could have computed the acreage if he had been interested in doing so. However, plaintiff owned more land than defendant was willing to pay for and it does not appear that it would have been unable to convey to defendant a quantity of land equal to that covered by the contract if he had been willing to pay for it. We find no merit in this defense.

[6, 7] Another contention is that the judgment in any event was excessive. As we have already stated, plaintiff contended that defendant was bound to take an additional 2,056.26 acres for a price of $16,250.48. The court found that there remained to be acquired and paid for by defendant only 986.17 acres, which accounts for the judgment of $7,889.36. The construction which the court placed upon the contract in this connection and the method used in reaching the lower figure were distinctly favorable to defendant. While they are casually criticized by plaintiff, we need not pass upon them since we have no appeal by plaintiff and consequently have no need to inquire whether the judgment should have been greater. However, the construction which the court placed upon certain provisions of the agreement is important in our discussion of plaintiff's contention. The court found, inferentially, that the contract did not cover all of the land in the grant owned by plaintiff, but only those portions thereof which were covered by the permit of the real estate commissioner. It is conceded to be a fact that 776.28 acres were acquired and paid for by defendant which were included in plaintiff's holdings but were not described in the permit. The court found that this acreage was selected by defendant as land which he wished to acquire but that in making such selections he did not know that the land was not embraced within the permit. His present contention is that, having purchased and paid for 776.28 acres which he was not obliged to buy, the acreage so purchased should have been deducted from the 986.17 acres which by the judgment he is required to pay for, which would reduce his obligation to the pur-

chase of 209.89 acres for a price of $1,679.-12. There are several reasons why this contention cannot prevail. It was not alleged by defendant that he acquired the 776.28 acres by reason of a mutual mistake of the parties, nor was there a finding to that effect. It appears that defendant bought and resold lands in the vicinity other than those owned by plaintiff; it was neither alleged nor found that defendant would not have purchased the land had he known that it was not embraced within the permit. The court was not obliged to infer that defendant would not have purchased it if he had known that it was not covered by the permit, for if it be granted that he could not lawfully have sold that land in California, it was in evidence that his sales of the New Mexico land were not confined to California but were being conducted in many other states. Furthermore, since he was in possession of the records, it would appear that defendant could easily have ascertained whether the parcels of land he selected from time to time were covered by the permit, and it may be inferred from the fact that he did not do so that it was not a controlling factor with him. If he had been deceived or prejudiced in any material respect he had an opportunity to present his grievances fully to the trial court but, as we have pointed out, there is a deficiency of those material facts which would enable us to hold as a matter of law that defendant was entitled to have credited, upon his obligation to purchase, the 776.28 acres which he was not obliged to purchase. In order to modify the judgment we would have to assume that defendant would not have bought this acreage had he known that it was not embraced within the permit, and that it was the intention of the parties, as expressed in the agreement or inferable from the circumstances of the purchases, that defendant's obligation would be thereby reduced. We cannot assume such a state of facts. We cannot modify the judgment, as requested by defendant, because it does not appear as a matter of law, from a construction of the contract or from a construction of the findings, that grounds for modification exist.

[8, 9] In addition to the points we have discussed, defendant, for the first time, argues the further point that plaintiff was at fault in failing to continuously drill an oil well on the land and to complete it within a reasonable time, as it was required to do under the contract, which alleged failure is now claimed to have constituted a breach of the agreement. The point requires no extended discussion. If plaintiff had failed to fulfill its drilling obligation, defendant would have had a right to be excused from further performance. He neither exercised nor attempted to exercise that right, he did not attempt to prove any breach of plaintiff's obligation to drill the well, his counsel stated during the trial that they were not relying upon any alleged breach of the contract in that respect, and naturally the court made no finding on that subject.

We find nothing in the manner in which the case was tried or decided which calls for a reversal or modification of the judgment. The judgment is affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.



61 Cal.App.2d 148

JACKS v. LEWIS.

Civ. 12272.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1943.

As Corrected Nov. 23, 1943.

1. Appeal and error ⇐127

It is reversible error to enter a default judgment more than three years after summons was served on defendant and the error will be corrected on a timely appeal from the judgment so entered. Code Civ.Proc. § 581a.

2. Dismissal and nonsuit ⇐60(2)

A default timely entered by the clerk was not, in view of statute distinguishing in terms a default and a judgment, an "interlocutory judgment" sufficient to satisfy statute requiring dismissal of actions if no answer has been filed and plaintiff fails to have judgment entered within three

years after service of summons. Code Civ.Proc. §§ 581a, 585.

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Judgment".

3. Appeal and error ⇐440

Where clerk within three years after service of summons entered defendant's default, judgment was not entered thereon until more than three years after service of summons and defendant filed notice of appeal from judgment and order denying motions to vacate and set aside judgment and to dismiss action, trial court improperly allowed plaintiff to file an amended complaint and entered an amended judgment. Code Civ.Proc. § 581a.

Appeal from Superior Court, San Francisco County; James G. Conlan, Judge.

Action by Romie E. Jacks against Grace E. Lewis. From default judgment for plaintiff and orders denying defendant's motions to dismiss the action, to vacate and set aside the judgment, to strike an amended complaint, and to vacate an amended judgment, defendant appeals.

Reversed with directions.

Keith & Creede and Gunther R. Detert, all of San Francisco, for appellant.

Theodore M. Stuart, of San Francisco, for respondent.

DOOLING, Justice pro tem.

Plaintiff herein filed his complaint against defendant on November 14, 1938. The complaint was based on a promissory note executed by defendant to plaintiff and prayed judgment for principal, interest and attorneys' fees. Summons was served upon defendant on November 16, 1938 and returned with proof of service on February 24, 1939 and on the same date, defendant having made no appearance in the action, the clerk entered her default.

No judgment on this default was entered until April 16, 1942, considerably more then three years after service of summons. In the meantime on April 9, 1942, acting through her present attorneys, defendant served upon plaintiff a notice of motion to dismiss the action for failure to have judgment entered within three years after service of summons. The motion was noticed for April 28, 1942 and the notice thereof, although served on April 9, was not filed with the clerk until April 17, 1942. We do not consider the date of filing material since the notice was filed in ample time for the hearing as noticed for April 28, but in the meantime as above noted plaintiff procured judgment to be entered on April 16, 1942.

Thereafter on April 23, 1942, defendant served upon plaintiff a notice of motion to set aside the judgment of April 16, 1942 on the ground that it had not been entered within three years after service of summons. This motion was likewise noticed for April 28, 1942. The motion to dismiss, the motion to vacate and a motion to set aside the judgment as void were denied by order of the court on May 29, 1942. On June 11, 1942 defendant filed her notice of appeal from the judgment of April 16, 1942, and from the order of the court of May 29, 1942 denying defendant's motions.

Thereafter on July 28, 1942, plaintiff was allowed by order of the court to file an amended complaint and on July 29, 1942, an amended judgment was entered thereon. Defendant moved the court to strike the amended complaint and vacate the amended judgment and these motions were denied. Defendant thereupon appealed from this order and the amended judgment.

We are satisfied that the case of Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662, is controlling on this appeal. The facts of the two cases are practically parallel. In Lynch v. Bencini summons was served on the appealing defendant on January 10, 1936 and the clerk entered his default August 4, 1936. On June 29, 1939 a default judgment was entered against the appealing defendant. Thereafter motions to vacate the judgment and dismiss the action were denied, and an appeal was taken from the default judgment and the orders denying the motions.

It will be seen from this recital that in the case of Lynch v. Bencini, as in the case before us, the clerk entered the default of the defendant within three years after service of summons, but in each case the judgment was not entered until more than three years after summons had been served, in each case the defendant moved after the entry of judgment to vacate the judgment and dismiss the action which motions were denied, and in each case the defendant appealed from the judgment itself as well as from the orders denying his motions.

In Lynch v. Bencini, 17 Cal.2d at pages 530–533, 110 P.2d at page 669, the Supreme Court held that under the last paragraph of sec. 581a, Code of Civil Procedure, it was mandatory on the trial court to dismiss an action where no pleading had been filed by the defendant and judgment had not been entered within three years after service of summons. The court further held that while a judgment so entered over three years after service of summons might not be void, it was error for the court not to dismiss the action and this error was "one which may be corrected on an appeal from the judgment, if taken within the statutory time. The duties and rights of the parties are still affected by the last paragraph of section 581a and the judgment itself is still subject to review on a direct and timely appeal. * * * Under such circumstances the error may be corrected and the judgment, entered and allowed to stand in disregard of the provisions of section 581a, should be reversed." 17 Cal.2d at page 532, 110 P.2d at page 668. And the court concluded on page 533 of 17 Cal.2d, 110 P.2d at page 669: "The direct requirement of the statute would be rendered nugatory if the disregard thereof may not be corrected on a timely appeal."

Respondent cites Pavlovich v. Watts, 46 Cal.App.2d 103, 115 P.2d 511; Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357; and Merner Lumber Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062. The latter two cases were considered and found inapplicable, where the question was presented on a direct appeal from a default judgment entered over three years after service of summons in violation of the last paragraph of section 581a, in Lynch v. Bencini, supra, 17 Cal.2d at page 531, 110 P.2d 622. The Pavlovich case involved an appeal from an order denying a motion to set aside a default judgment made more than six months after its entry. It went no further than to hold that the default judgment was not void although entered over three years after service of summons. It recognized the authority of Lynch v. Bencini, supra, but distinguished it on the ground that the Lynch case involved a direct appeal from the default judgment on which the error in entering the judgment could be reviewed and corrected, whereas the Pavlovich case, like Merner Lumber Co. v. Silvey, supra, involved an attack on the judgment by motion after the lapse of more than six months from its entry on which only want of jurisdiction and not error within jurisdiction could be urged. See 46 Cal.App.2d pages 105, 106, 115 P.2d 511.

[1] The effect of the several decisions on the question is that it is reversible error to enter a default judgment more than three years after summons served in violation of the last paragraph of section 581a, which error will be corrected on a timely appeal from the judgment so entered.

[2] Respondent argues that the default entered by the clerk is itself an interlocutory judgment sufficient to satisfy the requirements of section 581a, since the default was entered within the three year period. He cites no California case holding that the entry of default is equivalent to an entry of judgment, and cases from other jurisdictions having different statutory provisions are not controlling. The language of section 585, Code of Civil Procedure, distinguishes in terms the default and the judgment, providing as it does in subdivision 1 that "the clerk * * * must enter the default * * * and immediately thereafter enter judgment * * *." In Lynch v. Bencini, supra, the default was entered by the clerk within the three year period but the Supreme Court reversed the default judgment, because it was entered more than three years after the summons had been served, and ordered the action dismissed.

[3] The basis of decision in Lynch v. Bencini, supra, being that the court has a mandatory duty to dismiss the action where more than three years is allowed to elapse between the service of summons and the entry of judgment for the failure of the defendant to appear and plead, every action taken by the trial court after the lapse of the three year period was tainted with the same error. This is sufficient to dispose of the order allowing the filing of the amended complaint and the entry of the amended judgment.

The judgments and orders appealed from are reversed and the trial court is directed to dismiss the action.

NOURSE, P. J., and SPENCE, J., concur.

23 Cal.2d 82

HILL v. HILL.
L. A. 18144.

Supreme Court of California.
Oct. 15, 1943.

1. Husband and wife ⇐278(2)

A property settlement agreement, executed by husband and wife, living separate and apart, in contemplation of and conditioned on, divorce being obtained by either spouse, *held* not void as against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Contracts ⇐111

Generally, law will not countenance any contract having for its object the dissolution of a marriage.

3. Husband and wife ⇐278(1)

A husband and wife may agree to immediate separation and, after so agreeing and actually separating, enter into contracts adjusting their property rights. Civ.Code, § 159.

4. Husband and wife ⇐278(1)

Property settlement agreements between spouses are upheld, though made in contemplation of divorce, in absence of fraud on court by attempt to obtain divorce not justified by real facts.

5. Husband and wife ⇐278(2)

Where separation of husband and wife is induced by vicious conduct or disability of either spouse, without the other's inducement or fault, a contract for settlement of their property rights and proper maintenance of spouse not in fault is not repugnant to "public policy".

6. Husband and wife ⇐278(2)

Spouses' property settlement agreements, conditioned on divorce in sense that they are to become effective on dissolution of marriage, do not contravene "public policy".

7. Husband and wife ⇐278(2)

The validity of spouses' property settlement contracts which are promotive of, incidental to, or conditioned on, divorce, must be determined in light of factual background of each case and considerations of public policy appropriate thereto.

8. Husband and wife ⇐278(2)

"Public policy" seeks to foster and protect marriage, encourage spouses to live together and prevent their separation, but does not discourage divorce, where spouses' relations are such that legitimate objects of matrimony have been utterly destroyed.

9. Husband and wife ⇐278(2)

In absence of fraud, collusion or imposition on court, "public policy" does not prevent spouses, who have separated, from entering into property settlement contract to become effective only if one of them obtains divorce, though such contract may be a factor in persuading a spouse having good cause for divorce to proceed to establish it.

In Bank.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by Zola V. Hill against Jack C. Hill for amounts due plaintiff under a property settlement agreement executed by the parties while husband and wife. Judgment for defendant, and plaintiff appeals.

Reversed and remanded with directions.

Prior opinion, 133 P.2d 445.

Haas & Home and John D. Home, all of Los Angeles, for appellant.

Harry W. Horton, of El Centro, Sarau & Thompson, and H. L. Thompson, all of Riverside, and Roy W. Colegate, of Palm Springs, for respondent.

GIBSON, Chief Justice.

This action was brought by a divorced wife to recover payments under a property settlement agreement executed on August 14, 1928, while the parties thereto were still husband and wife, but living separate and apart. The trial court found and concluded that the execution and delivery of the agreement "was at the time and date conditioned upon and in contemplation of, and for the purpose of promoting an immediate and forthwith dissolution of the marriage," and that the agreement was therefore void as against public policy and good morals. Judgment was entered for defendant, from which plaintiff appeals.

Plaintiff and defendant were married in 1906 and separated in 1926, and it appears from the evidence that they had no intention or expectation of ever living together again. In 1926, defendant husband com-

menced an action for divorce in which plaintiff wife filed a cross-complaint for separate maintenance. It was stipulated here "that the judge who tried the case decided the case in favor of Mrs. Hill, but before signing the findings and judgment the judge passed away." Negotiations leading to the execution of the agreement in controversy were commenced two years later when plaintiff called upon Mr. Horton, defendant's attorney, at his request. In reponse to questions by Mr. Horton plaintiff stated she had grounds for divorce but she did not want to commence an action therefor; that she would, however, think the matter over and if she decided to get one it would have to be on her terms. On the same day defendant informed plaintiff that if she did not give him a divorce he would quit the practice of medicine, in which event he would not have enough to pay her anything. A few weeks later a second interview took place between plaintiff and Mr. Horton in which questions relating to support of plaintiff and the minor children of the parties, in the event of a divorce, were discussed, but no agreement was reached. At the time of these conversations plaintiff was not represented by counsel, but shortly thereafter plaintiff notified Mr. Horton that she had employed Mr. Haas to represent her in future negotiations. After some discussion between the attorneys, Mr. Horton prepared and forwarded to Mr. Haas a property settlement agreement which recited that "in the event the party of the second part [plaintiff] does obtain an interlocutory decree of divorce, and thereafter obtains a final decree of divorce, that the following agreement is made as a full and complete property settlement between said parties, and full and complete settlement for the support and maintenance of the said party of the second part and the said two minor children" and "this agreement shall not become effective * * * until or unless the party of the second part may have obtained * * * a divorce." Mr. Haas returned the contract unsigned together with a draft prepared by him which omitted the provision just quoted. Following further discussions between the attorneys, the agreement prepared by Mr. Haas was signed by the defendant and mailed to Mr. Haas together with a letter from Mr. Horton reading as follows: "I am sending you these contracts * * * the same to be held by you and not delivered or used except in the event of an action being filed by Mrs. Hill for divorce against Dr. Hill and the obtaining of the decree of divorce by one or the other of the parties. I will appreciate your getting the complaint prepared, signed, filed and served as soon as possible, and I will then put in an appearance and advise you." A complaint charging defendant with desertion and seeking court approval of the property settlement agreement was filed on August 17, 1928, and within a few days thereafter the defendant filed an answer in which he also requested the court to approve the agreement. On September 7, 1928, an interlocutory decree was entered for plaintiff which provided that "it appearing that a full and complete property settlement has been entered into * * * said property settlement is hereby approved." Mr. Horton was present at the hearing of the case but it does not appear that he took any part in the proceedings. A final decree of divorce was entered on September 17, 1929, which contained the following provision: "The disposition of property and the payment of alimony is covered by the property settlement agreement heretofore entered into * * * the said agreement having been approved at the time of the trial of this cause."

[1] The evidence clearly shows that the agreement was made in contemplation of divorce and conditioned thereon to the extent that it was not to become effective except upon "the obtaining of a decree of divorce by one or the other of the parties." In support of the findings it also may be inferred that plaintiff was unwilling to proceed with an action for the dissolution of the marriage unless a satisfactory agreement was entered into providing for a settlement of her property rights and for the support of herself and the minor children of the parties. Defendant was unwilling that the property settlement agreement should become effective until and unless a divorce was obtained by one of the parties, and his answer in the divorce action shows that he was desirous that all of the property rights of the parties including his obligations to support plaintiff be finally disposed of by the approval of such agreement in the judgment of divorce. It appears, however, that the parties had been separated for more than two years when this agreement was entered into and that they had no intention of ever living together as husband and wife again. Although plaintiff had a meritorious cause of divorce she did not tell defendant that she would get one, and there is no evidence whatsoever of collusion.

No evidence was offered tending to show that defendant agreed not to defend an action or to do anything to facilitate the granting of a divorce. Defendant contends, however, that since the agreement was to become effective only in the event of divorce (a condition which he himself imposed), it is void as against public policy and he should not be bound thereby. Under the agreement plaintiff relinquished her right of inheritance and agreed to a division of property and the amount to be contributed by defendant for the support of herself and the minor children. Defendant asked the court to approve the agreement and limit his obligations according to its terms after plaintiff, in reliance thereon, refrained from asking the court for alimony and for a division of the community property. Certainly, as between the parties, every principle of justice and equity demands that defendant be compelled to stand by his contract and we do not believe in the circumstances here presented, that any rule of public policy requires that he be relieved of his obligations under this agreement.

[2] Because preservation of the marriage relationship is considered essential to the maintenance of organized society, it has been stated generally that the law will not countenance any contract having for its object the dissolution of a marriage. Howard v. Adams, 16 Cal.2d 253, 105 P.2d 971, 130 A.L.R. 1003; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; Loveren v. Loveren, 106 Cal. 509, 39 P. 801; see Restatement, Contracts § 586; 6 Williston, Contracts, Rev.Ed. 1938, § 1743; 9 Cal.Jur. 636; Bishop, Marriage, Divorce, and Separation, § 169; notes, 14 So.Cal.L.Rev. 373; 130 A.L.R. 1008. Agreements not to defend or to abandon a defense in a divorce action, to destroy or conceal evidence in proceedings for divorce, and to procure or furnish testimony of certain facts which will successfully support or defeat a divorce action, or which provide that payment to the party procuring evidence to be used in such an action is contingent upon the result of the action, have been held void as parts of collusive arrangements to facilitate divorce. Lanktree v. Lanktree, 42 Cal.App. 648, 183 P. 954; Miller v. Miller, 284 Pa. 414, 131 A. 236; Beard v. Beard, 65 Cal. 354, 4 P. 229; Senter v. Senter, 70 Cal. 619, 11 P. 782; Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826; Loveren v. Loveren, supra; Hare v. McGue, 178 Cal. 740, 174 P. 663, L.R.A. 1918F, 1099; Harris v. Moore, 102 Cal. App. 413, 283 P. 76; note 130 A.L.R. 1008. Even in the absence of such a collusive arrangement certain agreements have been held void as contra bonos mores upon the theory they had a direct tendency to promote dissolution of the marriage relationship. Thus, the courts have refused to enforce an agreement by a husband to pay his wife a fixed sum in full satisfaction of her claims for alimony if he should thereafter give the wife cause for divorce. Pereira v. Pereira, supra; Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92; Lane v. Lane, 78 Cal.App. 326, 248 P. 686. An agreement by the husband to pay the wife's counsel fees in the event of a divorce, and an agreement between a plaintiff in a divorce action and her attorney for a contingent fee, have also been held void. McCahan v. McCahan, 47 Cal.App. 173, 190 P. 458; Newman v. Freitas, supra; Parsons v. Segno, 187 Cal. 260, 201 P. 580; Wiley v. Silsbee, 1 Cal. App.2d 520, 36 P.2d 854, noted in 21 Va.L. Rev. 446; Theisen v. Keough, 115 Cal.App. 353, 1 P.2d 1015; Ayres v. Lipschutz, 68 Cal.App. 134, 228 P. 720, Restatement, Contracts, § 542(2).

[3] Property settlement agreements between husband and wife have in like manner been held invalid when regarded as inseparable parts of agreements for divorce which are contrary to the public policy favoring preservation of marriage. Under the early common law, this policy was so inflexible as to be considered a barrier to agreements for separation and for the adjustment of property rights upon separation. See Gallemore v. Gallemore, 94 Fla. 516, 114 So. 371, 372; Madden, Persons and Domestic Relations, p. 333; 7 Minn. L.Rev. 592. It is now well settled, however, that a husband and wife may agree to an immediate separation, and having so agreed or having actually separated, may enter into contracts adjusting their property rights. Civ.Code, § 159; Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Hensley v. Hensley, 179 Cal. 284, 183 P. 445; Huntsberger v. Huntsberger, 2 Cal.2d 655, 43 P.2d 258; Brown v. Brown, 83 Cal.App. 74, 256 P. 595; Boland v. Boland, 7 Cal. App.2d 401, 46 P.2d 238; Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175; 9 R.C.L. 524; 7 Minn.L.Rev. 592. As said in Brown v. Brown, 83 Cal.App. 74, at page 82, 256 P. 595, at page 599, "The

whole theory of the law has been to prevent * * * agreements which have for their purpose the severance of the marriage relation in the future and not to invalidate agreements where the separation has already taken place or is an instant fact." See also Boland v. Boland, 7 Cal. App.2d 401, 405, 46 P.2d 238.

[4, 5] Accordingly, by the great weight of modern authority, property settlement agreements are upheld even though made in contemplation of divorce. Rhinehart v. Rhinehart, 52 Wyo. 363, 75 P.2d 390; Gallemore v. Gallemore, 94 Fla. 516, 114 So. 371; Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am.St.Rep. 102; Welsh v. Welsh, 230 Mo.App. 1006, 93 S.W.2d 264; Miller v. Miller, supra; Herrin v. Herrin, 103 Mont. 469, 63 P.2d 137; Dennison v. Dennison, 98 N.J.Eq. 230, 130 A. 463; Shankland v. Shankland, 301 Ill. 524, 134 N.E. 67; Henderson v. Henderson, 37 Or. 141, 60 P. 597, 61 P. 136, 48 L.R.A. 766, 82 Am.St.Rep. 741; Frothingham v. Anthony, 1 Cir., 69 F.2d 506; See Giddings v. Giddings, 167 Or. 504, 114 P.2d 1009, 119 P.2d 280; Nelson v. Vassenden, 115 Minn. 1, 131 N.W. 794, 795, 35 L.R.A.,N.S., 1167; Stokes v. Anderson, 118 Ind. 533, 552, 21 N.E. 331, 4 L.R.A. 313; Bishop, op.cit., supra, § 702; note 109 A.L.R. 844. The rule is stated in 17 Am.Jur. § 499 as follows: "The validity of such agreements depends on whether there is an attempt to obtain a divorce not justified by the real facts and thus to practice a fraud upon the court. * * * Under this rule, where a separation has been induced by the vicious conduct or disability of one of the parties, without inducement or fault of the other, a contract looking to a settlement of property rights and the proper maintenance of the one not in fault is in no sense repugnant to public policy." The California decisions are in accord with this view. Cookinham v. Cookinham, 219 Cal. 723, 28 P.2d 1045; Huntsberger v. Huntsberger, supra; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645; Robertson v. Robertson, supra; Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755; Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; see Hare v. McGue, supra; Boland v. Boland, supra; Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252; cf. Howard v. Adams, supra. It has also been said in this state that property settlements are "highly favored in the law." Hensley v. Hensley, supra, 179 Cal. at page 287, 183 P. at page 446; Makzoume v. Makzoume, 50 Cal.App. 2d 229, 230, 123 P.2d 72. See, also, Lindey, Separation Agreements, Antenuptial Contracts, and Marriage Settlements, p. 385.

[6] Such contracts made in contemplation of divorce are entered into upon the assumption that divorce will follow. See Bishop v. Bishop, Mo.App., 162 S.W.2d 332, 335. It would therefore seem proper for the parties to provide for any possible failure of this assumption in their contract. And it has accordingly been held that agreements conditioned upon divorce, in the sense that they are to become effective upon dissolution of the marriage, do not contravene public policy. Miller v. Miller, supra; Bishop v. Bishop, supra; Frothingham v. Anthony, 1 Cir., 69 F.2d 506; Phillips v. Phillips, 39 R.I. 92, 97 A. 593; Lubbell v. Stolls, Sup., 202 N.Y.S. 229; cf. Darling v. Darling, 241 App.Div. 57, 270 N.Y.S. 557; Maisch v. Maisch, 87 Conn. 377, 87 A. 729; Clarke v. Clarke, 42 Times L.R. [Engl.] 132; note 109 A.L.R. 844; see Stokes v. Anderson, 118 Ind. 533, 552, 21 N.E. 331, 4 L.R.A. 313, 2 Bishop op.cit. supra, § 702.

Recent California cases have upheld property settlement agreements thus conditioned upon divorce. In Cookinham v. Cookinham, 219 Cal. 723, 28 P.2d 1045, 1046, this court approved a property settlement agreement under which a husband agreed to pay his wife $200 per month for the support of herself and minor child during the pendency of the wife's action for divorce, and thereafter, if the court determined that the wife was entitled to a divorce, the sum of $150 per month for her support until her death or remarriage and $50 per month for the support of the minor child until the latter attained her majority. In rejecting the contention that the agreement was contra bonos mores the court remarked: "* * * it is to be observed that the parties were living separate and apart and the agreement conclusively establishes their intent to amicably settle and adjust all of their property rights. This they were competent to do and were authorized by law to do." In Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540, 542, during the pendency of the wife's action for separate maintenance, the parties entered into a property settlement agreement under which the husband agreed to pay the wife $250 per month "in the event of a divorce between the parties." Subsequently, and, as the wife contended, in considera-

tion of the execution of the agreement, she changed the form of her action from one for separate maintenance to one for absolute divorce. The validity of the agreement was in issue in the divorce proceedings where the agreement was approved and adopted in interlocutory and final decrees. On appeal from an order reducing the amount of payments, this court held the agreement was immune from judicial modification. The validity of the same agreement was again challenged in Ettlinger v. Ettlinger, 46 Cal.App.2d 628, 116 P.2d 482. It was there held the previous decision of the Supreme Court was res judicata upon the issue of the legality of the agreement, and that in the state of the record, a finding that the agreement was contra bonos mores would have been entirely wanting in evidentiary support. The court pointed out that it was not claimed that the divorce was obtained by collusion or that the wife did not have a meritorious cause of action for divorce. In Howard v. Adams, 16 Cal.2d 253, 105 P.2d 971, 130 A.L.R. 1003, this court held an agreement by which defendant undertook to support her niece, if the niece would procure the divorce she contemplated in another state in order to avoid publicity damaging to defendant's social and business connections, was not against public policy. The fact that the husband admitted his marital relations were discordant and that the wife had a good cause of action for divorce was, in the opinion of the court, a complete answer to any contention that the contract was invalid because it might have a tendency to induce, or did in fact, induce, the wife to proceed to obtain a divorce and the husband to permit her to prosecute the action without opposition. In Queen v. Queen, 44 Cal.App. 2d 475, 112 P.2d 755, 756, a property settlement agreement presented to the court for enforcement contained the following provision: "This agreement shall be and become effective if, as, and when within a period of six (6) months from the date hereof a decree of divorce is entered granting to the party of the second part a divorce from the party of the first part * * *. If a divorce shall not be so granted * * * then this agreement shall be and become forthwith null and void and of no effect. * * *" In holding the agreement was enforceable, the court answered the contention that the wife was persuaded to obtain a divorce as a result of the execution of the agreement by pointing to the recitals therein that the parties had separated, that the wife was about to institute an action for divorce, and that the parties were desirous of arriving at an agreement respecting the settlement of their property rights and providing for the support of the wife in the event a divorce was obtained. In Morrow v. Morrow, 40 Cal.App.2d 474, 105 P.2d 129, the signing of a stipulation by the wife in a divorce action to the effect that she should be awarded $75 a month as alimony was not against public policy, the court stating that the stipulation did not tend to interfere with the real and substantial status of the marriage contract as the parties were already separated. Cf. Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547; Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536.

Respondent relies upon certain decisions in this state to support his contention that a property settlement agreement conditioned upon divorce is invalid, but, with one exception hereafter noted, we find nothing in those decisions inconsistent with the principles expressed in the foregoing cases. In the leading case of Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 490, 23 L.R.A.N.S. 880, 134 Am.St.Rep. 107, the parties had separated and the wife commenced an action for divorce. During its pendency the parties became reconciled and the action was dismissed. The parties then executed an agreement providing among other things that if the husband should thereafter give the wife cause for divorce and if she should establish a right thereto in an action against him, the husband would pay the wife $10,000 in full settlement of alimony and property rights. After concluding that the agreement therein "could not but encourage him [the husband] to yield to his baser inclinations and inflict the injury" which would compel the wife to obtain a divorce, the court stated: "It shows by its terms that it is not an agreement to settle property rights accruing by reason of a marital offense already perpetrated and complete as a cause for divorce. There is therefore no force in the claim, as applied to this case, that it is * * * valid as a settlement of such rights, even if it were conceded that such an agreement might under some circumstances be permitted to stand." Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92, involved an antenuptial contract similar to the contract in the Pereira case. Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548, involved a contingent fee contract between the wife and an attorney which the court considered tended directly

to bring about alienation of husband and wife by offering a stranger a premium to advise dissolution of the marriage ties. The court pointed out, moreover, that the power of the court to compel the husband to pay his wife's counsel fees in a divorce action removed the necessity and reason for the rule permitting contingent fee contracts. See 21 Va.L.Rev. 446. In Moss. v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422, the plaintiff husband sought a declaration of his obligations under a property settlement, the sole consideration for which, he alleged, was a promise by the defendant wife to procure a divorce. The trial court sustained a demurrer to the complaint and this court affirmed the judgment. Since it was admitted by demurrer that the sole consideration for the agreement was the promise of the wife to procure a divorce, we assumed for the purposes of the decision that the agreement was invalid and held that the trial court had discretion in a declaratory action to refuse relief where it appeared the plaintiff was a party of equal fault to the illegal transaction. We expressly refrained, however, from passing upon the validity of the agreement.

Respondent also cites Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352, as holding that if it is the essence of the agreement that one of the parties obtain a divorce and if the promises made in contemplation thereof are conditioned upon a dissolution of the marriage, the contract is unenforceable. Although it does not appear in the Brown case that the parties had separated at the time the agreement was entered into, and for that reason the case may be factually distinguishable from the situation here presented, the language of that opinion is hereby disapproved insofar as it is inconsistent with anything said by us here.

[7] It thus appears that with the one exception none of the foregoing cases relied upon by defendant is authority for his position that a property settlement agreement entered into after separation, without collusion, is invalid solely because it is not to become effective unless a divorce is obtained by one of the parties. Defendant contends, however, that the judgment declaring the agreement invalid must be affirmed because the trial court determined not only that the agreement in question was "conditioned upon and in contemplation of" divorce, but also that it was "for the purpose of promoting an immediate and forthwith dissolution of the marriage." While it is true that contracts condemned by the courts usually have been termed "promotive of divorce" as distinguished from those "incidental to divorce" or "conditioned upon divorce," this terminology is not always accurate or descriptive. The validity of such contracts must be determined in the light of the factual background of each case and considerations of public policy appropriate thereto. Most property settlement agreements are incidental to or conditioned upon divorce, since they are means employed in the disposition of property upon divorce, and they are also promotive of divorce in the sense that an amicable adjustment of property rights facilitates the completion of contemplated divorce proceedings.

[8, 9] Public policy seeks to foster and protect marriage to encourage parties to live together, and to prevent separation. Deyoe v. Superior Court, 140 Cal. 476, 482, 74 P. 28, 98 Am.St.Rep. 73; 17 Am.Jur. 154; notes 15 So.Cal.L.Rev. 376; 130 A. L.R. 1008. But public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. Cf. Brewthauer v. Brewthauer, 45 Cal.App. 759, 761, 188 P. 296. In the absence of fraud, collusion or imposition upon the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights which shall become effective only in the event one of the parties obtains a divorce, even though such a contract may be a factor in persuading a party who has a good cause for divorce to proceed to establish it.

Applying these principles to the facts of the present case we conclude that the agreement is valid and enforceable. Prior to the execution of the contract the parties were living separate and apart as a result of a marital offense committed by the husband which constituted good grounds for divorce. They had no intention or expectation of resuming marital relations. At the time of the commencement of the negotiations which led to the execution of this agreement the domestic status of the parties was unsettled and their relations unsatisfactory. The husband had sued for divorce and the wife had countered with a suit for separate maintenance and the case had been tried. As appears from the stipulation, the court announced its intention to deny the husband a divorce and to

award the wife separate maintenance. The wife did not at any time agree to obtain a divorce and the husband did not agree to aid her in procuring a divorce by refraining from defending against an action or concealing evidence from the court. There is no intimation that the subsequent divorce was collusive. In language of the court in Morrow v. Morrow, 40 Cal.App.2d 474, 482, 483, 105 P.2d 129, 133, the agreement "did not tend to interfere with the real, substantial status of their marriage contract as the parties were already separated. They occupied the position of husband and wife in name only. It did not facilitate the divorce any more than the numerous valid property settlements which the courts of this state have recognized and approved."

The judgment is reversed and the cause remanded with directions to enter judgment in accordance with the views expressed herein.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



23 Cal.2d 120

In re HANLEY'S ESTATE.

HANLEY v. HANLEY et al.

L. A. 18316.

Supreme Court of California.

Oct. 29, 1943.

Rehearing Denied Nov. 24, 1943.

1. Executors and administrators ⇐510(6)

A statutory requirement that an appeal from an order settling account of executrix must be taken in 60 days from its entry is mandatory, and court is without jurisdiction to consider an appeal which has been taken subsequent to expiration of statutory period. Code Civ.Proc. § 939; Probate Code, § 1233.

2. Executors and administrators ⇐510(6)

The filing of a signed probate decree is the equivalent to "entry" at length in minute book of court within meaning of statutory requirement that an appeal from an order settling account of an executrix must be taken within 60 days from its entry. Code Civ.Proc. § 939; Probate Code, §§ 1221, 1233.

See Words and Phrases, Permanent Edition, for all other definitions of "Entry".

3. Executors and administrators ⇐510(6)

Where order settling first account current of executrix was filed December 12 and attorney for respondent served on attorney for appellant notice reciting that order had been filed on December 17, which recital was confirmed by a telephone conversation, and notice of appeal was filed February 11, 61 days from December 12, notice of appeal was not timely, and appellate jurisdiction was lost. Code Civ. Proc. § 939; Probate Code, § 1233.

4. Appeal and error ⇐353
Courts ⇐202(5)

In absence of statutory authorization, neither trial nor appellate courts may extend or shorten time for appeal even to relieve against mistake, inadvertence, accident or misfortune. Code Civ.Proc. § 939; Probate Code, § 1233.

5. Appeal and error ⇐21, 22

Jurisdiction cannot be conferred upon appellate courts by consent or stipulation of parties, estoppel or waiver. Code Civ.Proc. § 939; Probate Code, § 1233.

6. Appeal and error ⇐792

Where it appears that appeal was not taken within 60-day period, court has no discretion but must dismiss the appeal of its own motion, even if no objection is made. Code Civ.Proc. § 939; Probate Code, § 1233.

7. Appeal and error ⇐353
Courts ⇐202(5)

The taking of an appeal is a jurisdictional rather than merely procedural step, and authority of appellate courts to give relief for excusable delay in complying with procedural time provisions pertaining to appeals does not apply, and rule in favor of finality of judgment occasioned by lapse of statutory time for taking of an appeal is paramount. Code Civ.Proc. § 939; Probate Code, § 1233.

8. Judgment ⇐407(6)

Where, after a judgment has been rendered against a person, he is entitled to take proceedings looking to its reversal or modification and is prevented from doing so by fraud or duress of other party until it is too late, or is prevented from taking an appeal because of circumstances over which he has no control, such person is

entitled to equitable relief from the judgment, which relief may be invoked in the case of fraud or hardship without interfering with rules governing jurisdiction of an appeal. Code Civ.Proc. § 939; Probate Code, § 1233.

CURTIS and CARTER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding in the matter of the estate of Kate Hanley, deceased, relating to the first account current of Katharine G. Hanley, as executrix, etc. From an order settling such account, Katharine G. Hanley, in her individual capacity, appeals. On motion of legatees under the will to dismiss the appeal.

Appeal dismissed.

Prior opinion, 129 P.2d 968.

Laurence B. Martin, of Los Angeles, for appellant.

F. C. Stevens, of Los Angeles, for respondents.

EDMONDS, Justice.

The first account and report in the administration of the estate of Kate Hanley was approved by an order filed on December 12, 1941. A notice of appeal was filed by Katharine Hanley, who, the court determined by the order, does not own money inventoried as property of the estate. Certain legatees under the will of Mrs. Hanley, by a motion to dismiss the appeal, have challenged the jurisdiction of this court to entertain the matter upon the ground that the notice was not filed until February 11, 1942, one day beyond the applicable statutory period.

Katharine Hanley is also executrix of the estate, but in presenting the question of her asserted ownership of the money in controversy, is represented by different counsel from the attorney who appears for her in her administrative capacity. The record shows that on December 18th the attorney acting for her as executrix served upon her personal counsel a notice reciting that the order approving the account had been filed on December 17th. A few days later, according to the affidavits of her personal counsel, one of them, in a telephone conversation, was told by the attorney representing Mrs. Hanley as executrix that the date stated in the notice was correct and the time for appeal should be computed accordingly.

Late in the afternoon of February 10th, counsel upon whom the notice had been served discovered that the order was filed on December 12th, not December 17th. It was then too late to file a notice of appeal that day but one was served and filed the following morning. Since that time the appellant has proceeded in good faith with the prosecution of her appeal by the timely filing of the transcript and an opening brief. Basing her opposition to the motion upon these facts, the appellant asserts that under appropriate circumstances, such as innocent and justifiable reliance upon misrepresentations, one may be relieved from the effect of delay in filing a notice of appeal; or, adopting a different theory, the respondent whose misrepresentations were the cause of the delay may be estopped to take advantage of it by a motion to dismiss.

[1-3] An appeal from an order settling the account of an executrix must be taken within 60 days from its entry. Code Civ. Proc. sec. 939; Prob. Code, sec. 1233. The filing of a signed decree is equivalent to entry "at length in the minute-book of the court." Prob. Code, sec. 1221. In examining the appellant's position, it is immaterial whether the misrepresentations concerning the date upon which the order was filed were wilful or inadvertent, whether the reliance thereon was reasonable or unreasonable, or whether the parties seeking to dismiss are acting in good faith or not. It may be assumed that the appellant has presented grounds for relief which would be sufficient if relief could be granted. But the requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period. In re Estate of Smead, 12 Cal.2d 20, 82 P.2d 182; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Lane v. Pellissier, 208 Cal. 590, 283 P. 810; Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; In re Estate of Brewer, 156 Cal. 89, 103 P. 486; In re Estate of Murphy, 36 Cal. App.2d 653, 98 P.2d 523; Irving v. Sheetz, 26 Cal.App.2d 751, 80 P.2d 502; LeCyr v. Dow, 26 Cal.App.2d 459, 79 P.2d 777; In re Estate of Vizelich, 123 Cal.App. 651, 11 P.2d 870; Bates v. Ransome-Crummey Co., 42 Cal.App. 699, 184 P. 39.

[4-6] In the absence of statutory authorization, neither the trial nor appellate

courts may extend or shorten the time for appeal (Bryant v. Superior Court, 16 Cal. App.2d 556, 61 P.2d 483), even to relieve against mistake, inadvertence, accident, or misfortune. People v. Lewis, 219 Cal. 410, 27 P.2d 73; Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am.St.Rep. 68; Winchester v. General Cab Co., 8 Cal.App.2d 360, 47 P. 2d 1116; Estes v. Chimes, 40 Cal.App.2d 41, 104 P.2d 74. Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. Stipulation: Land v. Johnston, 156 Cal. 253, 104 P. 449; Langan v. Langan, 89 Cal. 186, 26 P. 764. Estoppel: In re Estate of Pearsons, 119 Cal. 27, 50 P. 929; but cf. Moyle v. Landers, 78 Cal. 99, 20 P. 241, 12 Am.St.Rep. 22, decided when service of notice of appeal was required under Code Civ.Proc., sec. 940, prior to 1921. Waiver: Aspegren & Co., Inc., v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400; In re Estate of Brewer, supra; In re Estate of Murphy, supra. For a full discussion of these rules, see comment, 30 Cal.L.Rev. 433, 448. If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made. In re Estate of Brewer, supra, 156 Cal. page 90, 103 P. 486; Langan v. Langan, supra, 89 Cal. page 195, 26 P. 764; In re Estate of Pearsons, supra, 119 Cal. page 29, 50 P. 929; In re Estate of Murphy, supra, 36 Cal.App.2d page 655, 98 P.2d 523; Smith v. Questa, 58 Cal.App. 1, 207 P. 1036.

[7] In strictly adhering to the statutory time for filing a notice of appeal, the courts are not arbitrarily penalizing procedural missteps. Relief may be given for excusable delay in complying with many provisions in the statutes and rules on appeal, such as those governing the time within which the record and briefs must be prepared and filed. These procedural time provisions, however, become effective after the appeal is taken. The first step, taking of the appeal, is not merely a procedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court. And of particular importance is the fact that the security of rights of contract, titles to property, and the status of persons rest upon certainty in the finality of judgments occasioned by the lapse of the statutory time for the taking of an appeal.

[8] It by no means follows that one who has failed to file a notice of appeal within the statutory time is always without remedy. For example, where after a judgment has been rendered against a person he is entitled to take proceedings looking to its reversal or modification and he is prevented from doing so by the fraud or duress of the other party until it is too late, or when he has been prevented from taking an appeal because of circumstances over which he has no control, he is entitled to equitable relief from the judgment. See Rest., Judgments, sec. 125, comment b; sec. 112. Such relief may be invoked in the unusual case of fraud or hardship, without interfering with the rules governing jurisdiction of an appeal.

The motion is granted and the appeal dismissed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

CURTIS, Justice.

I dissent. The proposition presented for determination is whether, in the light of the peculiar factual situation here involved, the appellant should be relieved by this court from the operation of the statute fixing the time for the taking of an appeal. While it does not appear that the erroneous statement in the notice referable to the filing date of the order approving the executrix' account was wilfully made for the purpose of misleading appellant, the natural and necessary consequence of the service of such notice upon her counsel was to induce reliance upon its positive statement of the condition of the record in the estate proceeding as affecting the time for the taking of an appeal. This erroneous representation as to the day of filing the order in question was couched in no uncertain terms and was made without qualification in circumstances implying knowledge of the true facts provocative of the definite assertion. Obviously, the inevitable gravity of the error in recital of the date of ruling predicate of future procedural steps was not lessened because the inaccuracy was the result of an inadvertence. A misrepresentation inadvertently made may produce the same dire results as an erroneous statement made intentionally.

The fact that service of notice of entry of decision is not required to start the time running within which an appeal may be

taken (Cook v. Cook, 208 Cal. 501, 282 P. 385; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Kraft v. Briggs, 15 Cal.App.2d 667, 59 P.2d 1044; Nagelmann v. McIntyre, 27 Cal.App.2d 621, 81 P.2d 466) does not preclude the recipient from relying with confidence upon the accuracy of the information so furnished him. If not intended as a credible representation, the notice of ruling should not have been volunteered. It was given at peril of acceptance without further inquiry as to the veracity of its positive declaration of the date of decision. The law is settled that "Where statements are such as to justify a reliance upon them, the person making them cannot excuse himself by saying that the other party need not have relied upon them; he must show that his representations were not in fact relied upon. A reason given for this rule is that the making of a representation to influence the conduct of the person to whom it is made carries with it an assurance, necessarily implied, of belief of the party making it in the truth of the affirmation." 12 Cal.Jur. § 27, p. 748. In Pomeroy's Equity Jurisprudence, 4th Ed., vol. 2, § 895, pp. 1855–1856, it is said that "whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact." In view of this established principle, it becomes unimportant here that the court records in this estate proceeding were open for inspection by appellant or her counsel for ascertainment of the true facts essential to the timely perfection of the appeal. Under the prevailing circumstances such examination was not required.

Nor does the fact that appellant is also the executrix of the will of the decedent estop her from complaining of the misleading character of the notice of ruling and the erroneous impression thereby created. It is a rule of general application that an act done in a representative capacity will not estop one in his individual capacity, and vice versa. 31 C.J.S., Estoppel, § 134, p. 402; 11B Cal.Jur. § 825, pp. 228–229. These identities are separate entities, totally distinct. Anthony v. Chapman, 65 Cal. 73, 2 P. 889; Estate of Bauer, 79 Cal. 304, 21 P. 759. The peculiar equities of this case add particular force to the application of the general rule here. Katharine G. Hanley was represented by different counsel in each of her capacities, and the attorney acting for her as executrix in giving the notice of ruling was in no way associated with the attorneys serving her as an individual. The independence of her respective counsel has been maintained throughout the estate proceeding, and there is no difficulty in separating her responsibility for legal actions as between her dual capacities. Counsel acting for her as an individual relied in good faith on the notice as served by opposing counsel, whose position in this proceeding, so far as the principle of distinction is concerned, was the same as though some other person than appellant occupied the status of executrix. Such situation furnishes no basis to conclude by way of estoppel the individual rights of Katharine G. Hanley in this matter.

To be considered now is the point whether the provision of the law fixing the time for taking an appeal must be enforced in all cases as it is written regardless of the circumstances of delay. Judge Elliott in his valuable work on Appellate Procedure, section 112, pages 92, 93, discusses the proposition as follows: "The rule that the court cannot enlarge the time for taking an appeal must be regarded as established, but the court may, nevertheless, relieve a party in the proper case against * * * accident. In relieving a party against * * * accident the court does not extend the time for taking the appeal by breaking down the provisions of the statute limiting the time within which appeals must be taken." The propriety of appellant's claim to relief is in accord with this general doctrine. Whether a misrepresentation such as is here involved be the result of inadvertence or deliberate design is immaterial insofar as its ultimate effect upon the aggrieved party is concerned. In either event the same

equitable elements are present in establishing a case calling for the exercise of an appellate court's inherent power to administer justice. The fact that the respondents moving to dismiss this appeal did not join with the respondent executrix in giving the erroneous notice of ruling does not alter the principle of decision herein, for considerations of justice and good conscience preclude their taking advantage of the error misleading appellant. To hold otherwise would permit a condition consequent of inadvertence to thwart this court's equitable control of its process, resulting in a travesty on justice and bringing the administration of the law into just reproach.

For the foregoing reasons the motion to dismiss should, in my opinion, be denied, and the appeal should proceed for decision on its merits.

SHENK, J., concurred.

CARTER, Justice.

I dissent. I am in full accord with all that Justice CURTIS says in his dissenting opinion in this case, but I desire to discuss the problem from a different point of view from that mentioned by him.

As I understand the majority opinion, it holds that the late filing of a notice of appeal requires the dismissal of such appeal regardless of the cause of the delay in filing such notice, and that any judgment rendered by an appellate court in such a case would be void. Because, if the filing of a notice of appeal within 60 days after the entry of judgment is necessary to confer jurisdiction upon the appellate court, such court would have no jurisdiction to act in a case where such notice is filed beyond that period. This would be true even if the respondent procured the kidnapping of the messenger who was taking the notice of appeal to the county clerk's office or otherwise intercepted and destroyed such notice before it reached the county clerk's office. The same conclusion would likewise follow if the courthouse and all its occupants were destroyed by fire, flood, earthquake, or even a bomb from an enemy bomber, after the entry of judgment and before the notice of appeal was filed. Such pronouncement, in my opinion, should not be dignified by the term "legal reasoning," but should be classified as a blind adherence to precedent which is likewise unsupported by legal reasoning. The great minds which evolved the common law, and promulgated the maxim "that for every wrong there is a remedy" would find no difficulty in advancing a sound legal argument as a basis for adequate relief in such a case. But the majority opinion says that "It by no means follows that one who has failed to file a notice of appeal within the statutory time is always without remedy," and then states that "where after a judgment has been rendered against a person he is entitled to take proceedings looking to its reversal or modification and he is prevented from doing so by the fraud or duress of the other party until it is too late, or when he has been prevented from taking an appeal because of circumstances over which he has no control, he is entitled to equitable relief from the judgment." Let us analyse this pronouncement: An appellant who has lost his right of appeal because of fraud or duress of the other party or who has been prevented from taking an appeal because of circumstances beyond his control, is required to bring an action in equity for relief. What sort of relief may I ask? The only answer must be that he bring an action to determine whether he had a meritorious appeal, and the trial court would be required to pass upon this question after it had already rendered judgment against him in the other action. It may be a fair assumption that the trial court would again decide the case against the appellant and he would take an appeal from the judgment which determined that the appeal which he attempted to take in the other action was not meritorious. The appellate court would then be asked to determine whether or not the appeal which the appellant sought to prosecute in the other action was meritorious, and if it so determined, the judgment in the second action would be reversed, and the trial court would be directed to award the appellant the relief to which he was entitled in the other action. The judgment obtained in the other action may have already been executed since it became final upon a dismissal of the appeal which the appellant intended to prosecute therefrom. Such a situation is incongruous, and is analogous to that depicted in the case of Taylor v. Hopper, 207 Cal. 102, at pages 103, 104 276 P. 990, at page 991, where this court said: "It seems clear upon principle that such a remedy does not exist in a case such as we are considering. The difficulty in determining the amount of damages is insurmountable. If the jury found a fraud had been committed upon plaintiff to induce her to give up her

cause of action, how would it determine what amount, if any, she would have received from another jury, had she not compromised her action, but had proceeded to trial? And how could damages in the instant case be assessed without some measure of what would have been accorded to plaintiff in the original action, had she proceeded to trial? A well-reasoned case (Urtz v. New York Central, etc., Co., 202 N.Y. 170, 95 N.E. 711) has considered this identical problem. The plaintiff therein alleged that upon the death of her husband, caused by the negligence of the defendant, she had been induced by false and fraudulent representations as to the facts to enter into an agreement conpromising her right of action for $500 and she sought recovery of damages for the fraud practiced upon her. The action was not to enforce or vacate the compromise, but to recover the actual pecuniary loss alleged to have been suffered by plaintiff by being induced to enter into the compromise. The court said: 'The jury were bound, having found the fraud, to determine whether the plaintiff was injured through the fraud, and, if injured, the sum of her damages. In case the right of action had no value, she had gained by the transaction and was not injured. It had no value whatever, if the true state of facts disclosed that it was an invalid and non-existing claim, or, in other words, that the defendant was not negligent, or, if the defendant was negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent, and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts, and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise but to recover the actual pecuniary loss sustained by the plaintiff. *An alleged value of the claim, based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim, is of a nature too speculative and wagering to be recognized by the law in this action for fraud.*'"

In the case of Taylor v. Hopper, supra, and in the New York case of Urtz v. New York Central, etc., Co., cited therein, plaintiff sought to recover in a separate action for fraud perpetrated by the defendant in inducing her to compromise a claim for damages for personal injuries and wrongful death as the result of the negligence of the defendants in the respective actions. It was squarely held in both of these cases that the cause of action for damages which was the subject of plaintiff's claim could not be liquidated in a separate action based upon a cause of action for the fraudulent loss of such claim. If the reasoning in the case of Taylor v. Hopper, supra, is sound, and it appears to constitute the settled law of this state, as its soundness has not been questioned by any subsequent decisions, and it has been twice cited with approval (Ramsey v. Penry, 1942, 53 Cal. App.2d 773, 128 P.2d 399, and Campbell v. Birch, 1942, 19 Cal.2d 778, 122 P.2d 902), then the rule announced in the majority opinion is clearly erroneous and the two pronouncements cannot stand in the realm of jurisprudence without doing violence to consistency and harmony in their application.

Let us assume that instead of claiming that she was defrauded in compromising her damage claim, the plaintiff in the case of Taylor v. Hopper, supra, had tried her cause in the superior court based upon her cause of action for damages and a judgment had been rendered against her, and she was prevented from taking an appeal from such adverse judgment as the result of the fraud or duress of the defendant or other circumstances beyond her control, and she thereupon commenced an action in equity for relief from the injury suffered as the result of being prevented from taking an appeal. Certainly the situation would be the same as that depicted in the decision of this court in said case, and if the rule therein announced would be applied, she would not be entitled to relief even though it were established beyond controversy that she had been prevented from prosecuting her appeal as the result of fraud or duress by the defendant or other circumstances beyond her control.

The effect of the holding in the majority opinion is that an appellate court may be deprived of jurisdiction of a cause as the result of fraud perpetrated by a party to said cause, and that the injured party is relegated to an action in the superior court for a determination of whether or not such fraud has been perpetrated, and if so, what relief the injured party is entitled to. Both

of these pronouncements are diametrically opposed to settled principles of law. First, it is settled law that an appellate court must determine its own jurisdiction (People v. Lewis, 219 Cal. 410, 27 P.2d 73; Wilbur v. Donohoe Kelly Banking Co., 10 Cal.2d 473, 75 P.2d 514; 2 Cal.Jur. 767), and it necessarily follows that it must determine whether or not it has lost jurisdiction of a cause because of the fraudulent conduct of one of the parties thereto; and second, that an appellate court may not be deprived of jurisdiction of a cause because of the fraud perpetrated by a party thereto.

Taking up the first proposition, it is settled that when a notice of appeal is filed, the superior court loses jurisdiction and the cause is thereby transferred to the appellate court having jurisdiction thereof, and it is for the appellate court which has jurisdiction of such appeal to determine whether or not the appeal has been properly taken and what disposition should be made thereof. Nothing a trial court can lawfully do or fail to do can deprive an appellate court of its power to determine its own jurisdiction in any cause in which jurisdiction is conferred upon such appellate court by the Constitution and statutes of this state. Therefore, it is illogical to say that when a party has been prevented as the result of fraud of the adverse party from perfecting his appeal from a judgment of the trial court, he must seek redress for that fraud in a trial court which has already decided the cause adversely to him.

Speaking to the second proposition, that an appellate court cannot be deprived of its jurisdiction of a cause as a result of the fraud perpetrated by one of the parties thereto, it is settled that where the judgment and the consequent sending down of the remittitur has been secured by fraud or imposition, or where the appellate court has been led astray so as to decide a case under a misapprehension as to the true facts, the court never loses jurisdiction to recall the remittitur and again consider the merits of the case. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006. At pages 725 and 726, 7 P.2d at page 1007, this court said:

"There can be no doubt that, in a proper case, this court has power to recall a *remittitur*. Under ordinary circumstances, it loses jurisdiction of a cause when the *remittitur* has been sent to and filed in the court below. This is so because the purpose of the *remittitur* is to return to the court below the cause which has been brought up on appeal, and, when the *remittitur* has been duly filed by the court below, the cause is pending in that court, and not in this court. Stated in another way, this court has no appellate jurisdiction over its own judgments, and it cannot review or modify them after the cause has once passed from its control by the issuance of the *remittitur*. Leese v. Clark, 20 Cal. [387], 388, 417. However, that rule has no application to a situation where the judgment of this court and the consequent sending down of the *remittitur* has been secured by fraud or imposition, or where the court has been led astray so as to decide the case under a misapprehension as to the true facts. If such be shown to be the case, this court may recall the *remittitur*. The theory upon which this power is exercised is not that the court, in this manner, resumes jurisdiction over a cause, but that the court has never lost jurisdiction, because an order secured by fraud and false suggestion is a nullity, and cannot be deemed to be the order of the court. It therefore follows that in such a case the court has never lost jurisdiction. The case of Trumpler v. Trumpler, 123 Cal. 248, 55 P. 1008, discusses the principles involved at some length. At page 252 of 123 Cal., 55 P. 1008, 1009, it is stated:

"'The general principles governing the jurisdiction of this court over a case which has been here, after the issuance of *remittitur*, and the power of the court to recall a *remittitur*, have been well settled. They were first elaborately stated in the case of Rowland v. Kreyenhagen, 24 Cal. 52. In that case the court, having stated that as a general rule this court cannot exercise any jurisdiction over a case in which a *remittitur* has been issued by its order and filed in the court below, say as follows: "But this general rule rests upon the supposition that all of the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party; for, if it appears that such has been the case, the appellate court will assert its jurisdiction and recall the case. Against an order of judgment improvidently granted upon a false suggestion, or under a mistake as to the facts of the case, this court will afford relief after the adjournment of the term, and will, if necessary, recall a *remittitur* and stay proceedings in the court below. This is not done, however, upon the principle of resumption of juris-

diction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree. These views are fully sustained by the numerous authorities cited on the argument by counsel for appellant." * * * The same rule has been declared in Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640; Holloway v. Galliac, 49 Cal. 149; People v. McDermott, 97 Cal. [247], 249, 32 P. 7; Estate of Levinson, 108 Cal. 450, 41 P. 483, 42 P. 479.'"

The argument advanced in the majority opinion in regard to the desirability of securing finality of judgments is equally applicable to a case in which the finality of the judgment is predicated upon the going down of the remittitur from the appellate court as it is to the time within which a notice of appeal should be filed after the entry of judgment. If the intervention of fraud can prevent the finality of a judgment in one case there is no sound reason why the same rule should not apply in other cases.

None of the cases cited in the majority opinion involved a situation where a party had been prevented by fraud perpetrated by the adverse party from filing his notice of appeal within the time provided by statute, and I have been unable to find any case within this jurisdiction involving a factual situation of this character. Neither do any of the cited cases involve duress or disclose that the party desiring to appeal was prevented from doing so because of circumstances over which he had no control. The most that can be said of the cases relied upon in the majority opinion is that some of them involve mistake or inadvertence on the part of the appellant himself, which presents an entirely different situation than where the filing of the notice of appeal is prevented by the conduct of the adverse party as is disclosed by the record in this case. Most of these cases contain the bald statement that the filing of a notice of appeal within the statutory period is mandatory and jurisdictional without any discussion as to what is meant by the term jurisdiction.

In this action the essential question presented is the effect of section 939 of the Code of Civil Procedure which requires that an appeal shall be taken within 60 days after the entry of judgment. In order for the appellate court to *acquire* jurisdiction of a *particular case,* the jurisdiction of that court must be *invoked* in some manner. The manner of invoking it is the subject of legislative enactment. It is firmly established that the mode of *procedure* for *invoking* jurisdiction of the appellate court in a particular case is the filing of the notice of appeal. 2 Cal.Jur. 416. It has been stated repeatedly that the procedural requirements for invoking the jurisdiction of the appellate court are themselves jurisdictional and that the time within which an appeal must be taken is jurisdictional. 2 Cal.Jur. 393–6. It becomes necessary to determine the *kind* of jurisdiction to which reference is made, that is, whether it is absolute jurisdiction of the subject matter, which cannot be conferred by consent, waiver, or estoppel, or some other kind of jurisdiction. In determining whether or not the appellate court had jurisdiction in the instant case, the kind of jurisdiction of which we are speaking must be clarified. Assuming that absolute jurisdiction over the *subject matter* may not be conferred by consent, waiver, estoppel, or any conduct of the parties, it cannot be doubted that the Supreme Court had general appellate jurisdiction over the *class* of cases to which the instant case belongs. Cal.Const. VI, sec. 4; Code Civ. Proc. sec. 963; Prob.Code, sec. 1240. While it may be that the requirement that an appeal must be taken in 60 days from the entry of judgment, Code Civ.Proc., secs. 939, 940, is a jurisdictional requirement, it is not jurisdictional in the sense of jurisdiction over the *subject matter.* It is a *procedural* jurisdictional prerequisite that must be met to *invoke* the jurisdiction of the appellate court. It is the procedural process by which the appellate court *acquires* jurisdiction. It is *not a limitation* on the *general appellate jurisdiction* over the *subject matter.* Hence, an objection based upon irregularities in the procedural jurisdiction may be waived or the party estopped to assert them. It does not consist of consenting to jurisdiction over the subject matter.

It was said in Young v. City of Los Angeles, 86 Cal.App. 13, 17, 260 P. 798, 800, quoting with approval from 15 Corpus Juris 844: "An absolute want of jurisdiction of the *subject-matter* or cause of action cannot be waived, nor can the doctrine of equitable estoppel be invoked to confer jurisdiction on a tribunal which has not jurisdiction of the subject-matter. But where the court has *general jurisdiction of the subject-matter a lack of jurisdiction of the particular case may be waived by failure to take timely and specific objections, or an invocation of or submission to the jurisdiction may raise an estoppel to deny such jurisdiction.*" (Emphasis added.) And at page 21 of 86 Cal.App., at page 802 of 260 P., quoting with approval from Taylor Coal Co. v. Industrial Commission, 301 Ill. 381, 134 N.E. 169: "The general rule as applied to courts is that jurisdiction of the *subject-matter—which means jurisdiction of the class of cases to which the particular case belongs* and not jurisdiction of a case within such a class—cannot be waived. The *method* by which jurisdiction of a particular case within the general class of cases is *obtained,* and *any defects or irregularities in respect thereto, may be waived,* and are waived unless seasonable objection is made in accordance with the established practice." (Emphasis added.) The distinction is manifest from those cases holding that appellate jurisdiction over the subject matter may not be conferred in instances where the order from which the appeal is taken is *not an appealable order.* Brooks v. Calderwood, 19 Cal. 124, 125; Sherman v. Standard Mines Co., 166 Cal. 524, 137 P. 249; Rossi v. Caire, 189 Cal. 507, 209 P. 374. Obviously in such cases the appellate court had no jurisdiction over the subject matter because the order from which the appeal is taken does not belong to the class of orders over which the appellate court has jurisdiction. Another illustration would be an appeal to this court from a judgment of a justice's or municipal court. This court would have no jurisdiction over the *subject matter* of such an appeal because it has no such jurisdiction at all and none could be conferred by the parties. A determination on the merits by this court in either case would be *void* and subject to collateral attack at any time. However, it is not to be supposed that a final determination by an appellate court on the merits even though the notice of appeal was late, where the lateness is entirely overlooked by the court and the parties, would be a *void* judgment and subject to collateral attack at any time in the future.

It follows, therefore, that the 60 day time requirement within which an appeal should be taken is no more than procedurally jurisdictional or a specification of the procedure for invoking the appellate jurisdiction which may be extended by the conduct of the parties. Most of the cases on that subject are not contrary to these views. In Bornheimer v. Baldwin, 42 Cal. 27, the only question was whether the pendency of an appeal from an order denying a new trial postponed the running of the time. The court did no more than declare that the time limit was "peremptory." The same comment is applicable to Henry v. Merguire, 111 Cal. 1, 43 P. 387. Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am.St.Rep. 68, holds only that the running of time is not tolled by the death of respondent, and it is merely declared that the statute is "jurisdictional and mandatory" not defining the first term. To the same effect is In re Estate of Turner, 139 Cal. 85, 72 P. 718; County Bank v. Jack, 148 Cal. 437, 83 P. 705, 113 Am.St.Rep. 285; Shank v. Blackburn, 61 Cal.App. 577, 215 P. 559; Moore v. Douglas, 132 Cal. 399, 64 P. 705; Duncan v. Ramish, 142 Cal. 686, 76 P. 661; Pogue v. Ball, 4 Cal.App. 406, 88 P. 376; Swafford v. Board of Education, 127 Cal. 484, 59 P. 900; Contra Costa County v. Soto, 138 Cal. 57, 70 P. 1019; In re Estate of Campbell, 141 Cal. 72, 74 P. 550.

The case of In re Estate of Brewer, 156 Cal. 89, 103 P. 486, did not mention or discuss the foregoing distinction. It relies upon Towdy v. Ellis, 22 Cal. 650, 651, which merely held that acknowledgment of service of the notice of appeal did not *constitute a waiver* of the lateness of the filing. Nothing was said about jurisdiction, and Langan v. Langan, 89 Cal. 186, 26 P. 764 and In re Estate of Pearsons, 119 Cal. 27, 50 P. 929, do not discuss the distinction. The same comment is applicable to Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Estate of Fisher, 75 Cal. 523, 17 P. 640. Aspegren & Co., Inc., v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400, merely followed In re Estate of Brewer, supra, without discussion.

In my opinion, this court should apply the same rule to a case where it is claimed

that a party has been prevented by fraud, duress or other cause beyond his control from filing his notice of appeal within the time provided by law as has been applied by this court in cases where the issuance of a remittitur has been procured through fraud or imposition upon the court or the adverse party, which would require this court or the appellate court having jurisdiction of the appeal to determine whether or not a factual situation has been presented which has prevented the appellant from perfecting his appeal in accordance with the provisions of the statute and upon determining that such factual situation exists, the appellant be permitted to proceed with the prosecution of his appeal in accordance with the Rules on Appeal adopted by the judicial council of this state.

In my opinion the motion to dismiss the appeal in this case should be denied.

Rehearing denied; SHENK, CURTIS, and CARTER, JJ., dissenting.



61 Cal.App.2d 230

Ex parte LANDRY.
Cr. 1834.

District Court of Appeal, Third District, California.

Oct. 30, 1943.

1. Pleading ⇐214(1)

Allegations on information and belief must be taken equally with positive allegations as stating facts admitted by demurrer.

2. Pleading ⇐207

Objections to a petition that essential facts appear only inferentially or as conclusions of law or by way of recitals must be raised by special demurrer.

3. Habeas corpus ⇐84

In habeas corpus proceeding, where petitioner objected by general demurrer to return as containing mere recitals and allegations on information and belief, and consequently not constituting a proper defense, petitioner admitted by demurrer recitals and allegations to be true.

4. Judgment ⇐715(3)

Judgment in abandonment proceeding instituted by minor's paternal uncle and aunt denying that minor was abandoned by mother was only conclusive of question of abandonment. St.1937, p. 1032, § 701.

5. Judgment ⇐715(3)

Where judgment in prior abandonment proceeding instituted by minor's paternal uncle and aunt against mother was conclusive only of question of abandonment, judgment was not res judicata on habeas corpus by mother to secure custody of minor son from uncle and aunt, where question of abandonment was not in issue. St.1937, p. 1037, § 701.

6. Habeas corpus ⇐79

In habeas corpus proceeding to secure custody of minor child, mere mention in defendants' return that child was left with them by his father could not be construed to mean that return was predicated solely upon such immaterial fact.

7. Habeas corpus ⇐25(2)

Habeas corpus proceeding by mother to secure custody of minor son from paternal uncle and aunt was proper remedy.

8. Habeas corpus ⇐120

In habeas corpus proceeding in District Court of Appeal by mother to secure custody of minor son from paternal uncle and aunt, denial of like petition in superior court was not a final adjudication, where sole reference to prior proceeding was contained in petition, and it merely appeared that writ was denied.

Proceeding in the matter of Allan Dale Landry, a minor, by Anne Landry McWethy for a writ of habeas corpus to secure custody of minor son from paternal uncle and aunt. On petitioner's general demurrer to return.

Demurrer overruled.

J. Adrian Palmquist, of Oakland, and Nathan G. Gray of Berkeley, for petitioners.

Albert L. Wagner, of Sacramento, for respondents.

PEEK, Justice.

Petitioner Anne Landry McWethy, by her application for a writ of habeas corpus, seeks to have the custody of her twelve year old minor son, Allan Dale Landry, restored to her. She alleges that at the time of the divorce and separation of her-

self and the minor's father on December 3, 1939, said child was left with his paternal aunt and uncle (respondents herein) and has so remained in their custody; that said divorce decree, obtained in the State of Nevada, awarded her the custody of said child; that respondents now refuse to return the child to her; that a proceeding was instituted by respondents in the County of San Joaquin under Section 701 of the Welfare and Institutions Code, St.1937, p. 1032, seeking to have the minor and his younger sister declared to be abandoned children; that said petition was denied; that upon the denial thereof petitioner filed a petition for a writ of habeas corpus in the Superior Court in and for the County of San Joaquin, seeking the custody of said minor, but that said petition was dismissed on the basis that the child had expressed a desire not to be returned to his mother; that the denial of said writ was improper and contrary to the rights of the mother, and also a denial of full faith and credit in the Nevada divorce decree.

The return and amended return to the petition allege that this is not a proper court and that habeas corpus is not a proper remedy; that the proper proceeding would be by petition for letters of guardianship in the Superior Court in and for the County of San Joaquin. Respondents then proceed to set forth with particularity, facts alleged to be such as would constitute petitioner an unfit and improper person to have the custody of said minor.

To the amended return petitioner has filed both a general demurrer and an answer.

By said demurrer petitioner raises two issues, the first, as regards the sufficiency of the facts alleged to constitute a proper defense to the petition, and second, as regards the jurisdiction of this court to entertain the questions raised by virtue of the prior abandonment proceedings, which proceedings petitioner contends were decisive of the identical question placed in issue here by the amended return, and likewise that this court is without jurisdiction to hear the questions raised by respondents, for to do so would be to deny full faith and credit to the Nevada decree.

In support of petitioner's first contention it is alleged that the amended return contains mere recitals and allegations based upon information and belief; that before this court can exercise its discretion in such a proceeding there must be a sufficient showing of a definite issue of fact.

[1-3] Allegations on information and belief must be taken equally with positive allegations as stating facts admitted by petitioner's demurrer. Stanton v. Quinan, 91 Cal. 1, 27 P. 517; Campbell-Kawannanaka v. Campbell, 152 Cal. 201, 92 P. 184. Objections to a petition that essential facts appear only inferentially or as conclusions of law or by way of recitals, must be raised by special demurrer and cannot be reached by a general demurrer. City of Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410; Gustafson v. Byers, 105 Cal.App. 584, 586, 288 P. 111. Admitting the material facts alleged in the amended return to be true, as petitioner must by her demurrer, it necessarily follows from the authorities cited that a sufficient case has been stated.

[4, 5] We find petitioner's second contention likewise to be without merit. The question before the trial court in the abandonment proceeding was entirely different than that here presented. Section 701 of the Welfare and Institutions Code sets forth the circumstances under which a juvenile court can make irrevocable orders forever terminating the custody and control of parents. Subdivision (a) of said section relates to intentional abandonment, and it was solely this question which was passed upon by the San Joaquin County Court. In its memorandum decision the court said: "It is patent that the problem before the court is not one of making a wise selection between the petitioner and the children's mother. It is not a question of who can best provide for the children, nor is it a question of whether the children's affections are centered upon the mother or upon the petitioner. The whole question for determination is whether or not the children have been abandoned within the meaning of section 701, and that question must be answered in the negative." Said judgment was only conclusive of the question of abandonment, which question is not one of the issues now before this court, nor for that matter could the fitness of the mother have been placed in issue in such proceeding under subsection (a) of section 701 so as to have foreclosed this court from a consideration of the issues presented in this proceeding.

[6] Petitioner admits that the Nevada decree added nothing to her petition in that such decree is entitled to no more consid-

eration than as determinative of the right of custody of the child as between the parents but nevertheless, she contends, that it is a complete answer to the allegations made by respondents that they are justified in holding the child at the request of the father. Mere mention in respondents' return that the child was left with them by his father cannot be construed to mean that their return is predicated solely upon such immaterial fact. Rather we find their case to be based upon the further and broader grounds as set forth in their amended return.

Respondents in said amended return also raise two jurisdictional questions, neither of which was set forth in their original return; first, that habeas corpus is not a proper remedy to determine the rights to custody as between the petitioner and themselves; but even in assuming that it is, that nevertheless, the denial of a like petition in the Superior Court of San Joaquin County was a final adjudication of the present matter.

[7] In support of the first question raised they cite the case of In re Culp, 2 Cal.App. 70, 83 P. 89, wherein this court dismissed a writ on the ground that habeas corpus was an inadequate and inappropriate remedy for the consideration and adjustment of the equitable and interstate questions involved. It is readily apparent that there is an obvious distinction between the situation therein presented and that set forth in the amended return now before this court. Respondents also cite the case of In re Inman, 32 Cal.App.2d 130, 89 P.2d 421, 423, as further authority for their contention, but they fail to note that the cited case is of itself ample authority for the present proceeding. The court therein stated: "* * * resort should be had to the trial courts; although if the child were in imminent danger as to its safety, health, morals or reasonable comfort, the writ would be a proper remedy. In re Dowell, 4 Cal.App.2d 688, 41 P.2d 596." A like question is directly put in issue herein by respondents' allegations.

To deny the writ under such circumstances would be in derogation of the law as previously stated in both the Inman and Dowell cases, supra, as well as the recent case of Ex parte De Leon, 59 Cal.App.2d 510, 139 P.2d 109, 111, while to grant the writ would be to make a coercive order "* * * by which the mere legal right of the petitioner may be enforced against the child's manifest inclination and reasonable choice to remain where she is." In re Gates, 95 Cal. 461, 462, 30 P. 596.

[8] Respondents further argue that the denial of a like petition in the Superior Court of San Joaquin County was a final adjudication of the present matter, citing the cases of In re Holt, 34 Cal.App. 290, 167 P. 184; In re Frazier, 50 Cal.App. 45, 194 P. 510, and In re McDaniel, 90 Cal.App. 307, 265 P. 884. A distinguishing fact is apparent in each of the cases cited from the question presented herein. In such cases the subsequent petition was denied by the appellate court in that it had before it a record of the proceedings in the Superior Court showing wherein the issues raised in the petition were directly before the trial court in the prior proceedings. In the instant case no such showing is made. The sole reference to the prior proceeding is contained in the petition, and it does not appear therefrom that any question was presented to that court relative to the fitness of any of the parties or that findings were made, but merely that the writ was denied. This court, then, is presented with a situation not unlike that which was previously before us in the case of Ex parte White, 49 Cal.App.2d 160, 121 P.2d 100.

The demurrer to the amended return is overruled.

It is apparent from the foregoing that sufficient cause appears for the appointment of a referee to hear and take testimony on issues of fact raised by the petition, the return, the amended return, and the traverse thereto.

It is so ordered.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 110

PEOPLE v. FREEMAN.

Cr. 3736.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1943.

1. Automobiles ⇐344

In order to violate statute relating to negligent homicide, motorist must drive with a reckless disregard of or wilful indifference to the safety of others which is the equivalent of the intentional doing of an act with a wanton and reckless disregard of its possible result, and is the same as "wilful misconduct," which implies at least the intention of doing an act either with knowledge that serious injury is a probable result or the intention of doing an act with a wanton and reckless disregard of its probable result. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilful Misconduct".

2. Automobiles ⇐355(13)

Evidence sustained conviction for negligent homicide by automobile as against defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident. Pen. Code, § 26, subd. 5; Vehicle Code, § 500, St. 1941, p. 1414.

3. Criminal law ⇐474

In prosecution for negligent homicide by automobile, accused was entitled under testimony to the benefit of expert proof on defense that epilepsy had caused accused to be unconscious from time of his departure on the drive until after the accident. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

4. Criminal law ⇐761(2)

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, instruction assuming that before his departure accused comprehended the meaning of his current sensations and that he was capable of appraising his contemplated effort to drive, was improper. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

5. Criminal law ⇐761(2)

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, instruction should have left for jury's determination what the evidence disclosed accused's condition to be while he was making a three-hour visit prior to his departure on the drive. Pen. Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

6. Automobiles ⇐321

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, question for jury was not whether accused knew facts which would lead a reasonable man to realize that the contemplated drive would create an unreasonable risk of bodily harm to others but was whether accused failed to do something which a reasonably prudent man would have done under the circumstances. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

7. Automobiles ⇐356

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, whether accused while he was making a three-hour visit before his departure had the power of an ordinarily prudent man to estimate the significance of his undertaking to drive was for jury. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

8. Automobiles ⇐356

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on a four-mile drive until after the accident, if accused was unconscious at the end of the drive jury had to determine whether the transition to unconsciousness was sudden, whether it occurred on the highway prior to the collision, or whether it had taken place during a visit before accused's departure and as the result of an epileptic attack. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

9. Automobiles ⇐357

In prosecution for negligent homicide by automobile with defense that epilepsy

caused accused to be unconscious from the time of his departure on the drive until after the accident, instruction requiring a finding of guilt notwithstanding that accused was unconscious at the time of the accident was erroneous. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

10. Criminal law ⇐46

A person is guiltless if at the time of his commission of an act defined as criminal he has no knowledge of his deed. Pen. Code, § 26, subd. 5.

11. Automobiles ⇐352

In prosecution for negligent homicide by automobile, it was not incumbent upon accused to plead insanity in order for him to prove that epilepsy caused him to be unconscious at the time of the accident. Pen. Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

12. Automobiles ⇐356

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, whether accused clearly recognized his probable early collapse was for jury, notwithstanding accused's statement before his departure that he thought he could make it home. Pen.Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

13. Automobiles ⇐357

In prosecution for negligent homicide by automobile with defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident, instruction should have authorized acquittal if accused was unconscious at the time of the accident, and such state of being had wholly or to a material extent overtaken him before leaving. Pen. Code, § 26, subd. 5; Vehicle Code, § 500, St.1941, p. 1414.

14. Automobiles ⇐357

In prosecution for negligent homicide by automobile, trial court properly directed jury to ignore defense that epilepsy caused accused to be unconscious from the time of his departure on the drive until after the accident if they did not believe accused's testimony relative to his early injuries and attacks of unconsciousness or if they believed that his accident was the result of his wilful bibulous negligence. Pen. Code, § 26, subd. 5; Vehicle Code, § 500, St. 1941, p. 1414.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

James A. Freeman was convicted of negligent homicide by automobile, and he appeals.

Judgment of conviction and order denying accused's motion for new trial reversed.

George S. Carter, of Pasadena, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

This appeal is from the order denying defendant's motion for a new trial and from the final judgment of conviction for violating Sec. 500 of the Vehicle Code, St.1941, p. 1414, by the commission of negligent homicide.

The grounds for appeal are (1) the insufficiency of the evidence to support the verdict and (2) errors committed by the court in the refusal of certain instructions and the giving of others.

(1) At the times herein mentioned, the defendant resided in the city of Pasadena where he was engaged in the mercantile business. He had a branch store in the neighboring city of Alhambra which was operated by one Ruben Pfieffer. The latter's residence was in the adjacent city of San Gabriel. About one o'clock in the afternoon of January 24, 1943, defendant drove from Pasadena to the home of Mr. Pfieffer. He remained three hours, during which he felt ill and drank two highballs of Seven-up and whiskey. About 4:30 o'clock p.m. he started to drive back home. His return was by way of the intersection of Winston Avenue and California Street which is about 4 miles from the Pfieffer place. During the last 700 or 800 feet before arriving at the intersection he drove at a speed in excess of 60 miles per hour. Upon entering the intersection, his car collided with another driven by Mrs. Clark and in which Miss Della Heath was riding. As a result of the collision, Miss Heath was killed and Mrs. Clark severely injured. Details will appear hereafter in the instruction under attack.

The charging part of the information was that he wilfully drove an automobile with

with reckless disregard of and wilful indifference to the safety of others, thereby injuring Miss Heath, who died on the same day as the proximate result of her injuries suffered on that occasion. The sole defense to the accusation was that defendant was unconscious from the moment he entered his car at the Pfieffer home until after the accident when he stood upon a nearby lawn. His testimony was in support of that defense. Promptly after the accident, defendant was given a sobriety test at the Huntington Memorial Hospital and was pronounced sober. The defense is based upon Section 26, subd. 5, of the Penal Code, which reads as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Five. Persons who committed the act charged without being conscious thereof."

Stated in other words: No person can be guilty of a crime who is not conscious at the time of doing the act charged.

[1] In order to violate section 500 of the Vehicle Code a motorist must drive his automobile with a reckless disregard of or wilful indifference to the safety of others which is the equivalent of "the intentional doing of an act with a wanton and reckless disregard of its possible result." People v. Young, 20 Cal.2d 832, 837, 129 P.2d 353, 356. It is the same as wilful misconduct (People v. McNutt, 40 Cal.App. 2d Supp. 835, 105 P.2d 657), which implies at least the intention of doing an act either with knowledge that serious injury is a probable result or the intention of doing an act with a wanton and reckless disregard of its probable result. Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279.

[2] In support of the information the prosecution proved that while at the home of his friend defendant drank whisky; that he had driven motor cars for 26 years; that he had never been unconscious on the occasion of any other drive; that he had never acquainted the motor vehicle division of such a tendency, although the blanks used to make his driver's application requested such information; that he made the drive at an excessive speed and entered the intersection without stopping and collided with the automobile of Mrs. Clark. The proof was such that under correct guidance it would have supported either a verdict of guilty as charged or a verdict of not guilty on the theory that defendant was a victim of epilepsy which caused him to be unconscious during the time elapsing from the moment of his departure from the Pfieffer home until after the accident.

In answer to a comprehensive hypothetical question four physicians testified that at the time of the collision of his automobile with that of Mrs. Clark defendant was, at the time and in the course of his drive from the Pfieffer's, unconscious; also, that his spells of unconsciousness and his frequently recurring violent headaches were due to epilepsy from which appellant had suffered many attacks since he was nine years of age and had been unconscious at the time of each attack until one that occurred about six years prior to the collision.

[3] From the recitals in the hypothetical question it appears that there was proof received that defendant was unconscious at the time of the collision. While the question was, in the main, predicated upon defendant's testimony which might have been rejected in toto by the jury, yet he was entitled to have the benefit of expert proof based upon all evidence admitted and he was likewise privileged to have an instruction as to the law with reference to the guilt of a motorist if under the circumstances recited the jury should find him to have been unconscious at the time of the collision by reason of epilepsy.

Predicated upon the evidence admitted the court read the following instruction to the jury:

"In this case the evidence is undisputed that the defendant has been subject to attacks which all of the experts called in the case have classed as epilepsy; that these attacks have caused him to lose consciousness for varying periods of time; that on the day of accident in question & at his friend's house he became ill, felt extremely nervous with no particular reason for so feeling; that upon the insistence of his friend he had two whiskey highballs; attempted to call his family doctor at least five or six times; that at about 4:20 p. m. he left his friend's house saying to his friend, in substance, 'I think I can make it home & that is where I belong.'

"It is the testimony of the experts & the defendant that he was unconscious at the time of the accident.

"Under the circumstances above related and all the other evidence in the case it is for you, the jury, to determine the following questions.

"1. Was the defendant, knowing he was subject to the attacks of unconsciousness as disclosed by all the evidence, and being in the condition the evidence shows he was at his friend's house,—was he guilty of a reckless disregard of the safety of others in undertaking to drive his automobile along the public highways and as I have just defined 'reckless disregard' for you.

"2. Did he know or have reason to know of facts which would lead a reasonable man to realize that such conduct on his part would create an unreasonable risk of bodily harm to others and would also involve a high degree of probability that substantial harm would result to others?

"If you answer these questions in the affirmative then you will find the defendant guilty as charged in the information, and this in spite of the fact that he was unconscious at the time of the accident, if you so find.

"On the other hand, if you find that the defendant was unconscious at the time of the accident, and you answer the two questions I have just propounded in the negative, then you must find the defendant not guilty unless you shall also find that the unconsciousness was proximately caused by his voluntary use of intoxicants, for intoxication."

In order fairly to evaluate the meaning of the language of the foregoing instruction, we turn to a consideration of the physical and nervous condition from which defendant suffered according to the proof. Basing their opinions upon his recitals of his experience, the four experts testified that on the occasion of his accident defendant was suffering a loss of consciousness and that it was due to epilepsy. "Epilepsy is defined as the falling sickness; a chronic apyretic nervous affection, characterized by seizures of loss of consciousness, with tonic or clonic convulsions." Lippincott's Medical Dictionary, Revised Edition. "It is a chronic nervous affection characterized by sudden losses of consciousness." Gould's Medical Dictionary, Fifth Edition. "It is a disease of the brain which occurs in paroxys with uncertain intervals between; * * * the attack is characterized by loss of consciousness, sudden falling down, distortion of the eyes and face. * * * and by muscular spasms." Black's Law Dictionary, Second Edition.

Epilepsy is only one of a number of causes for unconsciousness. It differs from insanity in that the latter generally means an unsoundness of mental condition which modifies, or removes, individual responsibility because it "is such a deprivation of reason that the subject is no longer capable of understanding and acting with discretion in the ordinary affairs of life." 1 Bouv. Law Dict., Rawle's Third Rev., p. 1589. The epileptic displays no such loss of brain function although at the time of or immediately preceding a convulsion he may experience psychical aurae such as a dreamy state or one of terror. Osler's Principles and Practice of Medicine.

In view of the behavior of the victim of epilepsy as defined by the foregoing authorities, and in the light of the expert proof of defendant's condition, we now turn to a consideration of the above instruction.

[4-8] The instruction is assumptive and arbitrary. It assumes that, before leaving Pfieffers, defendant had a present consciousness of his past sufferings, and that he had the normal powers of his will. It should have left for the jury's determination what the evidence disclosed the condition of defendant to be while at the Pfieffer home. It assumes that, throughout the three hours of his visit, his mind was clear, that his vision was unclouded, that he knew and comprehended the meaning of his current sensations, and that he was capable of appraising his contemplated effort to drive his car upon the highways. It was not whether he knew of facts which would lead "a reasonable man to realize" that such a drive would create "an unreasonable risk of bodily harm to others" but rather the questions for the jury's determination were (1) whether appellant failed to do something which a reasonably prudent man would under the circumstances have done, or (2) whether he omitted to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or (3) whether he exhibited the want of such care as a person of ordinary prudence would exercise under the same circumstances. Denman v. City of Pasadena, 101 Cal.App. 769, 775, 282 P. 820; Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A.L.R. 429; Coughman

v. Harman, 135 Cal.App. 49, 26 P.2d 851; Wolfsen v. Wheeler, 130 Cal.App. 475, 19 P.2d 1004; 19 Cal.Jur. 548. Moreover, it was for the jury to determine whether defendant, while he was visiting the Pfieffer home and at the time of his departure therefrom, had the power of an ordinarily prudent man to conceive, and estimate the significance of, his undertaking the drive back to Pasadena. If he was unconscious at the end of a four mile drive, the jury had to determine whether the transition from a state of normal consciousness to that of unconsciousness was sudden; whether it occurred on the highway prior to the collision or whether it had taken place at some time during his visit with Mr. Pfieffer and as a result of an epileptic attack. If the defendant was on the verge of losing consciousness from epilepsy before commencing his homeward journey it is probable that he might before starting already have lost the power to envisage the consequences to others of his undertaking. And what is of even greater importance, in order for him to be guilty of driving with a reckless disregard of, or with a wilful indifference to, the safety of others, before leaving the Pfieffer home, he must have had the power to will to drive or not to drive; that is, to direct the execution of a clearly conceived plan. When a human being loses consciousness as the result of a diseased condition of his nervous system there is no distinct line over which the mind leaps from the sunlit fields of clear consciousness to the dark canyons of unconsciousness. Surely, there must be, in the case of the epileptic, a period of penumbra when the will is in a state of total or partial paralysis. Under proper guidance the jury should have been permitted to determine whether defendant was suffering a state of clouded understanding or of obstructed will as a result of his epilepsy prior to his departure from the Pfieffer home.

[9] The instruction told the jury that if they should find that defendant was guilty of a reckless disregard of the safety of others in undertaking to make the drive and if they should find that he knew facts which would lead a reasonable man to realize that such a drive would involve a high degree of probability that substantial harm would result to others, they should find him guilty as charged in spite of the fact that they might find he was unconscious at the time of the accident. Such is absolutely contrary to the statute which declares one not guilty if at the time he commits a criminal act he is not conscious thereof.

[10] No principle of criminal jurisprudence was ever more zealously guarded than that a person is guiltless if at the time of his commission of an act defined as criminal he has no knowledge of his deed. Hale's Pleas of the Crown, Vol. 1, p. 473; Fain v. Commonwealth, 78 Ky. 183, 188, 39 Am.Rep. 213. "It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offence, of the commission of which he was ignorant at the time, would be intolerable tyranny." Duncan v. State, 26 Tenn. 148, 150. In State v. Lewis, 136 Mo. 84, 37 S.W. 806, the defendant having pleaded unconsciousness at the time she shot the deceased, the jury was instructed to acquit her if they believed from any cause she was so nearly unconscious as not to know what she was doing. In People v. Sameniego, 118 Cal.App. 165, 173, 4 P.2d 809, 812, 5 P.2d 653, it was declared that where the evidence shows the conscious mind of the accused ceased to operate and his actions were "controlled by the subconscious or subjective mind" the jury should be instructed as to the legal effect of such unconsciousness. A person who cannot comprehend the nature and quality of his act is not responsible therefor. An act done in the absence of the will is not any more the behavior of the actor than is an act done contrary to his will. State v. Strasburg, 60 Wash. 106, 110 P. 1020, 1024, 32 L.R.A.,N.S., 1216, Ann.Cas.1912B, 917.

[11-14] The attorney general contends that in order for defendant to prove his unconsciousness at the time of the accident it was incumbent upon him to plead insanity. Such is not the law. People v. Methever, 132 Cal. 326, 329, 64 P. 481; People v. Rothrock, 21 Cal.App.2d 116, 120, 68 P.2d 364. The fact that at Pfieffer's house defendant made such statements as "I think I can make it home," which in the case of a normal mental condition would indicate the possession of a clear understanding, did not necessarily signify such ability. Whether he clearly recognized his probable, early collapse was itself a fact for the jury's determination. If they had determined that he was unconscious at the intersection and that such state of being

had wholly, or to a material extent, overtaken him before leaving on his fatal drive, the instruction should have authorized his acquittal. Of course, it was proper to direct the jury to ignore the defense of unconsciousness if they did not believe his testimony relative to his early injuries and attacks of unconsciousness, or in the event they believed that his accident was the result of his wilful, bibulous indulgence. A harmful act due to the use of an intoxicating beverage is wilful misconduct, not negligence.

The judgment and the order are reversed.

McCOMB, J., concurs.

W. J. WOOD, Justice (concurring).

I concur in the judgment. One who leaves the residence of a friend to drive home should not be held guilty of a violation of section 500 of the Vehicle Code because he may be mistaken as to his ability to drive an automobile.

The jury should have been instructed in direct and clear language that defendant should be found not guilty if the collision occurred while he was not conscious of his acts because of an attack of epilepsy.



61 Cal.App.2d 189

BENSON v. CITY OF LONG BEACH et al.

Civ. 13924.

District Court of Appeal, Second District, Division 3, California.

Oct. 28, 1943.

Hearing Denied Dec. 20, 1943.

1. Municipal corporations ⇐592(4)

An ordinance, imposing a license tax on persons engaged as agents in placing bets on horse races, which provided only that the licensee could not conduct the business without obtaining a license and paying a tax for the privilege, was not invalid so as to permit the licensee to recover the license tax paid, notwithstanding the licensed business was outlawed by state statutes. Pen.Code, § 337a; St.1933, p. 2046, as amended by St.1935, p. 1943.

2. Licenses ⇐7(1)

The legality of a license tax does not depend on the legality of the business for which the tax is required.

3. Municipal corporations ⇐592(4)

An ordinance imposing a license tax on persons engaged as agents in placing bets on horse races was not invalid as legalizing business outlawed by state statutes in view of limitation to betting or wagering at legalized race tracks. Pen.Code, § 337a; St. 1933, p. 2046, amended by St.1935, p. 1943.

4. Gaming ⇐4

Where, after ordinance licensing persons placing bets as agents on horse races was enacted, state law legalizing pari mutuel betting was ruled invalid, recovery could not be had for amount of license fee paid under ordinance on ground of mutual mistake of law. Pen.Code, § 337a; St.1933, p. 2046, amended by St.1935, p. 1943.

5. Taxation ⇐541

A tax is not recoverable because its payment was involuntarily made without showing that tax is for some reason invalid.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by A. L. Benson against the City of Long Beach and others seeking to recover an amount paid city for a license. Judgment for defendants, and plaintiff appeals.

Affirmed.

Cree & Brooks, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Frank C. Charvat, Deputy City Atty., all of Long Beach, for respondents.

BISHOP, Justice pro tem.

Plaintiff was engaged in the business of an agent placing bets on race horses for those who fancied they could increase their fortunes in that way. His activities would have been considered unquestionably unlawful, because in violation of the provisions of section 337a of the Penal Code, but for the facts that the legislature had given its stamp of approval to betting on horse races under the pari mutuel system, Stats.1933, p. 2046, and had broadened the scope of its approval by an amendment

made in 1935, Stats.1935, p. 1943. The provisions of the amendment are set forth in the case soon to be cited. We are not concerned with those provisions, but only with these consequences: The attorney general interpreted them as authorizing such activities as plaintiff was engaged in; defendant's city prosecutor advised its city council that he concurred in the attorney general's interpretation; and the city council, city manager and city clerk accepted that interpretation. So it was that the city council adopted an amendatory ordinance, adding plaintiff's business to the list of businesses for which licenses were required under the city's general license ordinance, and fixing a fee of $3,000 as the tax for each license. Plaintiff applied for licenses to operate his business at two locations in the defendant city, paying $6,000 as required by the ordinance. On December 21, 1937, the licenses were issued by the city clerk and mailed to the plaintiff.

Unknown to the city clerk, and also on December 21, 1937, an opinion was filed in the case of In re Goddard, 1937, 24 Cal. App.2d 132, 74 P.2d 818, the effect of which was that plaintiff's business remained an offense under section 337a of the Penal Code. On December 22, even before the mail brought the plaintiff his licenses, defendant's chief of police notified the plaintiff that his business was forbidden by state law and if he continued in it he would be arrested and prosecuted. For some twenty days after the chief's warning the plaintiff continued to carry on his unlawful business (unlawful because of section 337a, Penal Code, not unlawful because conducted without the license required by the city ordinance), but he then desisted and in this action, begun in June, 1939, seeks to recover from the city the price paid for his licenses. The trial court entered its judgment that the plaintiff take nothing, and from this judgment the plaintiff has appealed. We have reached the conclusion that the judgment should be affirmed because we know of no legally sufficient ground upon which a judgment in favor of the plaintiff can be sustained, the sympathy that is naturally aroused for one who has, through no fault of his own, made a bad bargain, not constituting such a ground.

The theories advanced by the plaintiff to support his case have a fundamental fallacy running through them. It first appears in paragraph III of his complaint, where he alleges that the defendant city enacted an ordinance "purporting to legalize the operation of * * * horse-race betting agencies." Then in his opening brief he states one of the questions involved to be: "Where a business license fee has been paid to a city under a void ordinance containing criminal penalties which the city threatened to invoke if the fee were not paid, is the payor of such license fee entitled to a refund of the money paid by him therefor?" The concluding paragraph of plaintiff's closing brief opens with this sentence: "Fundamental justice requires that a license fee charged and collected under an invalid ordinance should under the circumstances found here be repaid." Nowhere does the plaintiff develop the idea that the ordinance is void or invalid, but reading between the lines of his argument we find the same thought as that found in paragraph III of his complaint; the ordinance is invalid, he believes, because it attempted to legalize that which the legislature had made a public offense.

[1] An examination of the ordinance discloses no such futile effort on the part of the Long Beach City Council. It is true, as revealed by the stipulation of facts which constituted the evidence in this case, that at the time the ordinance in question was adopted the city council was of the opinion, as was the defendant's city prosecutor and the attorney general of the state, that the legislature had removed the ban of the penal law from the business which the plaintiff was conducting. But while their opinion that plaintiff's business could be carried on lawfully may have caused them to adopt the ordinance, that opinion did not become a part of the ordinance. The ordinance in question had the simple effect of adding to the city's general licensing ordinance a new section providing that "Every person conducting, managing or carrying on the business in the city of Long Beach of an agent for the purpose of receiving, transmitting or paying bets on horse races shall pay a license tax of $3,000.00 (Three Thousand Dollars) per year." We have here no attempt on the part of the city to authorize the carrying on of the business of a betting agent. The ordinance did not attempt to provide that one who took out a license thereby had the legal right to conduct the business licensed, but only that he could not conduct it without obtaining a license

and paying a tax for the privilege. Without delving deeply into the collateral subject, we note that it has been held proper to require a license tax of those practicing as attorneys (In re Galusha, 1921, 184 Cal. 697, 195 P. 406); of those carrying on the business of physicians and surgeons (City of Redding v. Dozier, 1922, 56 Cal. App. 590, 592, 206 P. 465); and of a corporation doing a banking business (Mendocino County v. Bank of Mendocino, 1890, 86 Cal. 255, 259, 24 P. 1002). In each instance it was by state law declared to be unlawful for one to carry on the "business" required to be licensed for revenue, without first obtaining a state license. The licensing ordinances of the state subdivisions (city in the first two cases, county in the third) were not interpreted as attempts to legalize the carrying on of the activities, for which local licenses were required, in lieu of or in the absence of the requisite state permits. Incidentally, the authority to license for revenue which had been exercised in these cases was in each instance limited, by the grant of authority, to activities which were lawful. No such limitation appears in section 33 of Article IV of the Long Beach city charter which enumerates among the powers of the city the power: "To license * * * the carrying on of any and all professions, trades, callings, occupations and kinds of business, carried on within the limits of said city; and to fix the amount of license tax thereon * * *."

[2] The legality of a license tax does not depend on the legality of the business for which the tax is required. As stated in United States v. Constantine, 1935, 296 U.S. 287, 293, 56 S.Ct. 223, 226, 80 L.Ed. 233, 238: "The United States has the power to levy excises upon occupations, and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a state. The burden of the tax may be imposed alike on the just and the unjust."

[3] Plaintiff's contention that the ordinance purported to legalize a business outlawed by the state statute is untenable not only for the reasons already advanced but also because of a limitation found within the ordinance itself. After declaring that a license tax had to be paid by every person carrying on the business "of an agent for the purpose of receiving, transmitting or paying bets on horse races" it added that for its purposes the term "agent" should mean and include "any person who, for another, transfers or transmits for a consideration bets or wagers to a legalized race track where such is permitted under the laws of this state."

Much has been said, in the briefs before us, on the subject of the involuntary character of plaintiff's payment of the license tax. There is, of course, no contention, as there is no basis for one, that the city defrauded the plaintiff into taking out his licenses, or used any actual coercive measures. The payments were involuntary, it is claimed, because of the penal provisions of the licensing ordinance and because plaintiff's application for a license was made under a mutual mistake of law. As we view the matter we need not determine whether or not the payment was involuntary, for that is a material question only where the invalid nature of a tax gives rise to a cause of action for its return. The tax, however, has not been made to appear invalid.

[4, 5] Plaintiff's opening brief is silent on the point, suggested by the allegations of his complaint, that the fact that he and the city officials mutually entertained what proved to be a mistaken view of the law, could in some way afford him relief. That the situation was not one in which relief would be given because of a mutual mistake of law would seem to follow from Wingerter v. City and County of San Francisco, 1901, 134 Cal. 547, 548, 66 P. 730, 86 Am.St.Rep. 294, and Campbell v. Rainey, 1932, 127 Cal.App. 747, 750, 16 P.2d 310, in each of which this quotation from Cooley v. County of Calaveras, 1898, 121 Cal. 482, 486, 53 P. 1075, 1077, is made: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." In his closing brief plaintiff acknowledges that his acquisition of the licenses was not a contractual transaction, which could be rescinded in the event of a mutual mistake of law. Rather he takes the position already indicated, that his mistake of law affected the nature of his payment, rendering it involuntary. A tax is not recoverable, we have already said, because its payment was involuntarily made; not only must the payment

be involuntary but the tax must for some reason be invalid. The invalidity of the license tax which plaintiff paid not appearing, no reason appears why the city should be compelled to repay it.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



61 Cal.App.2d 216

MOORE v. OBERG et al.
Civ. 14147.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1943.

Rehearing Denied Nov. 19, 1943.

1. Joint adventures ⇐5(1)

When a group of joint adventurers designedly sequesters large asset of common fund and puts it wholly beyond reach of sole remaining adventurer by withdrawing money from venture's bank account and redepositing it to credit of members of such group, it is not error for court to issue ex parte order to show cause why receiver of venture's properties should not be appointed and appoint temporary receiver thereof, though no such property is in danger of being lost, removed or materially injured. Code Civ.Proc. § 564.

2. Appeal and error ⇐71(4)

An ex parte temporary order, appointing receiver of joint venture's property as part of order to show cause why such appointment should not be made permanent, was effective only until specified day of hearing and ceased to function as temporary order at moment of its confirmation, so that later permanent order became controlling and the only appealable order.

3. Joint adventures ⇐5(1)

In proceeding for appointment of receiver of joint venture's properties, superior court's findings from preponderance of conflicting evidence that defendants fraudulently withdrew large sum from venture's bank account, and deposited it to defendants' credit, and confused venture's funds from several construction jobs for purpose of enhancing defendants' profit and cheating plaintiff, justified confirmation of temporary order appointing receiver.

4. Joint adventures ⇐5(1)

An order to show cause why temporary order appointing receiver of joint venture's properties should not be made permanent was not erroneous as shifting to defendants in receivership proceeding burden of proving that appointment was improvident, as such order served merely as a notice of motion and citation to defendants to appear at designated time and show cause why motion should not be granted.

5. Appeal and error ⇐190(3)

In proceeding for appointment of receiver of joint venture's properties, it was incumbent on defendants to state any reasons for dismissal of order to show cause why temporary appointment of receiver should not be made permanent at hearing pursuant to such order before they could raise objection thereto on appeal from orders appointing receiver and confirming appointment. Code Civ.Proc. § 434.

6. Appeal and error ⇐189(1)

Generally, parties to proceeding on order to show cause will not be permitted to withhold objection to order made in course of such proceeding until appeal and then raise such objection for first time. Code Civ.Proc. § 434.

7. Joint adventures ⇐5(1)

In proceeding for appointment of receiver of joint venture's properties, plaintiff's affidavits were properly read by court on return day of order to show cause why temporary appointment of receiver should not be made permanent, as purpose of hearing pursuant to such order was to try in limine issues raised by complaint and plaintiff could meet defendants' affirmative evidence with affidavits reciting details to such extent as court deemed reasonable in order to derive satisfactory determination.

8. Receivers ⇐8

In proceeding for appointment of receiver, where evidence is conflicting or propriety of appointment based on uncontradicted evidence is doubtful, question of appointment is addressed to court's sound discretion to be exercised on all the facts.

9. Appeal and error ⇐1024(2)

A trial judge's order, appointing receiver of joint venture's properties on basis of facts concerning which reasonable minds might differ with respect to necessity for receivership, will not be reversed by District Court of Appeals, which cannot substitute its conclusion for that of trial court on sufficient evidence, even if appellate court be of opinion that there is no danger of loss or removal of, or other irreparable injury to, venture's assets.

10. Appeal and error ⇐955

To justify interference with superior court's order confirming appointment of receiver of joint venture's properties, it must clearly appear that order was arbitrary exercise of power. Const.art. 6, § 4½.

11. Joint adventures ⇐5(1)

Several joint adventurers' withdrawal of large sum from venture's bank account and redeposit thereof to their own credit, so as to deprive another adventurer of his right to check against it, warranted appointment of receiver of venture's properties, though joint control of such funds was granted to bonding company and there was no going business of venture.

12. Joint adventures ⇐5(1)

Where three joint adventurers, of whom two were partners, schemed to deprive fourth adventurer of his property and advantages gained from parties' association in four ventures which had been wholly consummated, and partnership was terminated, partners were at variance, and they and third adventurer were bitter in their enmity toward remaining adventurer, who cordially distrusted his associates, superior court was authorized to appoint receiver of venture's properties. Code Civ. Proc. § 564.

13. Appeal and error ⇐1043(4)

In proceeding for appointment of receiver of joint venture's properties, court's refusal to accept defendants' proposed stipulation that receiver be discharged, that all joint venture money be deposited in trustee account, and that no withdrawals therefrom be permitted without court order, was not prejudicial error, as it was not obligatory on court to accept or act on such proposal.

14. Stipulations ⇐1

Stipulations must be made by litigants, not by one litigant and trial court.

15. Stipulations ⇐1

It is not trial court's duty or function to require one of parties to litigation to stipulate with his adversary.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Joseph W. Vickers, Judges.

Proceeding by Nathan A. Moore against Seth Oberg and another, individually and doing business under the firm name and style of Oberg Brothers, Oscar A. Oberg, and the Bank of America National Trust & Savings Association for appointment of a receiver of the funds and properties of a joint venture. From an ex parte order appointing a receiver and an order confirming such appointment, defendants Oberg appeal.

Appeal from ex parte order dismissed, and order confirming appointment affirmed.

Walter G. Danielson, of Los Angeles, for appellants.

Alford P. Olmstead and John N. Hurtt, both of Los Angeles, for plaintiff and respondent.

MOORE, Presiding Justice.

Defendants appeal (1) from an ex parte order appointing a receiver and (2) from the order confirming such appointment. The errors assigned are (1) that there was no property in danger of "being lost, removed or materially injured"; (2) that in issuing the order to show cause the court cast upon defendants the "burden of proving the impropriety of the initial action"; (3) that the court considered affidavits filed by plaintiff at the time of the hearing; (4) that the court abused its discretion by confirming the appointment.

The complaint and the affidavits established that prior to June 8, 1942, the Obergs had been contractors in doing construction work. Seth and Lars Oberg had operated as a copartnership while Oscar had performed alone or collaborated with the firm. On that day, by a tripartite writing, Oscar, the firm and plaintiff entered upon a joint venture referred to by counsel as a partnership to do the "Laguna Dominguez Channel Job." On July 3 by similar instrument they agreed to do the "Dominguez Channel Bridges Job," and on August 15, 1942, they contracted to do the "Victorville Army Flying School Job." Each

agreement made provision for the equipment and the share of the finances to be supplied by each of the three parties. On the Victorville job plaintiff was to receive a specified rental per hour for the use of his carryall, bulldozer and motorgrader. At a subsequent date a fourth tripartite contract was made for the construction of an airport at Desert Center, California, for $700,000, and it required that all of plaintiff's equipment used there be maintained at the expense of the joint venture.

All four jobs were completed. On December 23, plaintiff demanded (1) a payment in the sum of $25,000 on account of the $45,000 claimed to be due him on the rental of his equipment, and (2) for an accounting. Both demands were rejected with the statement that there were no funds with which to pay. At that time, however, there was $144,000 in the bank account of the joint venture out of which plaintiff might have paid the rentals due himself as well as have shared to the extent of his profits. But according to the averments and implied findings within five days it had been fraudulently withdrawn and redeposited as follows: (1) to Oberg Bros., $10,000; (2) to Oscar, $20,000; (3) to Oberg Bros. by Oscar Oberg, $105,000. Withal, the bank would not recognize plaintiff's interest in the funds. While the profits and contributions of defendants did not amount to a small part of $135,000 there were obligations of the joint enterprise unsatisfied besides the rentals due plaintiff. This act of defendants injured the business and impaired the credit of the partnership. Plaintiff was excluded from the management of the business while all the records of receipts and disbursements were in the possession of defendants who denied plaintiff access thereto.

Moreover, as the court further determined, defendants confused and intermingled the funds from the several jobs for the purpose of enhancing their own profit and of cheating plaintiff. They so entered the credits and charges as to make the defendants' share of the profits appear larger in those jobs wherein their true share is greater and to appear less in those in which their actual profits are smaller. In addition to the moneys of the joint enterprise so removed from the bank account a sum in excess of $100,000 is due from the federal government in payment for the performance of work done by the joint venture. Upon such findings the court concluded that a receiver is necessary to possess the moneys, property and accounts receivable for the reason that if defendants are allowed to collect the money due and convert the joint assets into money the funds and properties of the joint venture will be lost and because of defendants' financial irresponsibility plaintiff will be irreparably injured.

[1, 2] (1) Appellants contend that the court prejudicially erred in appointing a receiver ex parte in that there was no property in danger of "being lost, removed, or materially injured." C.C.P. Sec. 564. They cite numerous authorities to the effect that a receiver cannot be appointed in the absence of a showing of irreparable injury. Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; A. G. Col Co. v. Superior Court in and for Santa Clara County, 196 Cal. 604, 238 P. 926; Tyler v. Park Ridge Country Club, 103 Cal.App. 117, 284 P. 247; McCall v. McCall Bros. Co., 135 Cal. App. 558, 27 P.2d 648. They argue that the only property involved was the books, the equipment, the money and the funds due from the United States; that there is no allegation that there is danger that the books will be removed or mutilated, or that there is a likelihood that the equipment will be removed, lost or injured. However, the complaint does in substance emphatically declare that by making improper entries in the books of account, by commingling the funds and by excluding plaintiff from a knowledge of the accounts, defendants will cheat plaintiff. Aside from references to the books and equipment the clandestine withdrawal from the bank account of the joint venture the sum of $144,000 and depositing it in such a manner as to defeat any attempt of plaintiff to use those funds was such a fact as might reasonably indicate to the court "that unless the defendants * * * be restrained from using the funds * * * the principal asset of the firm will be dissipated and placed beyond the reach of plaintiff herein, * * *." Many phrases were framed by defendants to establish their claim that they had advanced $30,000; that if the complaint had alleged that fact and, in addition thereto, that the $105,000 deposit was "a trustee and joint control account,' the court would have understood that the funds were in no danger of loss or dissipation.

With such contention we cannot agree. When a group or joint adventurers designedly sequesters so large an asset of the

common fund and puts it wholly out of the reach of the sole remaining member of the associates it is not error for the court to issue an order to show cause and, at the same time, as a part of the ex parte order appoint a receiver of the properties of the joint venture. Under such a showing of bad faith it was the duty of the chancellor so to protect the common fund as to insure a division thereof in conformance with the final judgment. This was accomplished temporarily by the ex parte order. But that order appointing the receiver was a mere part of the order to show cause on a day specified why the temporary order should not be made permanent. It was effective only until the day of the hearing. It ceased to function as a temporary order at the moment of its confirmation and the later and permanent order became controlling, and, of course, the only appealable order. Baumann v. Bedford, 18 Cal.2d 366, 368, 115 P.2d 437.

[3] At that hearing plaintiff presented the testimony of three witnesses and defendants presented that of five witnesses, all by affidavits. The ultimate fact to be found was whether the protection of the interest of plaintiff required the appointment of a receiver. This had to be determined by a preponderance of the evidence. Whatever the conflict between the proof offered by plaintiff and that offered by defendants it was resolved in favor of the former. In view of the behavior of defendants as determined by the court, we find no error in the court's extending its protective power to the assets of the joint enterprise by the confirmation of the appointment of the receiver.

[4-6] (2) Appellants contend that they were aggrieved by reason of the effect of the order to show cause in casting upon them the burden "to prove the appointment was improvident." There are two answers to this assignment. (1) The order to show cause did not shift the burden. It was only a temporary order and served merely as a notice of motion and a citation to the defendants to appear at a designated time to show cause why the motion should not be granted. Difani v. Riverside County Oil Co., 201 Cal. 210, 213, 256 P. 210; McAuliffe v. Coughlin, 105 Cal. 268, 270, 38 P. 730. At the hearing both sides presented their evidence and the court decided in favor of the preponderant proof. There is nothing to indicate that the court ignored the general rule requiring the plaintiff to establish his case. (2) But if defendants had any legal grounds why the order to show cause should be dismissed other than those stated in their affidavits and argument, it was incumbent upon them to state such reasons at the hearing. It is the general rule that the parties to a proceeding on an order to show cause will not be permitted to withhold objection to an order made in the course of the proceeding until the appeal and there raise it for the first time. Sec. 434, Code Civ. Proc.; Chalta v. Biller, 212 Cal. 745, 300 P. 821.

[7] (3) Defendants' contention that plaintiff's affidavits should not have been read by the court on the return day of the order to show cause suggests a novel doctrine. The very purpose of such a hearing is to try in limine the issues raised by the complaint. In such a proceeding the plaintiff may always meet the affirmative evidence of the defendant with affidavits reciting details to such extent as may be deemed reasonable by the court to the end that it may derive a satisfactory determination. To deny such a privilege would be a strange occurrence incompatible with judicial thoroughness. By exploring all affidavits filed herein the court was enabled to perceive that the behavior of the defendants required the appointment of a receiver. Whether defendants had any legal basis for objecting to the court's consideration of the reply affidavits does not appear. If there had been any reason for such objection it should have been stated at the hearing. Chalta v. Biller, supra.

[8-10] (4) Finally, where the evidence is conflicting or where the propriety of an appointment based upon the uncontradicted evidence is doubtful, the question of the appointment of a receiver is addressed to the sound discretion of the court to be "exercised upon all [of] the facts." Breedlove v. J. W. & E. M. Breedlove, 56 Cal. App.2d 141, 143, 132 P.2d 239, 240. So broad is the discretion of the trial judge that his order based upon facts concerning which reasonable minds might differ with respect to the necessity for the receivership will not be reversed. We cannot substitute our conclusion for that of the trial court made upon sufficient evidence even if we should be of the opinion that there was no danger of the loss or removal of, or other irreparable injury to, the assets of the joint venture. To justify our interference with the order confirming the appointment here-

in, it must be made clearly to appear that the order was an arbitrary exercise of power. Davies v. Ramsdell, 40 Cal.App. 432, 183 P. 702; Fox v. Flood, 44 Cal.App. 786, 187 P. 68; Misita v. Distillers Corp., Ltd., 54 Cal.App.2d 244, 128 P.2d 888; Sunset Farms, Inc., v. Superior Court, 9 Cal. App.2d 389, 50 P.2d 106; Constitution, Art. VI Sec. 4½. In the case of Hampton v. Rose, 3 Cal.App.2d 167, 39 P.2d 447, the facts fairly parallel those before us. Plaintiff there had a contract for a lease on premises which he would contribute to the proposed corporation and defendant would furnish his going business operating there with its furniture, fixtures, $1,300 cash, etc. After plaintiff had procured the lease in both names, Rose took possession, excluded plaintiff, appropriated the profits to his own use, declined to transfer the business to the corporation and refused an accounting. Upon such a showing there was no question of the propriety of the appointment of the receiver.

[11] In the instant case it is not clear that the chancellor abused his discretion. While defendants had contributed $30,000 to the joint enterprise they withdrew that sum as though it had been a loan and as though they had an authorization from plaintiff to take it. Placing $105,000 of the joint venture money in a bank account to which plaintiff had no access evidenced bad faith and warranted the trial court in extending the arm of equity to the protection of him whose rights had been scorned by those in whom he had placed his confidence. The withdrawal by defendants of $144,000 from the bank account and their depositing it so as to deprive plaintiff of his right to check against it was not wholly relieved of its vice by the fact that "joint control" thereof was granted a bonding company. There was no prior agreement to place the joint venture funds under the control of a third party. Neither was it conclusive against the appointment of a receiver that there was no "going business." The estate of the joint venture is immense and plaintiff's share is a fair fortune. By a stroke of the pen an ill-advised partner might deprive plaintiff of substantial property rights. That the chancellor concluded that such event was probable warranted the measures taken.

[12] But aside from the probable loss to be suffered by plaintiff the court was authorized to appoint a receiver "in an action * * * between partners or others jointly owning or interested in any property or fund * * * where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Sec. 564, Code Civ.Proc. On the showing made at the hearing the court determined that the appointment should be made. The facts impliedly found from the complaint and the affidavits establish an attempted scheme to deprive plaintiff of his property and of the advantages gained. While the extensive affidavits filed by defendants present a picture quite different from that found, yet the court exercised a judicial privilege in adopting the facts as presented by plaintiff. The partnership created was effectually at an end. The parties had become associated for the purpose of accomplishing four definite ventures. Not only had those aims been wholly consummated, but the partners had become at variance. The Obergs were bitter in their enmity towards plaintiff and he cordially distrusted them. No one could collect, conserve and distribute the estate to the satisfaction of the partners save only the court.

[13-15] The contention that the court committed prejudicial error in refusing to accept at the hearing defendants' proposed stipulation is devoid of merit. Its terms were that the court should (1) discharge the receiver, (2) direct all joint venture money to be deposited in the trustee account, and (3) permit no withdrawals therefrom without order of court. It was not obligatory upon the court to accept or act upon such proposal. Stipulations are to be made by litigants, not by one litigant and the court. Neither is it the duty or the function of a court to require one of the parties to stipulate with his adversary. The contents of the document served only as an argument to the court to enter an order embracing the terms suggested.

The appeal from the ex parte order is dismissed.

The order confirming the appointment of the receiver is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

61 Cal.App.2d 235

BAKER et al. v. BERREMAN et al.

No. 12276.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1943.

Hearing Denied Dec. 29, 1943.

1. New trial ⇐88

Generally, the absence of a witness does not warrant the granting of a new trial on the ground of surprise. Code Civ. Proc. § 657, subd. 3.

2. New trial ⇐95

Where plaintiffs knew for two and a half months prior to trial that witness was in army and was stationed at particular camp and knew importance of his testimony, and, even after outbreak of war, had ample opportunity to take deposition of witness, plaintiffs in failing to procure deposition failed to exercise "diligence", hence when witness was transferred to another camp two days before trial plaintiffs could not rely on surprise as a ground for new trial, notwithstanding that witness had promised to attend the trial. Code Civ. Proc. § 657, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

3. New trial ⇐140(3)

In order to justify the granting of a motion for new trial upon ground of accident or surprise due to absence of witness or newly discovered evidence, the affidavits or other evidence introduced in support of motion must show that there was no lack of diligence to procure testimony of witness. Code Civ.Proc. § 657, subd. 3.

4. New trial ⇐97

Where plaintiffs knew two days before trial that witness would not be able to attend and proceeded with trial in absence of witness without having brought matter to attention of court or opposing counsel and without having requested a postponement, the grounds of accident and surprise were not thereafter available to plaintiffs in asking for a new trial. Code Civ.Proc. § 657, subd. 3.

5. New trial ⇐97

Where surprise is discovered but is not made known to court, and no motion for mistrial or postponement is made, the right of the party surprised to a new trial on such ground is waived. Code Civ.Proc. § 657, subd. 3.

6. Continuance ⇐22

Where material witness relied upon by plaintiffs was stationed at army camp but was transferred two days before trial to an undisclosed new post, plaintiffs would have been entitled to a reasonable continuance in order to locate witness upon making such request.

7. New trial ⇐97

The general rule requiring presentation of a motion for continuance when surprise is discovered as a prerequisite to the granting of a new trial on ground of surprise is not inflexible, but is to be given a reasonable application. Code Civ.Proc. § 657, subd. 3.

8. Appeal and error ⇐980, 981
New trial ⇐82, 99

The matter of granting or denying a motion for new trial upon grounds of accident or surprise or newly discovered evidence is generally within discretion of trial court, and such order will not be disturbed unless a clear abuse of discretion is shown, but such rule has no application where evidence upon which order is made furnishes no reasonable basis for exercise of discretion. Code Civ.Proc. § 657, subd. 3.

Appeal from Superior Court, City & County of San Francisco; George J. Steiger and I. L. Harris, Judges.

On rehearing.

Former opinion reversed, and order granting plaintiff's motion for new trial reversed.

Prior opinion 136 P.2d 576.

Cooley, Crowley & Supple and Robert L. Lamb, all of San Francisco, for appellants.

Felix Lauricella and George I. Hoffman, both of San Francisco, for respondent Mae Baker.

T. B. Scott, of Modesto, for respondent, Joseph Ventura.

KNIGHT, Justice.

The defendants appeal from an order granting a new trial in an action for damages brought by the parents of John Ventura, who was killed in a collision between an automobile he was driving and one driven by the defendant Berreman. The

appeal is now before this court on rehearing, which was granted in order to give consideration to numerous cases not cited in the original briefs, mostly from outside jurisdictions, which involved issues similar to the one here presented.

The accident occurred about 2:30 o'clock on the morning of December 21, 1940, at the intersection of Fremont and Mission streets in San Francisco, and the trial took place before a jury early in January, 1942. A verdict was returned in favor of defendants on January 8, 1942, and the motion for new trial was granted on March 9, 1942, by a judge other than the one who presided at the trial, the latter having died subsequent to the entry of judgment and prior to the presentation of the motion for new trial. The motion was granted by the entry of a minute order in general terms, insufficiency of the evidence not being specified as one of the grounds therefor; and the question presented by the appeal is whether the trial court was legally justified in granting the motion upon the ground of accident or surprise, which ordinary prudence could not have guarded against. Subd. 3, sec. 657, Code Civ.Proc. Such was one of the several grounds specified in plaintiffs' motion, in support of which they filed two affidavits showing that an eye witness to the accident named Burness, subsequent to the happening of the accident, was inducted into the army; that while stationed in a training camp in San Luis Obispo county he promised to attend the trial and testify as a witness for plaintiffs, but afterwards, on account of unavoidable and unforeseen events brought about by the outbreak of war, was unable to do so. Two days prior to the trial, he so notified counsel for plaintiffs, but no request was made for continuance. One of the supporting affidavits was made by counsel for plaintiffs, and the other by Burness.

[1] As pointed out in California Jurisprudence (vol. 20, p. 69), the general rule is that the absence of a witness does not warrant the granting of a new trial on the ground of surprise, since the parties are bound to use reasonable diligence in endeavoring to procure the attendance of witnesses, and, in case of their nonappearance, to move for a continuance. Here the record shows that Burness had never been subpoenaed as a witness, nor had any attempt ever been made to take his deposition, although up to two days prior to the trial plaintiffs were given ample opportunity so to do; furthermore, the record shows, as stated, that two days prior to the date set for the commencement of the trial Burness notified counsel for plaintiff by telegram that he would not be able to attend, and despite such knowledge plaintiffs made no request for a postponement nor at any time during the course of the trial did they even intimate to the court or opposing counsel that they had suffered any accident or surprise because of the absence of any witness. Defendants contend, therefore, that not only was there a lack of diligence to procure the testimony of the witness, but that by reason of the total failure during the course of the trial to mention the matter of his absence or to request any postponement, the ground of accident or surprise was not available to them afterwards as a ground for new trial; that in those circumstances the law will not permit them to proceed with the trial, speculate on the outcome, and then later, on motion for new trial, complain of the absence of a witness.

The particular facts relating to the absence of the witness, as they appear from counsel's affidavit, are as follows: The trial was originally set for October 22, 1941, and subpoenas were issued for plaintiffs' witnesses, including Burness. He was a resident of San Francisco, and prior to the issuance of the subpoena he had been interviewed by plaintiffs' counsel relating to the circumstances attending the accident. The subpoenas were given to a process server on October 10, 1941, but a week later he reported to plaintiffs' counsel that he was unable to serve Burness because he had been inducted into the army. Shortly afterwards, however, counsel learned through Burness' mother that he was stationed at Camp Roberts in San Luis Obispo county, and he sent Burness a telegram asking him to be present at the trial. Burness replied that he had arranged with his commanding officer so to do. Due, however, to congestion of the superior court calendar the court dislodged the case from the calendar and counsel for plaintiffs so advised Burness by letter, stating that when the trial date was definitely settled he would be notified. Thereafter on stipulation the trial date was set for November 13, and counsel for plaintiff so notified Burness, but on November 10 the court again dislodged the case from the trial calendar and counsel for plaintiffs again so notified Burness. Meanwhile Bur-

ness came to San Francisco to visit his mother. He was then a lieutenant, and while in San Francisco he informed plaintiffs' counsel that it would be a simple matter for him to obtain leave to attend the trial when the date was finally settled. Later counsel sent him a subpoena so that the army record would show the reason for his absence if he attended the trial. Shortly thereafter war was declared, and on December 30, 1941, counsel for plaintiffs notified Burness by telegram at Camp Roberts that the trial date had not been set, and suggesting that when it was necessary for him to attend he should come by plane. The next day, December 31, 1941, counsel for plaintiffs was notified by the secretary of the superior court that the cause would be tried on Monday, January 5, 1942, and counsel so notified Burness by telegram, asking him to come by plane; but on January 3, 1942, counsel received a telegram from Burness stating that he would not be present. Thereupon counsel wired back asking when he could appear, and Burness replied by telegram stating that he expected a change of station and that his plans were indefinite. This last telegram from Burness was received by counsel on Monday, January 5, 1942, after the trial had begun, and that same night he tried to reach Burness at Camp Roberts by phone, but was informed by the commanding officer that Burness had been transferred and that his present location was a military secret. Thereafter and during the course of the trial counsel kept in touch with Burness' mother, but she was unable to give him any information as to her son's whereabouts, and the trial ended on January 8, 1942. As stated, however, at no time prior to or during the course of the trial did counsel ever mention the matter of the absent witness or request any postponement of the trial; and less than a month after the trial ended counsel ascertained that Burness was stationed at Riverside, California, and on March 4, 1942, obtained from him the affidavit which was used in the presentation of the motion for new trial.

[2, 3] After having examined the additional authorities submitted, and given full consideration to all of the circumstances of the case, we are of the opinion that the trial court's order is not sustainable. As will be seen by the facts disclosed by counsel's affidavit, plaintiffs knew for two and a half months prior to and up to within two days of the trial that the witness was in the army and was stationed at Camp Roberts. They knew also of the importance of his testimony, because they had already interviewed the witness; and during all of that period of time they were afforded full opportunity to take his deposition, but no steps were taken to that end; in fact in November, 1941, which it will be noted was more than a month before the cause was brought to trial, the witness was in San Francisco, and at that time communicated with counsel for plaintiff. Moreover it appears that for nearly a month after the outbreak of the war Burness continued to remain at Camp Roberts, and that plaintiffs knew that he was still stationed there. It would seem, therefore, that in view of the extremely uncertain and unsettled conditions prevailing during the month of December, 1941, there was a lack of diligence on the part of plaintiffs in failing to procure the deposition. True, the witness promised he would attend the trial, and he doubtless would have done so had he not been prevented by events over which he had no control. But plaintiffs must have realized, especially after the declaration of war, that large bodies of American troops were being suddenly and rapidly transferred from one military station to another, and that under such conditions there would be no reasonable assurance that Burness would remain at Camp Roberts much longer or be available at all as a witness when the case was finally set for trial. In other words it appears that for nearly a month after the actual outbreak of hostilities plaintiffs could have taken the deposition of the witness; and that being so, it would seem that there could be no legal excuse under the circumstances for not having done so. Under well settled legal rules, in order to justify the granting of a motion for new trial upon the ground of accident or surprise due to the absence of a witness or newly discovered evidence, the affidavits or other evidence introduced in support of the motion must show that there has been no lack of diligence to procure the testimony of the witness. Turner v. Morrison, 11 Cal. 21; Heath v. Scott, 65 Cal. 548, 4 P. 557; Denvir v. Judson Fruit Forwarding Co., 86 Cal.App. 369, 260 P. 846; Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 276 P. 394; see, also, Slemons v. Paterson, 14 Cal.2d 612, 96 P.2d 125. It is our opinion that in the present case such showing was not made.

[4] Irrespective, however, of the question of whether there was a lack of diligence in failing to procure the deposition of the witness, it is our conclusion that since plaintiffs knew definitely, two days before the date set for the trial, that the witness would not be able to attend, and that nevertheless they proceeded with the trial, in his absence, without even having brought the matter to the attention of the court or opposing counsel, or ever having requested a reasonable postponement, the grounds of accident and surprise were not afterwards available to them in asking for a new trial.

[5] The general rule governing in cases of this kind is as stated in 39 Am. Jur. at page 158, that the "right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause"; and as will be seen from the supplemental briefs filed herein by the respective parties, cases involving the application of the foregoing general rule are to be found in nearly all jurisdictions; and beyond question such general rule has been recognized by the courts of this state for a great many years. An examination of the additional authorities cited by the parties shows that some of them involved absent witnesses, while others dealt with cases of surprise brought about during the course of the trial by the failure of a witness to testify as promised or by unusual situations arising from the introduction of unforeseen events by the adverse party or his omission to produce vital documents at the trial. Each case involved its own peculiar facts, and it would doubtless be an interminable task and serve no useful purpose here to analyze them. No attempt will be made to do so, but it may be stated generally that in all of the cases so cited clear recognition was given to the existence of the universal rule hereinabove quoted. In some instances the rule was applied and in others it was not; and in some cases the trial court's ruling was reversed, and in others it was affirmed, depending on the factual situation presented by the individual case.

One of the earliest cases arising in this state involving the application of the rule is Turner v. Morrison, supra. There a new trial was granted because of the absence of a witness, but on appeal the order was reversed. In so reversing the order the court said:

"The order of the Court below was clearly erroneous. The facts set out in the affidavits in support of the motion for a new trial should have been made the foundation of an application for a continuance, so that the plaintiffs might, if they desired, have avoided the delay by admitting the evidence as stated in the affidavit of defendants. 'That a party came to the trial unprepared to make out his case, or establish his defense, has not even the appearance of a valid excuse. It is true that, sometimes, no amount of diligence or effort will suffice to arrange all the details and procure everything needful in time for the trial. But injury need not for that reason be sustained. Courts are extremely indulgent and liberal in granting adjournments, and they are seldom or never appealed to in vain in a proper case. Even where it is simply expedient that a continuance should be had, and much more where any necessity for it exists, they will not deny a postponement. It is therefore incumbent upon a party, if for any good reason he finds himself unprepared to go on, to state the circumstances to the Court and move for an adjournment. If he fail to do this, he waives his want of preparation, and all right after to object. Any other rule would work great injustice, and be attended with innumerable evils.' (3 Graham & Waterman on New Trials, p. 894.)

"'The parties,' says Judge Kent, in Alexander v. Byron, 2 Johns. Cas., N.Y., 318, 'must come to trial prepared, at their peril, and if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. It has, therefore, been repeatedly held, that the subsequent allegation of a party that he was not prepared, is no reason for granting a new trial, unless it be founded on the discovery of testimony of which the party was not at the time apprised.'

"By failing to apply for a postponement of the trial, plaintiffs waived their right to move for a new trial for reasons which existed at the time of the trial."

Another early California case is Schellhous v. Ball, 29 Cal. 605. In that case the surprise was brought about during the trial by an adverse ruling of the trial court, and no motion for continuance was requested. A new trial was denied, and on appeal the

order was affirmed. In part the court said: "Upon this ground [surprise] new trials should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and inattention rather than as a meritorious ground for relief. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief. * * * When, during the progress of a trial, conditions are found to exist which may amount to legal surprise, it is better for the purposes of justice and the convenience of Courts and litigants to afford relief at once and on the spot, if it can be done; and in the exercise of that sound discretion which the law recognizes as vested in Judges, they should not refuse such relief, if attainable under the circumstances, and it is not to be presumed that they will. This discretion, however, should be exercised with great care, and only in cases where the Court is satisfied that the surprise has not resulted from carelessness, for its exercise in such a case would be demoralizing, and tend to a relaxation of that vigilance on the part of counsel which the due and orderly conduct of a trial renders indispensable. What we mean to say is, that the relief should be granted on motion at the trial, if practicable, when it would be granted on motion after the trial, and not otherwise."

The above two cases have been cited repeatedly with approval in later cases, among them being Heath v. Scott, supra; Denvir v. Judson Fruit Forwarding Co., supra; Bradbury Estate Co. v. Carroll, supra; Whitfield v. De Brincat, 18 Cal.App. 2d 730, 64 P.2d 960; and so far as our attention has been called, there has been no repudiation of such general rule.

[6] In the present case, assuming, as plaintiffs contend, that there was no lack of diligence in failing to procure the deposition of the witness during the two and a half months preceding the trial, plaintiffs would have been entitled to and doubtless would have been granted a reasonable continuance in order to locate the witness, if a request for such continuance had been made. In this connection the record shows that had the cause been brought to trial on any of the previous dates set, the witness would have been able to attend, but it was twice dislodged by the court of its own motion, and finally summarily set for trial on only five days notice; and on the date set, because of conditions beyond the control of the witness or plaintiffs, the witness was unable to attend. It would seem apparent, therefore, that to have denied a reasonable continuance in those circumstances, if request had been made therefor at the opening of the trial, would have constituted an abuse of discretion. On the other hand, if at the opening of the trial plaintiffs had made known to the court and opposing counsel the circumstances relating to the unexpected absence of the witness, it is not unreasonable to believe that the trial court would have been able to have brought about a stipulation between the parties as to the testimony plaintiffs expected to elicit from the witness, and then go on with the trial. In any event, if defendants had declined to enter into such a stipulation and request for a continuance were denied, defendants would not have been in a favorable position afterwards to claim in opposition to a motion for new trial that plaintiffs had been derelict in failing to exercise all available means to obtain a reasonable postponement.

[7] As plaintiffs point out, the general rule hereinabove quoted requiring the presentation of a motion for continuance when the surprise is discovered is not inflexible but is to be given a reasonable application; and in support of their contention that the present situation falls within one of the excepted classes, they argue that they were not in a position to move for a continuance for the reason that they did not then know the whereabouts of the witness and consequently could give the court no assurance as to when if ever they would be able to produce him as such or take his deposition. As already shown, however, the admitted circumstances of the case were such as would have called for a reasonable continuance, and there is nothing in the record to indicate that if application had been made therefor it would not have been granted; furthermore it appears that if such continuance had been applied for and granted the result would

not have been futile, since within a month after the trial ended the witness was definitely located in Riverside, California.

In further support of their contention that they were not required to move for a continuance plaintiffs cite several cases, but in our opinion they are not here controlling. In Laverne v. Dold, 17 Cal.App. 2d 180, 61 P.2d 497, 499, the order granting the new trial specified as one of the grounds therefor insufficiency of the evidence, and such was the main ground upon which the order was affirmed. True, it was held also that there was legal justification for granting the new trial on the additional ground of newly discovered evidence, and that under the circumstances there present the failure to move for a continuance did not alter the situation. But in this respect it is pointed out that one of the reasons why such a motion would not have been available was that the respondent was unable to make an affidavit "as to what he [the witness] would testify if called." Such is not the case here. In Whitfield v. De Brincat, supra, the factual situation was essentially different from the one here involved. There the surprise occurred during the course of the trial as the result of a witness having testified on a vital point exactly contrary to what he had told respondent was the fact prior to the trial. And in affirming the order granting the new trial the court held in effect that in those circumstances to have moved for a continuance or to attempt an impeachment might only have made matters worse, and that such testimony coming from one of the respondent's own witnesses under such circumstances could and probably would have undermined whatever reliance the jury may have had in his defense. No such situation existed here. In Delmas v. Martin, 39 Cal. 555, the surprise occurred at the very close of the case by the unexpected introduction in evidence by the adverse party of a deed, and it was held in effect "that in the last stage of a jury trial, at the conclusion of the evidence, sufficient opportunity may not have occurred to enable the defendants and their counsel to decide, deliberately and discreetly, what course it was proper to pursue in respect to the last item of proof which was offered in the cause"; and that therefore the failure to request a continuance did not operate as a waiver of the right to move for a new trial on the ground of surprise. Rodriguez v. Comstock, 24 Cal. 85, was another case of a witness having testified contrary to what he had previously told the parties producing him, and the parties had no other witness in attendance by whom they could establish the fact they expected to prove by the witness who had failed them; whereas after the trial had ended such a witness was discovered. The court held that under the circumstances the failure to move for a continuance at the time of trial was not fatal, "for at that time they did not know, and therefore could have given no assurances to the Court, that a continuance would enable them to retrieve the disaster that had befallen them." The last case cited by plaintiffs, Barr v. Mountjoy, 50 Cal.App.2d 40, 122 P.2d 676, is not at all in point. The basis of the decision there, in affirming the order granting the new trial, was that the trial court had committed fatal error in law in failing to bear in mind that the defendant was guilty of negligence per se in failing to yield the right of way to a pedestrian in a crosswalk. The decision does not indicate what the facts were with regard to accident and surprise.

[8] In considering the merits of the appeal we have not overlooked the fundamental rule that the matter of granting or refusing to grant a motion for new trial upon the grounds of accident or surprise or newly discovered evidence is generally a matter within the discretion of the trial court, and that such an order will not be disturbed unless a clear abuse of discretion is shown. However, as stated in Slemons v. Paterson, supra, that rule has no application where the evidence upon which the order is made furnishes no reasonable basis for the exercise of such discretion; and it is our opinion that such is the situation in this case.

Besides Burness there was another eye witness to the accident, named Vincent Allemany, who was riding with Ventura at the time of the collision; and Allemany was produced as a witness at the trial and gave a full account of the circumstances attending the accident as he saw it. The facts to which Burness would have testified are set forth in detail in his affidavit; and a comparison thereof with the testimony given by Allemany would seem to show that aside from the fact that Burness witnessed the accident from a different angle, his version of the happening thereof was substantially the same as that given by Allemany. Defendants contend, therefore, that in any event Burness' testimony would

have been merely cumulative, and would have presented no different case to the jury, which served as another reason why the motion for new trial should have been denied. Brandt v. Krogh, 14 Cal.App. 39, 111 P. 275. This point becomes unimportant, however, in view of the conclusions reached on the others hereinabove discussed.

The order is reversed.

WARD, J., concurs.

PETERS, Presiding Justice (concurring).

I concur. I agree with the holding in the majority opinion that plaintiffs' failure to mention, during the trial, their inability to secure Burness as a witness, as a matter of law, under the facts here existing, bars them from relying on accident or surprise as a ground for a new trial. I disagree, however, with the holding that, as a matter of law, plaintiffs' counsel was guilty of a lack of due diligence in failing to take the deposition of the witness. The majority opinion fully and fairly states the facts. It therein appears that the case was originally set for trial on October 22, 1941. Burness was then available, and had secured the permission of his commanding officer to attend. The case was then put over to November 13th. Burness was then available, and about this time advised plaintiffs' counsel that it would be a simple matter to obtain leave to attend the trial. On December 31st the case was set for January 5th. As late as December 30th plaintiffs' counsel must have believed Burness was available, because on that date he notified him the trial date had not been set, but that when it was, to come to San Francisco by plane. It was not until January 3, 1942, that plaintiffs' counsel was informed that Burness was not available. At that time he was equally unavailable so far as taking his deposition was concerned. The majority opinion holds that, as a matter of law, plaintiffs' counsel was guilty of a lack of due diligence in not taking Burness' deposition, at least after December 7, 1941. In my opinion, under such a state of facts, whether plaintiffs' counsel exercised due diligence in failing to take the deposition, and whether he was reasonably entitled to believe that Burness would be available, were questions of fact for the trial court. It may be conceded that the trial court would have been justified in finding a lack of due diligence, but the point is, that, in support of the order, we must assume it found the other way. While we know now in 1943 that those in the armed forces are frequently and unexpectedly transferred from place to place, we did not have that knowledge in December of 1941. Keeping in mind the wide discretionary powers of the trial court in passing on such motions, it is my opinion that the trial judge was justified in finding that up to January 3, 1942, plaintiffs' counsel was reasonably justified in believing that the witness would be available when needed. For that reason, he was not guilty of a lack of due diligence in failing to take the deposition of the witness.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



61 Cal.App.2d 152

In re JACOBS' ESTATE.

PEOPLE v. JACOBS.

Civ. 12472.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1943.

1. Statutes ⇐181(1), 225

Statutes in pari materia should be construed together so as to harmonize them if possible, to ascertain legislative intent and maintain integrity of both.

2. Statutes ⇐181(2)

Statutes should be construed reasonably to ascertain and effect legislative intent.

3. Statutes ⇐181(1), 184, 208, 215, 217, 218, 225

Legislative intention may be ascertained by considering words used, context, object in view, evils to be remedied, history of the times and of legislation upon same subject, public policy, contemporaneous construction, and the like.

4. Executors and administrators ⇐173

Family allowances in administration of decedents' estates are strongly favored in the law. Probate Code, §§ 680, 950, 952.

5. Statutes ⇐225

Taxing statutes are in pari materia and should be construed together in ascertaining legislative intent.

6. Executors and administrators ⇐261

Claims against decedents' estates for taxes owed to the United States take precedence over taxes owed to the state.

7. Constitutional law ⇐48

Court should not assume that Legislature intended to attempt to give a priority to a state tax over a federal tax which could not be allowed under federal Constitution.

8. Executors and administrators ⇐416

Upon insolvency of decedent's estate, claim for expenses of last illness and family allowance is entitled to priority over claim for retail sales taxes owing by decedent to the state. Probate Code, §§ 640–646, 680, 950, 952; St.1939, p. 2183, § 26½.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding between the People of the State of California and Jean L. Jacobs, executrix of the estate of Hyman Jacobs, deceased, involving the question of priority of payment of retail sales taxes and expenses of last illness and family allowance. From an order, the People of the State of California appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, and Lawrence Fletcher, Deputy Attys. Gen., for appellant.

Dean Cunha and Edward A. Cunha, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

This appeal presents the single question: In the event that a decedent's estate is insolvent, which is entitled to priority of payment, the expenses of the last illness and family allowance or a claim for retail sales taxes owing by the decedent to the State of California?

The trial court decided the question by giving priority to the payment of expenses of the last illness and family allowance, and settled an account showing the exhaustion of the estate by such payments leaving the claim of the State for sales taxes unsatisfied. From this order the State has prosecuted this appeal.

The question is purely one of statutory construction. Probate Code, § 950, enacted in 1931 provides the order of payments in the administration of decedents' estates in the following language:

"The debts of the decedent, the expenses of administration and the charges against the estate must be paid in the following order:

"(1) Expenses of administration;

"(2) Funeral expenses;

"(3) Expenses of last illness;

"(4) Family allowance;

"(5) Debts having preference by the laws of the United States;

"(6) Wages, to the extent of two hundred dollars, of each employee of the decedent, for work done or personal services rendered within ninety days prior to the death of the employer * * *;

"(7) Mortgages and other liens * * *;

"(8) Judgments * * *;

"(9) All other demands against the estate."

Sec. 952, Probate Code, provides that: "No creditor of any one class shall receive any payment until all those of a preferred class are fully paid."

Sec. 26½ of the Retail Sales Tax Act as amended in 1939, Stats. 1939, p. 2183, reads as follows: "Whenever any retailer or other person liable for any tax levied hereunder is insolvent, whenever any retailer or other person makes a voluntary assignment of his assets, *whenever the estate of a deceased retailer or other person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased,* or whenever the estate and effects of an absconding, concealed, or absent retailer or other person are levied upon by process of law, *the tax, together with interest and penalties attaching thereto, shall be first satisfied;* provided, however, that this section shall not be construed to give the State a preference over any recorded lien which attached prior to the date when the tax became a lien." We have italicized the portion of this section particularly dealing with priority of payment of the retail sales tax in case of the insolvency of a decedent's estate.

Appellant admits that the priority thus provided in section 26½, Retail Sales Tax

Act, is a priority over debts of the decedent only, and gives no priority over other lawful charges against the estate. It therefore concedes that expenses of administration and funeral expenses, not being debts of the decedent, take priority over the claim for retail sales tax. It further concedes that the family allowance is not a debt of the decedent, but it argues that since expenses of last illness do constitute a debt of the decedent and must be paid before the family allowance and since section 26½, Retail Sales Tax Act, provides that the sales tax "shall be first satisfied" when the estate "is insufficient to pay all the debts due from the deceased", the sales tax is thus given a priority over the expenses of last illness and hence over family allowance.

Respondent argues with an equal show of logic that since the sales tax takes precedence of payment only over other debts of the decedent, other charges against the estate having precedence over the sales tax, and since the family allowance is not a debt of the decedent, therefore the family allowance must be paid before the sales tax; and since expenses of last illness must be paid before family allowance they must likewise have precedence of payment over sales tax.

In the solution of the dilemma thus posed by the arguments of respective counsel there are certain settled rules of statutory construction to which we may have recourse.

[1-3] Statutes in pari materia should be construed together so as to harmonize them, if possible, to ascertain the legislative intent and maintain the integrity of both. Raynor v. City of Arcata, 11 Cal.2d 113, 120, 77 P.2d 1054; Rose v. Superior Court in and for Imperial County, 80 Cal. App. 739, 751, 252 P. 765; Cohn v. Isensee, 45 Cal.App. 531, 537, 188 P. 279; McGrath v. Kaelin, 66 Cal.App. 41, 44, 225 P. 34. In construing and harmonizing the several statutes they should be so construed as to avoid if possible a construction which would be unreasonable (23 Cal.Jur. 722) or absurd (23 Cal.Jur. 766) and to ascertain and effect the legislative intent (23 Cal. Jur. pp. 725-727); and "intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like." 23 Cal.Jur. 735.

[4] It is pertinent to this consideration to remember that family allowances are strongly favored in the law. 11a Cal.Jur. p. 507. Statutes providing for family allowances are of purely American origin and are grounded in a social policy which recognizes the interdependence of the family and the state "recognizing the true relation of the State to the family as its organic, constituent element." 1 Woerner, The American Law of Administration, 3d Ed., § 77, p. 234. "Such statutes, like homestead and exemption laws, are enacted because of a benevolent and humane consideration of the helpless condition and distress of families occasioned by the death of those who had furnished their support and protection, and they must be construed with the same spirit of liberality that prompted their enactment. By the enactment of such laws the Legislature, under a wise public policy, seeks to guard and protect the family, which constitutes the foundation of the state itself, during the trying period of affliction and need caused by the death of the one who directed the family affairs." In re Pugsley's Estate, 27 Utah 489, 76 P. 560, 561.

Mindful of these considerations, the legislature has provided for the granting of a family allowance "which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration * * *." Probate Code, § 680. The legislature thus made it abundantly clear that at the time the Probate Code was adopted in 1931 it deemed the payment of a family allowance for the period of one year, even by an insolvent estate, of more importance than the payment of any debt of the decedent except only the expenses of the last illness.

This preference of the expenses of the last illness alone, among all decedent's debts, over the family allowance is itself grounded in a sound social policy. As important as is the maintenance of the security of the family after it has lost the protection of its head through death, it is even more important to the family that everything reasonably possible to preserve that head alive should be done through the care that the physician, the nurse and the hospital can give. The legislature has, so

far as it is possible by such legislation to do so, assured the ministration to the sick by making the charges for those services a highly preferred claim in the event of death.

In this connection another portion of the Probate Code must be referred to. By sections 640–646, Probate Code, provision is made for setting aside estates of decedents to the surviving spouse or minor children without further administration where the net value of the estate does not exceed $2,500 upon proof that the expenses of the last illness, funeral charges and expenses of administration have been paid. These sections were last amended in 1939, the same year that section 26½, Retail Sales Tax Act, was amended, and it is conceded by the Attorney General that "the Sections 640–646 providing for setting aside to the surviving spouse or minor children of certain estates precludes the state from collecting from such assets for delinquent sales taxes unless a lien for said taxes shall have been perfected prior to the death of the decedent. The sections specifically set forth the conditions under which the estate shall be set aside and the sections are contemporaneous in their date of amendment with section 26½ as amended." Opinion of the Attorney General NS 2802, July 29, 1940.

To construe section 26½ as giving a priority over expenses of last illness and family allowance in the case of insolvent estates subject to ordinary administration, and at the same time to construe it as excluded from payment in estates summarily set aside under sections 640–646 Probate Code, would obviously lead to an absurd and unreasonable result. Assume for illustration one estate of a net value of $2,500 and another of a net value of $2,600. In the first case expenses of the last illness but not sales taxes must be paid before setting aside the estate to the widow or minor children; in the second case, accepting the position of the Attorney General, sales taxes owed by the decedent must first be paid before expenses of the last illness or family allowance. If the sales tax exceeded $100 in the cases supposed the dependent widow or children would get less for their support from the $2,600 estate than from the $2,500 one. We cannot believe that the legislature intended any such consequences.

It is to be noted also that section 26 (b) of the Personal Income Tax Act, Stats. 1941 p. 3080, provides as follows: "(b) Every fiduciary who pays, in whole or in part, any claim, other than claims for taxes, expenses of administration, funeral expenses, expenses of last illness, and family allowance, against the person, estate or trust for whom or for which he acts, or who makes any distribution of the assets of such person, estate or trust, before he satisfies and pays taxes, including all increases, interest and penalties, except penalties due from a decedent, imposed by this act on the person, estate or trust for whom or for which he acts, or which constitute a claim against such person, estate or trust, or which are a lien or charge on or against the assets of such person, estate or trust, shall be personally liable therefor to the extent of such payments and distributions."

[5] This provision, adopted in 1941, expressly subordinates the income taxes of the decedent to expenses of the last illness and family allowance. Taxing statutes are in pari materia and should be construed together in ascertaining the legislative intent. Old Homestead Bakery, Inc., v. Marsh, 75 Cal.App. 247, 259, 242 P. 749; Jameson Petroleum Co. v. State, 11 Cal. App.2d 677, 680, 54 P.2d 776.

The interest of the State may be supposed to be as great in one source of revenue as another. No conceivable reason can be suggested why the State should prefer the retail sales tax over expenses of last illness and family allowance, and subordinate the income tax to the same items.

[6, 7] Finally we may point to subdivision 5 of section 950, Probate Code, which makes "debts having preference by the laws of the United States" next in priority of payment after family allowance. The United States statutes generally give precedence of payment to taxes due from the decedent to the United States. It is settled that claims for taxes owed to the United States take precedence over taxes owed to the State. Harrison v. Deutsch, 294 Ill.App. 8, 13 N.E.2d 511; Bowes v. United States, 127 N.J.Eq. 132, 11 A.2d 720. To adopt the Attorney General's construction of section 26½, Retail Sales Tax Act, would create unnecessary confusion in the case of an insolvent estate where a federal tax and a retail sales tax were both involved, which might well give rise to a serious question of the constitutionality of section 26½. It should not

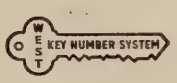
be assumed that our legislature intended to attempt to give a priority to a state tax over a federal tax which could not be allowed under the Constitution of the United States.

[8] We are satisfied of the correctness of the construction placed on the pertinent statutory law by the probate court.

The order appealed from is affirmed.

DOOLING, J., pro tem.

NOURSE, P. J., and SPENCE, J., concur.



61 Cal.App.2d 224

NICKEL v. LOOSER et al.

Civ. 6899.

District Court of Appeal, Third District, California.

Oct. 29, 1943.

Rehearing Denied Nov. 27, 1943.

1. Cancellation of Instruments ⇐34(1)
Limitation of actions ⇐40(1)

Where plaintiff purchased house under contract whereby vendor agreed to make good all defects of construction appearing within one year, plaintiff's action to cancel note executed for purchase price based on vendor's breach of contract to repair, which action was brought more than four years after contract was made, was not barred by laches or statute of limitation. Since plaintiff was not required to take affirmative action to assert vendor's failure of performance. Code Civ.Proc. §§ 337–339.

2. Equity ⇐73

Where plaintiff purchased a house under contract whereby vendor agreed to repair all defects in construction appearing within one year, plaintiff's delay of more than four years in bringing action for equitable relief based on vendor's breach of contract could not be regarded as prejudicial to rights of vendor's guardian, because of inability to have vendor and another appear as witnesses, so as to justify application of doctrine of "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

3. Equity ⇐72(1)

To justify the application of doctrine of "laches", in addition to mere lapse of time, there must exist some circumstances from which the defendant may be prejudiced, or there must be such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed.

4. Appeal and error ⇐1010(1)

Question whether a plaintiff was guilty of laches is to be determined primarily by the trial court, and the District Court of Appeal will not interfere with trial court's discretion unless manifest injustice has been done or unless its conclusion cannot be reasonably held to find support in the evidence.

5. Cancellation of Instruments ⇐34(1)

Where plaintiff purchased a house under contract whereby vendor agreed to repair all defects appearing within one year, plaintiff's delay of more than four years in bringing action to cancel note executed for purchase price on ground of vendor's breach of contract to repair did not constitute a waiver of plaintiff's rights, since such breach could have been raised as a defense to an action to foreclose deed of trust.

Appeal from Superior Court, Nevada County; Percy King, Judge.

Action by Velma Nickel, formerly Velma Brock, also known as Velma E. Brock, against John J. Looser, Johanna Burton, also known as Johanna E. Burton, and Johanna Burton, as guardian of the estate of Alfred H. Burton, an incompetent person, to quiet plaintiff's title to property free and clear of a deed of trust held by defendant guardian. From a judgment for plaintiff, defendants appeal.

Affirmed.

James Snell, of Grass Valley, and Thos. O. McCraney, of Los Angeles, for appellants.

T. L. Chamberlain, of Auburn, for respondent.

PEEK, Justice.

This is an appeal by the defendants from a judgment and decree enjoining them

from claiming or asserting any rights under a certain promissory note and deed of trust and cancelling the same. The judgment also quieted plaintiff's title to the real property.

Pursuant to an oral agreement with plaintiff Alfred H. Burton built a house on a certain lot owned by him in the city of Grass Valley, and thereafter, by an agreement of sale dated April 4, 1934, he sold the same to plaintiff for the sum of $1,975; $500 to be paid by plaintiff upon the execution of the agreement, and the balance in monthly payments until the purchase price was paid in full. Shortly after the execution of this agreement Burton requested further sums of money, and arrangements were made between the parties and the local branch of the Bank of America to finance the balance of the purchase price. A part of said financing was one note and trust deed dated May 12, 1934, in the sum of $432. It is this note and trust deed which are involved herein and which plaintiff alleges were given in consideration of the execution by Burton of the following guarantee:

"To Whom It May Concern:

"This is to certify that I, Alfred H. Burton, who constructed the stucco cottage for Velma Brock, at 134 Empire Street, Grass Valley, do herewith agree that should any defects arise through faulty workmanship or construction, for a term of one year from this date, that I will repair same free from any cost to Mrs. Velma Brock.

"In Witness Whereof, I have hereunto set my hand and seal this twelfth day of May, 1934.

"A. H. Burton

"John Looser, (Witness)."

Plaintiff alleges that within one year of the date of said guarantee she discovered defects in the house; that she so informed Burton, and was assured by him that the necessary repairs would be made, but that nothing was done; and that by virtue of such failure on his part to repair such defects she has been damaged in the sum of $600.

On January 4, 1935, Burton was adjudged insane, and on April 10, 1935, defendant Johanna Burton was appointed, and ever since has been, his guardian. Plaintiff further alleges she was under the belief that because of Burton's insanity it would be but an idle act to give him further notice of the continuing defects; that during the month of December, 1937, she first learned of Johanna Burton's appointment as guardian; that she thereupon demanded of the guardian that the house be repaired in accordance with said guarantee, and upon the refusal of the guardian to comply with the terms thereof, she stopped the monthly payments on the note and trust deed.

On December 3, 1939, defendants instituted proceedings for the sale of the property under said deed of trust, and plaintiff immediately instituted the present action as an affirmative defense to defendants' proposed sale, and to quiet title to the property. It is from the judgment entered after a hearing on said complaint that defendants now appeal.

The various transactions mentioned were shown by the introduction of both oral and documentary evidence on the part of plaintiff. The testimony of Johanna Burton, the sole witness for defendants, was limited to an identification of the note and the fact that the last interest payment was made on December 9, 1937. No other witness was called nor was other evidence introduced on behalf of defendants.

Defendants contend that the plaintiff's evidence is insufficient to support the judgment; that the same is against law in that the action is barred by the statute of limitations and by laches on the part of plaintiff; and that this is particularly true by reason of the insanity of Burton and the death on September 1, 1938, of Mr. Rector, the manager of the bank were the transactions were consummated, in that both Burton and Rector were material and indispensable witnesses for defendants. Defendants also allege in their answer, and likewise argue herein, that plaintiff by her failure to bring an action, and by continuing to make payments until December 1937, thereby acquiesced in whatever defects there may have been in the construction of the house, and if any fraud was practiced by Burton her actions likewise amounted to a waiver of whatever defense, if any, she had in this regard.

It is plaintiff's answer to such contentions that the failure of Burton to build the house in workmanlike manner resulted in a failure of consideration for the note; that such nonperformance on his part may be alleged by her by way of affirmative answer, and is a valid defense to an enforcement of the obligation of the note and deed of

trust; that under such circumstances the statute of limitations and the doctrine of laches have no application; and that her acts in continuing to make payments on the note did not amount to a waiver of her rights under either the guarantee or the general obligation of Burton to build the house in a workmanlike manner.

[1] Defendants' first contention must fail as it was not necessary for plaintiff to take affirmative action. Upon Burton's failure to perform under the agreement she could have instituted an original proceeding for rescission and cancellation of the note and deed of trust or she could have accepted the house as it was and brought action for the damages sustained by reason of the faulty construction, or lastly, she might, as she has done herein, await the time when enforcement of the note and trust deed was sought, and excuse herself from the performance thereof by virtue of the failure of performance on the part of Burton. Williams v. Stillwell, 217 Cal. 487, 19 P.2d 773. So long as defendants are permitted to seek enforcement of the obligation, the plaintiff may allege and prove the failure of performance by defendants as a defense. J. B. Colt Co. v. Freitas, 76 Cal.App. 278, 244 P. 916; Stiles v. Bodkin, 43 Cal.App.2d 839, 111 P.2d 675.

[2] Defendants, however, insist that had plaintiff filed her action while Burton and Mr. Rector were still able to testify, evidence on the part of defendants might well have been much stronger, and that their absence as witnesses was prejudicial to defendants. In this regard is should be noted the evidence discloses that Burton was adjudged insane less than one month after plaintiff's last talk with him, when he reiterated his promise to repair the house, and that Rector died nearly a year prior to the notice of the intention to sell the property under the trust deed. The testimony further discloses that both Mrs. Burton and Mr. Looser participated in all conversations with Burton and Mr. Rector relative to the financing of the house, yet no questions were asked of either of them regarding such discussions. No showing is made by defendants as regards the reason for their failure to testify. The record is also silent of any showing wherein the testimony of either Burton or Rector would have been material to their case. All that is presented to this court is merely the statement contained in their brief that such persons were indispensable witnesses.

Defendants' sole objection to the proceedings or the introduction of any evidence essential to plaintiff's case was, by way of a motion for judgment on the pleadings at the outset of the hearing, on the ground that plaintiff's cause was barred by the statute of limitations. The motion was denied by the court, and thereafter during the course of the hearing, all material elements of plaintiff's case, both oral and documentary, were admitted in evidence without objection by defendants.

Upon such a record defendants cannot justify their contentions that the plaintiff was guilty of laches or that they have been prejudiced thereby by virtue of their inability to have Burton and Rector appear as witnesses in their behalf. Even assuming that plaintiff was not timely by her failure to institute an original proceeding, defendants would have been in no better position as regards the availability of witnesses after January 4, 1935, when Burton was adjudged insane, or September 1, 1938, when Rector died.

[3] Defendants rely on the case of Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767, 770, wherein the court refused to invalidate certain chattel mortgages because of the showing that the mortgagor, with knowledge of the facts, delayed action for more than two years. However, such case is of no benefit to defendants, as the Supreme Court, in applying the doctrine of laches, merely affirmed the decision of the trial court, and in that respect said: "There is no hard and fast rule, either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. In addition to mere lapse of time, there must exist some circumstances from which the defendant may be prejudiced, or there must be such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. Cahill v. Superior Court, 145 Cal. 42, 47, 78 P. 467. Laches is a question of fact, on the evidence, and must be determined by a consideration of all the circumstances of each particular case. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516."

Defendants also rely upon the case of Williams v. Stillwell, supra, as authority for the well established axiom that equity abhors stale claims, but defendants fail to note that the decision quieted plaintiff's title, refusing to apply the doctrine of laches, and stated: "It was only when

defendants attempted to interfere with plaintiff's possession of said real property which he had enjoyed uninterruptedly for forty years that the latter found it necessary to take legal steps to protect his rights." [217 Cal. 487, 19 P.2d 774.] The evidence in that case discloses further that the plaintiff took no steps to establish the ownership of the lands until after the death of his mother and two other persons, the three being the only persons beside himself who knew of the true facts of the transaction between him and his mother regarding the gift of the land.

[4] The question herein presented is to be determined primarily by the trial court, and this court will not interfere with its discretion in this respect unless manifest injustice has been done or unless its conclusion cannot be reasonably held to find support in the evidence. Wolpert v. Gripton, supra.

It would be an unconscionable antinomy of the law if on the one hand equity would relieve plaintiff from the bar of the statute of limitations and then preclude her recovery on the doctrine of laches, which doctrine is customarily applied when the period of delay is less than the statutory time.

The significant dates herein are not in dispute, and since more than four years have elapsed it becomes immaterial whether the section of the Code of Civil Procedure, §§ 337, 338, 339, providing for two, three, or four years within which such actions must be commenced, governs.

Therefore, the various elements herein presented resolve themselves into but one consideration, that is, whether or not equity will permit the plaintiff to assert her rights despite the bar of the statute of limitations. Defendants' contention in this regard, as has already been stated herein, is without merit.

It could be said that the situation in which plaintiff finds herself is analogous to the rule applied in the case of an outlawed mortgage debt where equity will refuse to quiet title in favor of the mortgagor unless he discharges the debt against which the statute has run. Civil Code § 2911; Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am.St.Rep. 75, 14 Ann.Cas. 844.

[5] Under the cases cited and the facts herein presented, this court has no hesitancy in holding first, in accordance with the case of Wolpert v. Gripton, supra, that the questions of laches is one of fact to be determined by the trial court; secondly, that the statute of limitations cannot be invoked by defendants to bar the defense of the invalidity or non-performance of the agreement as alleged and proved by plaintiff, and lastly, there was no waiver by plaintiff of her rights under the guarantee agreement.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



61 Cal.App.2d 258

DINKELMAN v. HARRISON et al.

No. 12555.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1943.

1. Mortgages ⇐144

Neither mortgagor nor those claiming under mortgagor may buy in a tax title and assert it successfully against the mortgage or the title acquired through foreclosure of mortgage.

2. Limitation of actions ⇐165

Where mortgagor could not have successfully asserted a tax title to defeat title of mortgagee acquired through foreclosure of mortgage, mortgagor's heirs could not rely on tax title to defeat such title, notwithstanding mortgagor's husband, who was one of the heirs, had successfully pleaded statute of limitations in mortgage foreclosure action. Code Civ.Proc. § 353; St.1931, p. 440, § 47.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action to quiet title by Frederick H. Dinkelman against Ruth E. Harrison, administratrix of the estate of George P. Elliott, deceased, and others. From a judgment for defendant, plaintiff appeals.

Reversed.

Hawkins & Hawkins, J. W. Hawkins, and J. Lee Robertson, all of Modesto, for appellant.

H. K. Landram, of Merced, for respondents.

SPENCE, Justice.

Plaintiff sought to quiet his title to a parcel of land in Merced County and he appeals from a judgment in favor of defendants.

The material facts are undisputed. All parties are agreed that in 1929, title to said parcel was in Edith G. Elliott, now deceased. In that year, Edith G. Elliott and her husband, George P. Elliott, also now deceased, executed a note in the sum of $2,500 in favor of plaintiff and also executed a mortgage covering said parcel to secure the payment of said note. The note was payable one year after date and the mortgage provided "Mortgagor shall pay all taxes, assessments and incumbrances on said property * * *". Edith G. Elliott died intestate in 1933, leaving as her heirs her husband, George P. Elliott, her son George E. Elliott and her daughter Ruth E. Harrison. No personal representative was appointed until 1938 when Ruth E. Harrison was appointed administratrix of the estate of Edith G. Elliott, deceased. In due time plaintiff presented his claim upon said note and mortgage but said claim was rejected by the administratrix. Thereupon plaintiff brought an action to establish his claim and to foreclose said mortgage. In that action plaintiff had judgment and he became the purchaser of the property upon the foreclosure sale, receiving the commissioner's deed in 1940. George P. Elliott, the surviving husband, who had signed the note and mortgage, was made a party to said foreclosure action but his demurrer, pleading the statute of limitations, was sustained. The statute had not run, however, in favor of the administratrix. Code of Civil Procedure, section 353. George E. Elliott, the surviving son, was also made a party to said foreclosure action. He claimed title to said property under a tax-deed, said claim being based on the facts hereinafter set forth. The trial court made no findings in the foreclosure action with respect to George E. Elliott's claim of title, holding that it had no jurisdiction to try title in such action. Said action was therefore dismissed as to George E. Elliott without prejudice to the rights of any of the parties. George P. Elliott, the surviving husband, died in 1941 and Ruth E. Harrison was appointed administratrix of his estate. Thereafter this action to quiet title was brought against said Ruth E. Harrison, individually and as administratrix of the estate of George P. Elliott, deceased, and also against George E. Elliott, the surviving son.

The controversy in the present action arises over the claim of said defendants that title to the property was in said George E. Elliott. The facts upon which that claim is based may be briefly stated. In 1932, and during the lifetime of Edith G. Elliott, said Edith G. Elliott and her husband George P. Elliott, as mortgagors, failed to pay all taxes and assessments as required by the terms of the mortgage. As a result the property was sold to the Merced Irrigation District on August 23, 1932, and later, after the period for redemption had expired (California Irrigation District Act, section 47, Stat.1931, p. 440), the Collector of the district deeded said land to the Merced Irrigation District. Said deed was dated February 7, 1936, and was recorded on February 20, 1936. On February 17, 1936, George P. Elliott, the surviving husband, wrote to the directors of the district offering to purchase the property saying, "I will pay all taxes against the property including your expenses." Thereafter the board accepted the offer specifying the amount to be paid to the district as $379.92. This amount was paid by George P. Elliott and a deed from the district to George P. Elliott was executed and recorded in January 1937. In November of that year, George P. Elliott took the deed to the county recorder, told him that a mistake had been made in the deed and requested him to change the deed and the record so that George E. Elliott rather than George P. Elliott would appear as the grantee therein. The recorder, apparently being in an accomodating frame of mind, changed the deed and the record as requested. While plaintiff contends that this change of the grantee's name could not have vested title in George E. Elliott, who was decreed by the trial court to be the owner of the property, and while defendants make no reply to this contention, we believe that the discussion of the contention is unnecessary in view of the conclusions which we reached.

[1] Plaintiff contends that neither the mortgagor, nor those claiming under the

mortgagor, may buy in a tax title and assert it successfully against the mortgage or the title acquired through foreclosure of the mortgage. In our opinion, this contention must be sustained. There is an abundance of authority sustaining this general proposition and the cases have been collected and discussed in a note found in 134 A.L.R. at page 289. The reasons for the rule have been variously stated. In those cases involving controversies between mortgagors and mortgagees, which cases are numerous, the courts have usually contented themselves with stating that the mortgagor could not assert a tax title against the mortgagee for the reason "that it is the duty of the mortgagor to keep the taxes paid and that he cannot be allowed to derive an advantage from his own wrong in permitting them to go unpaid". 134 A.L.R. 292. The duty of the mortgagor to pay the taxes, referred to in such cases, was based upon the personal obligation imposed by the terms of the mortgage or by statute. But the rule has been quite generally applied against those claiming under the mortgagor such as purchasers (134 A.L.R. 303); or junior lien holders (134 A.L.R. 297); or heirs or devisees. 134 A.L.R. 312. In many of the cases, no personal obligation to pay taxes rested upon the successor in interest of the mortgagor, and the mere relationship of the parties was considered sufficient justification for the application of the rule. 134 A.L.R. 297. It has been pointed out "that the decisive factor is not whether the obligation to pay the tax rests on the one asserting the tax title, but whether on broad equitable grounds he should be estopped to assert such title". 134 A.L.R. 294.

In this state, the general question was considered in Barnard v. Wilson, 74 Cal. 512, at page 517, 16 P. 307, at page 309, and it was there said: "A mortgagor is under obligation, from the nature of the mortgage contract, to preserve the property pledged for the purposes of the original security; and, on grounds of public policy, to insure good faith and fair dealing, he is estopped, independent of covenants of warranty, from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property on which it was placed; and those claiming under the mortgagor are equally estopped." This case and the authorities therein cited have been recently cited with approval in Garvey v. Byram, 18 Cal. 2d 279, 15 P.2d 501, 136 A.L.R. 1137.

[2] It thus appears that while the estoppel against the mortgagor has been based in some decisions upon the narrower ground of a violation by the mortgagor of his personal obligation to pay the taxes, such estoppel against both the mortgagor and his successors may be, and frequently has been, based upon the broader ground that a disability should be imposed upon said parties by virtue of the mere relationship existing between them and the mortgagee. If this broader ground be the true basis of the rule, and we believe that it is, the claim of defendants that they were under no personal obligation, as heirs of the mortgagor, to pay the taxes, and particularly the taxes accruing prior to the death of Edith G. Elliott, need not be considered. Neither need we consider the fact that the statute of limitations had been successfully pleaded by George P. Elliott in the foreclosure action as he is treated here solely as one of the heirs of Edith G. Elliott, deceased, and not as one of the signers of the note and mortgage. If it be assumed that the heirs were under no personal obligation to pay any taxes accruing prior to the death of Edith G. Elliott, nevertheless the rights of the heirs with respect to the property were no greater or better than the rights of their ancestor. Carlson v. Carlson, 124 Cal.App. 207, 12 P.2d 165; Burdick v. Kerkovecz, 81 Cal.App. 786, 792, 254 P. 684. And as their ancestor, who was the mortgagor, could not have successfully asserted a tax-title to defeat the title of plaintiff acquired through foreclosure of the mortgage, we are of the opinion that the heirs had no better right and that they labored under the same disability.

The judgment is reversed.

NOURSE, P.J., and DOOLING, Justice pro tem., concur.

In re MICHELETTI'S ESTATE.

PUCHEU v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 12396.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1943.

Rehearing Denied Dec. 4, 1943.

Hearing Granted Dec. 31, 1943.

1. Perpetuities ⇐6(1)

The possibility that future interest created by will may suspend power of alienation longer than statute permits, so as to render such interest void, must be determined by conditions existing at time of testator's death, on which such interest is created. Civ.Code, §§ 716, 749.

2. Perpetuities ⇐6(7)

The possibility of posthumous child of testator, who devised residue of his estate in trust for his two minor sons, any after-born children, and surviving issue of any children predeceasing testator, does not suspend power of alienation beyond lives in being, as posthumous child must be deemed existing person so far as necessary for its interests. Civ.Code, §§ 29, 716, 749; Probate Code, §§ 123, 250.

3. Wills ⇐473

A testamentary trust in residue of testator's estate for benefit of his two minor sons, any after-born children, and surviving issue of any children predeceasing him, was not void in its entirety, even if interests limited to such sons' issue suspended power of alienation beyond lives in being or 25 years, as such interests were separable from interests in such sons. Civ. Code, § 715.

4. Wills ⇐473

The separability of invalid provisions in will from other provisions depends on whether such operation will cut off only incidental or insubstantial portion of testator's express scheme and purpose and preserve, rather than defeat, his main scheme or plan, without working injustice among beneficiaries.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

In matter of the estate of Arturo Micheletti, deceased. From an order denying a petition by Fosca Pucheu for partial distribution by the Bank of America National Trust & Savings Association, as executor of deceased's will, petitioner appeals.

Affirmed.

John J. Taaffe and Bernard Nugent, both of San Francisco, for appellant.

J. W. Coleberd, of South San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order of the superior court which denied a first amended petition for partial distribution in the matter of the estate of Arturo Micheletti. Petitioner is the adult daughter of Arturo Micheletti. She filed her petition for partial distribution as an heir at law, alleging that the residuary bequest in her father's will was void in that it unlawfully suspended the power of alienation in violation of section 715 of the Civil Code. In order to understand fully the questions presented by the appeal, it is necessary to present the entire testamentary scheme of the testator although the problem centers around the validity of the testamentary trust of the residue.

Arturo Micheletti at the date of his death on September 21, 1940, was married to Teresa Micheletti, his second wife. Surviving him were this wife, two minor sons by this second marriage born June 24, 1928, and April 8, 1930, and two adult children of a former marriage, one of whom, Fosca Pucheu, is the appellant here. Teresa Micheletti also had a son by a former marriage. The testator bequeathed certain household furnishings to his wife for life and upon her death these furnishings were to go to the two minor sons and "to all of (his) children born of (his) present marriage after the date of this will and to those of them surviving (him), and to the surviving issue of them predeceasing (him) by right of representation." Other personal effects were given to her absolutely and no other provision was made for her except the above. To the appellant Fosca Pucheu he bequeathed $2,500. To his adult son, Otello Micheletti, he gave $2,500, a piece of real estate, and $60 a month for his life to be taken from the income of a separate trust established by the will. To the son of his wife by her former marriage he left $1,000. The residue of his estate was to be placed in trust for the benefit of his children by his present marriage which residue was to be increased

by the amount held in the trust for Otello Micheletti at Otello's death.

In the opening paragraph of the "Tenth" provision which created the trust the testator makes it clear that the main beneficiaries of the trust are to be the two minor sons, any other afterborn children, and the surviving issue of any children predeceasing the testator. This interpretation coincides with the intent shown by the provision made for the remainder interest in the household furnishings following Teresa Micheletti's death. By subdivision (a) of the "Tenth" provision the testator provided that the income of the trust should be used for the support and maintenance of the above mentioned principal beneficiaries until each beneficiary attained the age of 25. As only the two minor sons, who were 10 and 12 years old at the testator's death, were born or survived the testator, there is no possibility that the trust for their support and maintenance till they reach 25 will suspend the power of alienation beyond lives in being or 25 years. By subdivision (c) of the "Tenth" provision the testator provided that his two sons should take an absolute interest in one-half the trust as each reached 25 and 32 respectively. In the event either or both died without issue prior to coming into possession, no provision is made. An intestacy would result and the testator's heirs at law would take. In the event either one died with issue surviving, the issue were to take the deceased son's share when they reached the age of 21. Finally he provided that the trust corpus should be subject to certain general spendthrift trust provisions.

[1, 2] Preliminary, it should be noted that we have only the interests of the two minor sons and their issue mentioned to deal with as the testator had no children born subsequent to the execution of the will. "The time of the death of the testator is deemed to be the time of the 'creation of the limitation, condition, or future interest' declared to be void by the Code sections above mentioned. Civ. Code, 749. Section 716 declares that 'every future interest is void in its creation which, by any possibility,' may suspend the power of alienation longer than the Code permits. This possibility is to be determined by the conditions existing 'at the time of the creation' of the limitation or future interests, that is, at the time of the death of the testator." In Re Estate of Whitney, 176 Cal. 12, 15, 167 P. 399, 401. By reason of this principle, subdivision (d) of the "Tenth" provision of the will is of no force and effect as it is obvious the testator intended its operation only in the event he had after-born children. It provided that these after-born children and their issue should share in the trust to the same extent as the two minor sons and their issue shared. Further, it should be noted, in answer to part of appellant's argument, that the possibility of a posthumous child, who, undoubtedly, the testator intended to take an interest under the trust, would not create a suspension beyond lives in being as such child is to be "deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth * * *." Civil Code, sec. 29; Probate Code, secs. 123, 250.

[3] Appellant contends that the interests limited by the testamentary trust to the issue of Arturo Amadeo and Manlio Elmo Micheletti suspend the power of alienation beyond lives in being or 25 years, and will not vest in interest within lives in being and 21 years. She asserts that the whole trust is void by reason of this contention. With this conclusion we cannot agree. Assuming, without deciding, that the interests in favor of issue do violate the provisions of Civil Code, § 715, and the constitutional prohibition against perpetuities, we conclude that the assertedly invalid provisions are separable from the interests created in Arturo Amadeo and Manlio Elmo Micheletti. In Re Estate of Troy, 214 Cal. 53, at page 59, 3 P.2d 930, at page 933, the court states the question to be decided: "May the invalid provisions be cut from the will and the balance stand as the will of the testator, or will such an operation have the effect of making a provision for the testator which is contrary to his intent or which will destroy his general plan or scheme? The answer must be obtained from a consideration of the terms and provisions of the will itself. That trust provisions for a valid term may be separated from those providing a trust for an invalid period was decided in Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St. Rep. 227." The dominant intent of the testator Arturo Micheletti manifestly was to provide for the children of his second marriage. Further, it appears that he did not want them to have the corpus until they were mature enough to handle large sums of money. In the event all the children

of his second marriage died without issue, prior to coming into possession of their shares, he died intestate as to the major portion of his estate. In the event his children died with issue he desired these children to have his estate. But this disposition of the remainder was an afterthought of the testator. This conclusion is supported by the inartistic wording of the executory interests created and the absence of cross-remainders between the two sons in the event one died without issue, the other son surviving. The testator indicated no objection to benefiting his heirs at law so long as his minor sons were provided for adequately. We cannot say that the testator would not have wanted the interests limited in favor of his sons to stand if their issue could not take. It seems reasonably certain that had the testator known that the interests limited in favor of the issue were invalid, he would still have wanted his general division of property to stand, namely the major portion going to the children of his second marriage in the event they survived to the ages of 25 and 32 respectively.

[4] This case is clearly distinguishable from In re Estate of Van Wyck, 185 Cal. 49, 196 P. 50, and In re Estate of Whitney, 176 Cal. 12, 167 P. 399. In both of those cases the testator's general scheme would have been defeated had only the void executory interest been struck down. In both cases the testator had attempted to make an equitable division of his property among his heirs at law. By striking down only the executory interest either the division became disproportionate or the sole heirs at law were also the life tenants. The testamentary scheme before us is controlled by the principles of separability announced in Re Estate of Troy, 214 Cal. 53, 3 P.2d 930. At page 62 of 214 Cal., 3 P.2d at page 934, it is said that the test in determining separability is: "Will such an operation serve but to cut off only an incidental or insubstantial portion of the testator's express scheme and purpose, and, without working an injustice among the beneficiaries, have the effect of preserving rather than defeating his main scheme or plan for the disposition of his property?" To cut off only the assertedly void interests in the issue of the two minor sons works no injustice among the testator's intended beneficiaries. If those interests alone, as the testator attempted to create them, be void, then the rule of the Troy case requires that they be struck down so that the main scheme or plan of the testator may be preserved and accomplished.

For the reasons expressed the order is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.



61 Cal.App.2d 263

McQUEEN et al. v. TYLER et al.
TYLER v. ITO et al.

No. 12539.

District Court of Appeal, First District, Division 1, California.

Nov. 2, 1943.

Hearing Denied Dec. 29, 1943.

1. Carriers ⇐147

A contract between shipper and carrier may, under proper circumstances, limit liability, but the contract must be reasonable and freely and fairly made between the parties. Civ.Code, §§ 1565, 1567, 2176.

2. Carriers ⇐155

A carrier, defending an action for loss of goods on ground of special contract limiting liability, must show that shipper accepted contract with knowledge of its terms.

3. Carriers ⇐165

Evidence that motor carrier's agent informed shipper that freight bill was an authorization to take goods, and that shipper signed bill when it was too dark to read without knowledge of limitation on liability, sustained jury's implied finding that contract was obtained through fraud or mistake. Civ.Code, §§ 1565, 1567, 2176.

4. Carriers ⇐155

Fact that contract limiting motor carrier's liability was required by rules of railroad commission and was in exact form prescribed by the rules did not make contract binding on shipper whose assent to contract was not fairly obtained. Civ.Code, §§ 1565, 1567, 2176.

Appeal from Superior Court, Madera County; H. S. Shaffer, Judge.

Action for damages for loss of household furniture by H. H. McQueen and another against Everett A. Tyler, individually and doing business under the fictitious name and style of Oneonta Transfer & Storage, and Raymond T. Ito, individually and doing business under the fictitious name and style of R. T. Ito Company, wherein the first-named defendant filed a cross-complaint against the second-named defendant. The action was consolidated with an action by Everett A. Tyler, individually and doing business under the fictitious name and style of Oneonta Transfer & Storage, against Raymond T. Ito, and Raymond T. Ito doing business under the fictitious name and style of R. T. Ito Company. From judgment for plaintiff, Everett A. Tyler, individually and doing business under the fictitious name and style of Oneonta Transfer & Storage, appeals.

Affirmed.

W. Cloyd Snyder and Louis T. Fletcher, both of South Pasadena, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondents.

KNIGHT, Justice.

A jury returned a verdict for the sum of $5,500 in favor of plaintiffs McQueen and against the defendant Everett A. Tyler individually and doing business under the name of Oneonta Transfer & Storage, in an action to recover damages for the loss of household goods. From the judgment entered on said verdict the defendant Tyler appeals.

The circumstances attending the loss of the goods and which gave rise to the litigation are these: The plaintiff H. H. McQueen, an engineer employed by the Shell Oil Company, was ordered transferred from Tracy to South Pasadena, and his employer made arrangements with the company operated by the defendant, which was licensed as a common carrier by the state Railroad Commission, to transport plaintiffs' household goods to Pasadena. Accordingly on November 5, 1941, a moving van, operated by Lloyd Tyler and Willis Crossley, arrived at Tracy from Pasadena, and after having spent most of the day loading plaintiffs' goods into the van, started back for Pasadena. En route, about midnight, at a point a few miles south of Madera, a collision occurred between the van and a produce truck owned by R. T. Ito Co. and driven by one Jack Ault. As the result of the collision the drivers of both trucks, Ault and Tyler, were killed; Crossley was severely injured; both trucks caught fire and burned, and all of plaintiffs' household goods were completely destroyed by the fire. Two suits arose out of the collision. One was brought by the appellant Tyler against Ito for damages for loss of equipment, and the other was brought by the McQueens against appellant and Ito for the loss of their goods, which they alleged were of the value of $7.077.28. In the latter action the appellant Tyler filed a cross-complaint against Ito to offset any judgment the McQueens might obtain against him, and in his answer to plaintiffs' complaint he set up as a special defense a "freight bill", claiming that by reason thereof the carrier's liability for loss of goods was limited to 10¢ per pound per article lost. Appellant claimed, therefore, that the highest value that could be recovered for the loss of the goods was $1,000. The action brought by the McQueens against appellant and Ito, and the one brought by appellant against Ito, were consolidated for trial, and the action brought by the McQueens was submitted to the jury on two general and two special verdicts. On the issues raised by the McQueens' complaint and the answers thereto the jury returned a general verdict in favor of the McQueens and against appellant and Ito separately for the sum of $5,500; and on the issues raised by the cross-complaint and the answer thereto the jury returned a general verdict in favor of Tyler and against Ito for the sum of $5,500. The two special verdicts were submitted at the request of appellant Tyler. The first was as follows: "Was Lloyd Tyler, the driver of the Oneonta Transfer and Storage Vehicle at the time of the accident in question, guilty of negligence which was the proximate cause of the said accident?" The jury's answer thereto was "No." The second special verdict was in the following form: "Did the provisions in the freight bill in evidence here, purporting to limit the carriers liability for loss to plaintiff's goods to 10¢ per pound per article, constitute a contract between the parties, limiting such liability and entered into fairly between the parties?" And the jury's answer thereto was "No." Ito filed notice of appeal from the judgments

against him, but took no steps to perfect the appeals, so that the only appeal now before this court is the one taken by Tyler from the judgment for $5,500 entered against him and in favor of the McQueens on the general verdict; and the sole issue presented by the appeal is whether there is evidence to support the conclusions reached by the jury on the second special verdict. If there is, such verdict in itself supports the general verdict and the judgment entered thereon. In other words, according to the jury's finding on the second special verdict the freight bill referred to therein did not constitute the contract between the parties and was not fairly entered into by them; therefore the limitation of liability specified therein was not controlling and the McQueens were entitled to recover the reasonable value of the goods, which the evidence clearly shows and the jury found was no less than $5,500.

An examination of the "freight bill" referred to in the special verdict shows that it has none of the characteristics of a bill of lading or similar instrument. It consists of a paper about a foot square, the middle one-third portion of which is made out in the form of a workman's time sheet to be filled in by the employee, and down in the lower third portion is a space wherein was written a general description of the goods to be transported. The upper third of the document contains the names and addresses of the consignor and consignee, and immediately below the name of the consignor, in extremely small print, is a provision reading as follows: "You are hereby authorized to move, ship, or store the goods referred to below from the above Consignor's address. The shipper's agreed or declared value of the shipments transported hereunder is hereby specifically stated by the shipper to be not exceeding 10¢ per lb., per article." The "10¢" was filled in a blank space in pencil, and opposite the provision appears McQueen's signature. He admitted having signed the document, but he claimed that he did so at Crossley's request and in reliance upon the representation made by Crossley that it was "an authorization to take the goods"; that he did not read the document, and had no knowledge of its contents, and would not have signed had he known it contained the limitation provision. The uncontradicted testimony given at the trial fully substantiates such claim. Briefly stated it was as follows: Appellant's employees, Crossley and Tyler, having driven all night, arrived at the McQueens early on the morning of the day set for the moving, and as stated all that day they were engaged in packing the goods and placing them in a large, enclosed van. Nothing had been said to McQueen by anybody at any time about any contract of carriage or the signing of any document. After dusk the McQueens were ready to leave in their car with their two children, and McQueen told Crossley they were leaving. Crossley then said that before McQueen left he had something for him to sign and he handed McQueen the paper. It was then too dark for McQueen to read the paper, and he asked Crossley what it was, to which Crossley replied, "An authorization to take the goods"; whereupon, relying on Crossley's representation that such was the nature of the document and without reading the paper or knowing its contents, he signed it, putting it up against the door jamb on the porch to do so. Crossley then took the paper, leaving no copy thereof with the McQueens, and they had no knowledge of the provision therein purporting to limit the liability of the carrier until long after the destruction of their goods. During the week following the accident the carrier's representative asked the McQueens to submit a claim containing an inventory showing the full value of their goods, and not even then was the purported contract limiting liability called to their attention. It is true that the rate specified for the transportation of the goods was less than it would have been if there had been no limitation of liability. But McQueen did not even know what rate had been specified; and at the trial McQueen testified positively that he would not have signed the paper if he had been aware of the provision therein limiting the liability for loss of the goods.

[1, 2] Section 2176 of the Civil Code provides in part that a consignor or consignee by accepting a written contract for carriage "with a knowledge of its terms" assents to the rate of hire and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks or boxes is lost or injured, when the value of such property is not named; but his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same. Section 1565 of the Civil Code provides that the consent of the parties to

a contract must be free, mutual and communicated by each to the other; and section 1567 declares that an apparent consent is not real or free when obtained through fraud or mistake. And in this connection it is held that while a contract made between a shipper and the carrier may, under proper circumstances, limit liability, such a contract must not only be reasonable, but must be freely and fairly made between the parties (Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 P. 603, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1118); also that a carrier who defends an action for loss of goods, alleging a special contract limiting liability, must show that the shipper accepted the contract " 'with a knowledge of its terms' which would seem to be a necessary condition of his 'assent' to the limitation." Murray v. Southern Pac. Co., 112 Cal.App. 150, 296 P. 667, 670.

[3] In the present case the questions of fact as to whether McQueen had knowledge of the terms of the special contract, and as to whether such contract was fairly and freely made and entered into, also as to whether the apparent consent of McQueen thereto was obtained through fraud or mistake and therefore not real and free, were all submitted to the determination of the jury under a set of instructions, the correctness of which appellant nowhere challenges; and it would seem to require no comment to demonstrate that the uncontradicted testimony above narrated is amply sufficient to sustain the jury's negative implied findings on all of those questions of fact.

Crossley was a witness at the trial, but did not deny the testimony given by McQueen as to the circumstances attending the signing of the paper; but appellant contends that Crossley's statement that the document was "an authorization to take the goods" was not a representation of fact, but a conclusion of law, and that in making the statement Crossley had no intention of deceiving or defrauding McQueen; that McQueen was a man of superior education and intelligence, and should not have relied on Crossley's statement. The fact remains, however, that the statement was not a correct statement of the true nature of the document he asked McQueen to sign. Quite to the contrary, standing alone the statement was a positive misrepresentation of the contents of the document and was made as a definite answer to McQueen's inquiry as to what the document was; and McQueen signed his name under circumstances where he could not read the document and on the full strength and reliance of the representation made by Crossley as to what the document contained.

[4] Nor does the fact that the contract limiting the carrier's liability was required by the rules and regulations of the Railroad Commission and was in the exact form prescribed by such rules, take the case out of the operation of the code sections hereinabove referred to and make the contract binding on McQueen, in view of the uncontradicted evidence and the jury's finding thereon that McQueen's assent to the contract was not fairly obtained. Furthermore, the rules of said commission require a higher rate to be charged where the valuation of the property is placed by the shipper at more than 10¢ per pound per article, and it does not appear that plaintiffs would not have been willing to pay whatever rate would have been necessary to carry the property at its true valuation. On the contrary, the evidence positively shows that McQueen would not have signed the freight bill if he had been aware of the purported limitation of value contained therein.

In further support of the trial court's judgment plaintiffs contend that in no event was appellant entitled to rely on the special defense of a contract limiting liability for the reason that it was nowhere alleged therein that the freight bill was signed by McQueen upon any special consideration; that is, that it was not alleged therein that any reduction in freight rates was accorded by the carrier as an inducement for, or by reason of, the signature to the alleged contract; hence that no issue thereon was properly tendered. In urging this point plaintiffs rely on the case of Reeder v. Wells Fargo & Co., 14 Cal.App. 790, 113 P. 342. However, in view of the conclusion reached on the controlling factual issue presented by the appeal, it is unnecessary to inquire into this additional point. Nor do the remaining points urged by appellant require special attention, for the reason that they are merely incidental to the main issue presented by the appeal, and in our opinion are without merit.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

PRATHER et al. v. HOBERG.

Civ. 6680.

District Court of Appeal, Third District, California.

Oct. 28, 1943.

Rehearing Denied Nov. 27, 1943.

Hearing Granted Dec. 20, 1943.

1. Waters and water courses ⇐38, 42, 100, 101

Where there is underground stream directly connected with perennial spring and surface creek flowing in well defined channel, such stream, spring and creek are deemed parts of same water course, to natural flow of which owners of lands riparian to any portion thereof have usufructuary and correlative rights of proportionate necessary and beneficial use, dependent on their respective needs under circumstances of particular case.

2. Waters and water courses ⇐100

An underground water supply is presumed to consist of percolating water, in absence of proof, and burden is on one asserting existence of underground stream to prove such fact.

3. Waters and water courses ⇐100

The presence of underground stream within fixed boundaries may be satisfactorily established from topography of land, shrubs and trees along stream's course on surface of land, tapping of stream by wells or tunnels, and effect of diminution of its supply on springs or surface rivers or creeks, but a subterranean stream known to exist is presumed to flow through fixed and definite course and channel varying only with erosion produced by water.

4. Waters and water courses ⇐49

In suit to apportion water of creek between parties' adjacent riparian tracts of land, evidence *held* sufficient to show existence of constantly flowing stream of water beneath defendant's land between source tapped by tunnel dug by him and spring which was source of creek.

5. Waters and water courses ⇐38, 40, 101

The water from a spring, flowing directly into creek with well defined channel, is deemed part of such creek, and hence is subject to apportionment between owners of lands riparian thereto.

6. Waters and water courses ⇐49

In apportioning quantity of water to which owners of tract of land were entitled from creek flowing across such tract for use of their summer resort thereon, court properly included their previously cultivated adjacent tract riparian to creek and its source spring, though acquired by them after their purchase of tract on which resort was situated.

7. Waters and water courses ⇐39, 47

Riparian rights attach to land by virtue of its location adjacent to either bank of stream, and area of riparian land may not be enlarged by addition of owners' subsequently purchased adjoining tract not bordering on stream.

8. Waters and water courses ⇐101

The common law doctrine that land owner has absolute right to use percolating water beneath his land is not accepted in California, but correlative rights of owners of riparian land prevail therein with respect to adjacent owners of land overlying common supply of percolating water, and neither of them is entitled to appropriate entire water supply for benefit of his own land to detriment of needs of his neighbor's land.

9. Waters and water courses ⇐101

Where quantity of percolating water beneath adjacent lands of different owners is insufficient for both, each is entitled to reasonable proportion thereof, according to necessary beneficial use to which such water may be adapted on overlying land, but water may not be transported for use on other remote land having no relation to supply from which water is taken.

10. Waters and water courses ⇐101

Owners of land, extending over source of water from which owner of adjacent tract obtained supply by means of tunnel, were entitled to their correlative share of percolating water for necessary use on their land, regardless of whether tunnel tapped underground stream or not.

11. Waters and water courses ⇐49, 107(3)

In apportioning water of underground stream, spring, and surface creek between adjacent riparian tracts of land used by respective owners for maintenance of summer resorts, superior court erred in failing to determine whether one owner's land, adjoining his tract riparian to underground stream from which he derived his water supply, was also riparian to such stream, in view of undisputed evidence that some of his resort buildings were situated on such adjoining land.

12. Waters and water courses ⇐79

An owner of two or more adjoining tracts of land riparian to same stream may divert water from upper tract for use on lower tract to extent that his lower holding entitles him to water, but may not also take for use thereon water which he is entitled to use as upper owner.

13. Waters and water courses ⇐42, 47

The rights of owners of lands riparian to same stream in water thereof are mutual and reciprocal, each is entitled only to reasonable share of such water, considering the other's rights and needs, and such rights must be exercised and water used only on parcel of land to which rights attach.

14. Waters and water courses ⇐79, 100

An owner of two adjacent tracts of land, through which creek flowed from spring on one of such tracts, which he had not cultivated for several years, was not entitled to divert from creek amount of water allowed to cultivate such tract for use on the other tract to detriment of owner of third tract riparian to underground stream flowing into spring.

15. Waters and water courses ⇐49, 107(3)

In suit to apportion waters of creek, spring, and underground stream between owners of riparian lands, court's findings, awarding owner of land overlying such stream one-fifth of water therefrom, but fixing such proportion at maximum quantity amounting to only 4⅙ gallons per minute, as compared with 258 gallons per minute allowed owners of other land for similar use, *held* erroneous as unsupported by evidence.

16. Waters and water courses ⇐42

Owners of lands riparian to stream are entitled to correlative and reasonably proportionate shares of water therefrom for necessary beneficial use for agricultural, domestic or industrial purposes on their respective lands.

Appeal from Superior Court, Lake County; Hilliard Comstock, Judge.

Action by Robert Lilburn Prather and others, executors of the will of W. R. Prather, deceased, against Max Hoberg to apportion the waters of a creek, spring and underground stream, enjoin defendant from interfering with plaintiffs' portion of water, and recover damages for unlawful diversion of the flow of the stream by defendant, who filed a cross-complaint to quiet title to all waters secured by means of a tunnel constructed by him. Judgment for plaintiffs and defendant appeals.

Reversed.

Breed, Burpee & Robinson, of Oakland, and Derby, Sharp, Quinby & Tweedt, Associate Counsel, of San Francisco, for appellant.

Huston, Huston & Huston, of Woodland, and H. G. Crawford and Burt W. Busch, both of Lakeport, for respondents.

THOMPSON, Justice.

The defendant has appealed from a judgment which was rendered against him in a suit to apportion the water of Big Canyon Creek in Lake County between adjacent riparian tracts of land belonging to the respective parties, each of whom maintains a popular summer resort. The court also awarded damages against the defendant for wrongfully diverting from an underground stream, which is the source of said creek, an excessive amount of water by means of a tunnel, depriving plaintiffs of their reasonable share thereof. Injunctive relief was also granted.

We have inserted a map taken from defendant's brief to show the relation of the respective properties to the underground stream, spring and creek which are involved in this litigation. Plaintiffs own the two northerly contiguous tracts of land enclosed in heavy lines, across both of which Big Canyon Creek flows. The first is designated "Plaintiffs' Tract 1, Price Ranch." The other is marked "Plaintiffs' Tract 2" upon which Adams Springs Resort is located. Both tracts of land border on both sides of the creek. Prather Spring, which supplies the water for said creek, and for Adams Springs Resort, is situated 100 feet northerly from the extreme southerly boundary line of plaintiffs' so-called Price Ranch.

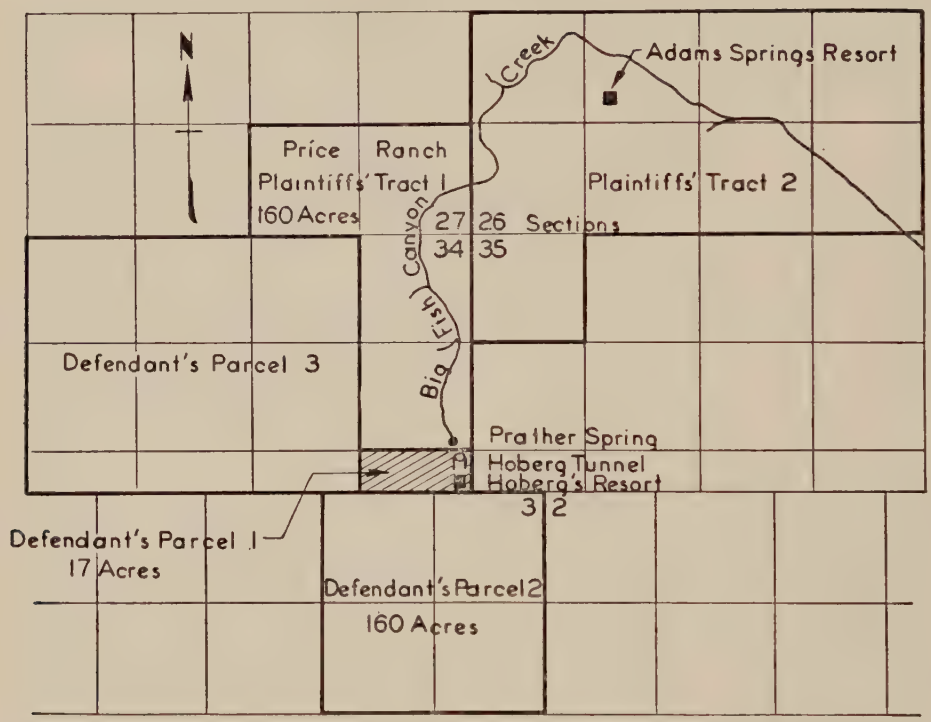
Defendant owns three adjoining tracts of land, which are marked on the map "Defendant's Parcel 1", "2" and "3", respectively. Defendant's first parcel contains 17 acres of land and adjoins plaintiffs' Price Ranch on the south. The defendant's summer resort, called Hoberg's Resort, is located on the southeast corner of his 17 acre parcel. On this same tract, near the northern border, opposite Prather Spring, a

couple of hundred feet distant, the defendant constructed a tunnel extending southerly into the hillside a hundred feet or more where he tapped the underground stream which furnishes the supply of water for Prather Spring and the creek.

The locations of Hoberg Tunnel, Prather Spring, both summer resorts, and the course of Big Canyon Creek are appropriately marked on the map.

of plaintiffs' Price Ranch, about 100 feet north of defendant's 17 acre parcel 1, flowed down a well defined channel through a swale or gulch over a portion of the Price Ranch, and thence northeasterly over plaintiffs' tract 2, to an angle from which it flows southeasterly across that tract of land. Adams Springs is located on plaintiffs' property, on the south side of the stream near the angle, over a mile from

MAP OF SITUS



After the commencement of this suit in 1931, the original plaintiff, W. R. Prather, died and the present plaintiffs, as his heirs and representatives, were substituted as proper parties. For more than two decades the plaintiffs and their predecessors in title have owned a tract of land east of Kelseyville in Lake County, consisting of more than 200 acres of land, upon which they have continuously maintained and operated a popular health and pleasure resort called Adams Springs. More than twenty years ago they purchased the Price Ranch, consisting of 160 acres of land, adjoining their original tract on the west. From time immemorial a small stream called Big Canyon Creek, supplied with water from a perennial spring called Prather Spring, which is located on the extreme southerly portion

the spring. Adams Springs has been continuously patronized annually by several hundred guests. Plaintiffs' land has not been used for agricultural purpose, with the exception of fifteen acres of the Price Ranch, which was annually cultivated until that farming enterprise was necessarily abandoned for lack of water after 1924, when the defendant diverted the water from the spring and creek by means of a tunnel which he constructed on his 17 acre parcel at a point 200 feet south of the spring. Since that time the plaintiffs' land has been used almost exclusively for the maintenance of their summer resort at Adams Springs. That resort is absolutely dependent for maintenance on the water from the spring and Big Canyon Creek. For many years the water which is used

in and about the Adams Springs resort has been piped by the plaintiffs from the spring. The flow from this spring naturally varies during the summer and winter months and in unusually wet and dry seasons. Both of plaintiffs' adjoining tracts of land are riparian to Big Canyon Creek.

For more than a decade the defendant has owned three contiguous parcels of land in Lake County, situated southerly and westerly from plaintiffs' previously mentioned property. Defendant's lands are respectively designated as parcels 1, 2 and 3. Parcel 3 adjoins plaintiffs' Price Ranch on the west and contains more than two hundred acres. It is not contended that parcel is riparian to the stream. It has not been used for agricultural purpose and was not considered in apportioning the water of Big Canyon Creek. Parcel 1 adjoins plaintiffs' Price Ranch on the south, and contains 17 acres of land. On the southeast corner of this parcel the defendant maintains his Hoberg Resort. Near the northerly boundary of this parcel, without the knowledge or consent of plaintiffs, the defendant, in 1924, constructed a tunnel south of Prather Spring, at a distance of about 200 feet therefrom, extending southerly some distance into Boggs Mountain, where it tapped the water supply in the underground stream, which is the chief subject of controversy in this suit. It is not contended the defendant used any of his land for agricultural purpose. The water which he obtained from the underground stream by means of the tunnel and a pumping system was used exclusively to supply the needs of his summer resort. The court determined that until this water was diverted in 1924, Hoberg Resort did not have a patronage of guests approximating the number which annually visted Adams Springs. After the diversion of water from the underground stream the supply in Prather Spring was increasingly diminished from year to year, so that the plaintiffs were finally obliged to abandon the cultivation of 15 acres of land on their Price Ranch and to discontinue the maintenance of a small dairy and garden at Adams Springs, and they had an insufficient supply of water for the use of their resort.

When the plaintiffs learned of defendant's diversion of the water from the underground stream, by means of his tunnel and pumping system, they brought this suit to apportion the water of Big Canyon Creek, Prather Spring and the underground stream, to enjoin defendant from interfering with their portion of the water, and for damages as a result of the alleged unlawful diversion of the flow of the stream. The defendant answered the complaint, denying the material allegations thereof, and also filed a cross complaint asking for a decree quieting title to all of the water secured by means of the tunnel and pumping system on the theory that it was percolating water in the soil of his own land to which he is entitled, and that the alleged underground stream beneath defendant's parcel 1 does not exist.

The trial of the case was not finally completed for several years. At least three separate hearings occurred. The trial judge viewed the premises. The court adopted findings favorable to the plaintiffs determining that: "There is an underground stream of water flowing beneath the property of said plaintiff" and defendant's 17 acre parcel 1, to which underground stream plaintiffs' land is riparian; "that Hoberg Tunnel and the Prather Spring derive their water supply from the same source, to-wit: said underground stream, * * * and that said tunnel and said spring are directly connected with said water supply; that said stream of water does now and at all times referred to in the complaint has come to the surface of the ground upon plaintiff's property * * * forming what is known as Prather Spring; that the waters of said Prather Spring overflow, form and supply what is known as Big Canyon Creek; that said water flows from the said Prather Spring down said Big Canyon Creek and through the property of said plaintiff described in said complaint; that the lands of the plaintiff described herein and the said lot One (1) are riparian to said underground stream; that there has been and is a flow of water underlying the lands of the plaintiff and said lot One (1) of the lands owned by the defendant;" that for more than forty years the plaintiffs and their predecessors in interest have necessarily used the water from said spring and Big Canyon Creek to irrigate fifteen acres of their Price Ranch for agricultural purpose and to supply their Adams Springs Resort; that without the knowledge or consent of plaintiffs, the defendant in 1924, completed a tunnel on parcel 1 of his land, at a point about one hundred feet south of the boundary line between plaintiffs' and de-

fendant's property, by means of which, with the use of pumps, the "defendant diverted an unreasonably large portion of the flow of said underground stream," a part of which he used on lands in the Kelsey Creek watershed not riparian to the Big Canyon Creek or the underground portion thereof, thus depriving plaintiffs of their reasonable share of said water; that the quantity of water unlawfully diverted by the defendant by means of the tunnel and pumping system has gradually increased since 1929, and the quantity accessible to the plaintiffs has greatly decreased until they have been forced for lack of water to abandon a valuable garden and dairy previously maintained by them, and they are unable to secure "sufficient water to supply the reasonable demands and necessities of said Adams Springs;" that the amount of water reasonably required by plaintiffs for the maintenance of Adams Springs is 258 gallons per minute, in addition to 2 acre feet of water per annum to irrigate fifteen acres of their Price Ranch for agricultural purpose; that continuously since 1880 the plaintiffs have conveyed the water necessary for use at Adams Springs from the Prather Spring by means of pipes and ditches.

The court further found that the quantity of water reasonably and beneficially necessary for defendant's use on his 17 acre tract of land to supply the needs of Hoberg Resort, situated thereon, is "one-fifth (1/5) of the dependable supply at Hoberg tunnel, * * * *which, until further order of the Court is fixed at six thousand (6,000) gallons per day pumped by the said defendant at the rate of sixteen (16) gallons per minute.*" The court did find that the defendant diverted water by means of the tunnel amounting "in some instances to approximately Fifty Thousand (50,000) gallons of water per day."

The court specifically refrains from determining whether defendants' southerly parcel 2, consisting of 160 acres of land, is riparian to either the underground stream or Big Canyon Creek, and therefore does not consider that tract of land in apportioning the water. That problem is specifically reserved for future determination.

Finally, in finding number 27, the court determines that the plaintiffs are "entitled to the use of *all of the water* flowing into said Prather Spring and said Big Canyon Creek, *except the quantity of water herein apportioned to the said defendant Hoberg, * * * ; that the quantity of water* herein found that said *defendant, Max Hoberg, is entitled to is equal to one-fifth (⅕) of the dependable daily supply at the said Hoberg tunnel, pumped at the time and manner hereinbefore fixed.*"

The findings do not determine the quantity of water which Prather Spring is capable of producing, except that the 9th finding does determine that plaintiffs require 258 gallons per minute for necessary use at Adams Springs, together with 2 acre feet to irrigate the 15 acre tract of land. The 11th finding also determines that since 1880 the plaintiffs have conveyed the water from Prather Spring to Adams Springs by means of "pipes and ditches."

Based on said findings a decree was rendered awarding to plaintiffs, as riparian owners of land adjacent to Big Canyon Creek, Prather Springs and the underground stream, previously mentioned, "the full flow of said stream without diminution or interference by the defendant, *except to the extent fixed in the findings,*" which is one-fifth of the supply procured from the Hoberg Tunnel. The defendant is perpetually enjoined from interfering with plaintiffs' apportioned share of the water. Judgment for damages in the sum of $2,500 is awarded to plaintiffs on account of the defendant's diversion of water from the underground stream by means of the tunnel. Jurisdiction is specifically reserved in the trial court to determine in the future the defendant's riparian rights, if any exist, to a portion of the water of Big Canyon Creek, Prather Spring or the underground stream, for use on his southerly 160 acre parcel of land. From that judgment this appeal was perfected.

The appellant seeks a reversal of the judgment on the grounds that: (1) The findings and decree to the effect that an underground stream exists beneath the surface of defendant's 17 acre parcel 1, which stream flows into and is a part of Prather Spring and Big Canyon Creek, are not supported by the evidence; (2) the water secured by means of the Hoberg Tunnel is merely percolating water to the whole of which he is entitled by priority for the necessary benefit of his summer resort as a domestic purpose; (3) the court erred in failing to determine that defendant's 160 acre parcel 2 is also entitled to participate in the apportionment of the water derived from the Hoberg Tunnel; (4) the ap-

portionment of water between plaintiffs and the defendant as owners of riparian lands is unreasonable and unsupported by the evidence; (5) the court erred in failing to apportion to the defendant a specific quantity of water, rather than a mere percentage of the flow of the underground stream; (6) the findings and judgment are irreconcilably conflicting in determining that the defendant is entitled to one-fifth of the water secured by means of the Hoberg Tunnel, without regard to the quantity of water obtained by the plaintiffs in the remainder of Big Canyon Creek, while on the contrary the court fixed the quantity of water to which the defendant is entitled at a maximum of six thousand gallons per day, and finally, (7) the court erred in refusing to reopen the case, after it had been submitted, to permit the introduction of evidence of experiments and of the effect upon the water supply in Hoberg Tunnel and Prather Spring, as the result of an unusually heavy rainy season, in comparison with other springs and reservoirs in that vicinity, ascertained by the sinking of several wells.

The record contains substantial evidence supporting the findings and judgment determining that an underground stream flows northerly beneath the surface of defendant's 17 acre parcel 1 into, and becomes a part of, Prather Spring and Big Canyon Creek, to which certain specified lands of both parties to this action are riparian.

[1-3] When the presence of an underground stream is satisfactorily established showing its direct connection with a perennial spring and a surface creek flowing in a well defined channel through and beyond the lands of riparian owners, the underground stream, the spring and the open creek are deemed to be parts of the same water course, to the natural flow of which the owners of land riparian to any portion thereof have the usufructuary and correlative rights of proportionate necessary and beneficial use, dependent upon their respective needs under the circumstances of a particular case. City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533; Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; 25 Cal. Jur. 1102, § 110; 67 C.J. 834, § 249; 2 Wiel on Water Rights, 3d Ed., 1011, § 1077. It is true that in the absence of proof, an underground supply is presumed to consist of percolating water, and that the burden is on one who asserts the existence of an underground stream, to prove that fact. The authorities recognize the fact that the presence of a flowing underground stream within fixed boundaries may be satisfactorily established from the nature of the topography of the land, from shrubs and trees along its course on the surface of the land, from the tapping of the stream by means of wells or tunnels, from the effect of a diminution of its supply upon springs or surface rivers or creeks, and in various other methods. In 67 C. J., supra, at page 834, it is, however, said in that regard: "Once a subterranean stream is known to exist, the presumption is that it has a fixed and definite course and channel through which it flows and which varies only with the erosion which the water produces."

[4] In the present case, as we have previously said, there is sufficient evidence to support the conclusions of the court, after viewing the premises, that an underground stream exists beneath defendant's parcel 1, which flows in a definite channel into Prather Spring and thence into Big Canyon Creek, to which certain designated properties of both parties are riparian. It would unduly extend the length of this opinion to attempt to recite the evidence which we think justified the court in determining the existence of that underground stream and of the fact that it flows directly into and becomes a part of Prather Spring and thence into Big Canyon Creek. Both the defendant and his son, George Hoberg, testified that they struck a stream with a continuous steady flow of water when they dug their tunnel. The defendant said: "I think it was in 1924, spring and fall of 1924, we went in there and excavated it to its present size, and we found a big stream of water there, probably 45 or 50 gallons a minute, in one solid stream."

George Hoberg testified that they pumped from that tunnel approximately 50 gallons of water per minute. He said, "That supply runs in. That supply acts very much like a running stream." The evidence shows that defendant's use of water from the tunnel had a direct effect upon Prather Spring by greatly reducing the quantity of water therein. For the purpose of experimenting to ascertain whether there was a direct connection between Hoberg Tunnel and Prather Spring, the plaintiffs in-

stalled a pump in that spring and reduced the water in the spring to a low level, which promptly resulted in practically exhausting the water in Hoberg Tunnel. When the pumping ceased the flow of water was restored to the tunnel. After those experiments were performed, the defendant, in April, 1934, sought to enjoin plaintiffs from continuing to pump water from Prather Spring, pending the trial of this suit. Upon that motion the affidavit of Max Hoberg was read in evidence, in which he averred that he relied upon that supply of water for the maintenance of his summer resort, and that the pumping of water from Prather Spring by plaintiffs greatly reduced the supply of water in Hoberg Tunnel. We are satisfied the evidence sufficiently shows a direct connection of a constantly flowing stream of water between the source which was tapped by the Hoberg Tunnel and Prather Spring, which is the undisputed source of Big Canyon Creek.

[5] Clearly the water from Prather Spring, which for generations has flowed directly into Big Canyon Creek and became an inseparable part of that stream, is subject to apportionment between owners of land riparian to the creek. Irrespective of the source of supply, the water from a spring which flows into a creek with a well defined channel is deemed to be a part of that stream, and the use of its water is governed by the doctrine of riparian rights. Gutierrez v. Wege, 145 Cal. 730, 79 P. 449; Hanson v. McCue, 42 Cal. 303; San Francisco Bank v. Langer, 43 Cal.App.2d 263, 110 P.2d 687; 25 Cal.Jur. 1106, § 113; 1 Wiel on Water Rights, 3d Ed., 357, § 336.

[6, 7] In apportioning the quantity of water to which the plaintiffs are entitled, the court properly included 15 acres of the Price Ranch which had previously been cultivated in spite of the fact that it was acquired by them subsequently to their purchase of the other tract upon which Adams Springs is situated. The Price Ranch is riparian to Big Canyon Creek and Prather Spring independently of the location of the previously acquired tract. It is entitled to riparian benefits to the extent of the water necessarily and beneficially used on that ranch for agricultural purpose, regardless of the demands of the other tract for a reasonable quantity of water for the maintenance of the summer resort. The court recognized that fact and made a separate allowance for the Price Ranch. Both tracts are riparian to the creek on both sides of the stream. Riparian rights attach to land by virtue of its location adjacent to either bank of a stream. It is true that the area of riparian land may not be enlarged by the addition of a subsequently purchased adjoining tract which does not border on the stream. Miller & Lux v. James, 180 Cal. 38, 179 P. 174; 67 C.J. 685, § 11. In this case no previously purchased land intervenes between the Price Ranch and the creek. It is therefore entitled to riparian benefits in its own right.

[8, 9] The appellant contends that since the water which he secured by means of the Hoberg Tunnel was percolating water taken from the soil of his overlying land in parcel 1, and not from an underground stream, he acquired prior rights to the entire supply. We are of the opinion that claim is not necessarily true. The English common law doctrine of absolute right to the use of percolating water by the owner of overlying land is not the present accepted rule in California. In this and in most jurisdictions of America the English rule in that respect has been rejected. The same correlative rights which apply to the owners of riparian land prevail in California with respect to adjacent owners of land overlying a common supply of percolating water. Neither is entitled to appropriate the entire supply for the benefit of his own land, to the detriment of the needs of his neighbor's land. If the quantity of percolating water is insufficient for both owners, each is entitled to a reasonable proportion according to the necessary beneficial use to which it may be adapted on the overlying land. It may not, however, under such circumstances, be transported for use on other remote land which has no relation to the supply from which the percolating water is taken. Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260; 67 Corpus Juris 838, § 255; 29 Cal. Law Rev. 7. Many cases in support of that doctrine are cited at page 8 of the last mentioned Review.

The syllabus in the Burr case, supra, correctly states the rule as follows: "Different owners of separate tracts of land, situated over common strata of percolating water, may, each upon his own lands, take by means of wells and pumps from the common strata, such quantity of water as may be reasonably necessary for beneficial use upon his land, or his reasonable

proportion of such water, if there is not enough for all; but one cannot, to the injury of the other, take such waters from the strata and conduct it to distant lands not situated over the same water-bearing strata."

[10] The Price Ranch extended over the source of water from which the defendant obtained his supply by means of the tunnel, for the evidence clearly shows that Prather Spring was immediately affected by the absence or flow of water in the tunnel. Under that rule, regardless of whether the tunnel tapped an underground stream or not, the plaintiffs would be entitled to their correlative share of the percolating water for necessary use on the Price Ranch.

However, the court has found that the defendant took the water from an underground stream by means of the tunnel, and we have previously held that finding is sufficiently supported by the evidence.

The appellant also contends that he acquired title to that water by adverse possession. The court determined that he failed to establish the necessary elements constituting adverse possession. The evidence supports that finding.

[11] The appellant contends that the court erred in failing to determine whether his 160 acre parcel 2, which adjoins parcel 1 on the south, upon which last mentioned parcel the bulk of improvements constituting Hoberg's Resort are situated, is riparian to the underground stream, which is the only source from which he derives his supply of water. In finding 32 the court specifically reserves jurisdiction to subsequently determine whether defendant's parcel 2 is riparian to the underground stream. The appellant challenges that finding in the following language: "Unless and until the court determines the amount of defendant's land which was riparian to the water supply, it had not laid the necessary basis for determining (a) the prorata of water to which the defendant was entitled; (b) the land upon which the water could be used; and (c) the amount of damages to be awarded against defendant."

There appears to be merit in the foregoing statement of the appellant. The evidence is undisputed that at least some of the buildings comprising the Hoberg Resort are situated on defendant's parcel 2. His chief demand for water from the Hoberg Tunnel was for use in supplying his resort. After determining that the present patronage of the two resorts is approximately the same, from which it would necessarily be inferred their demands for water for that purpose would be about the same, the court awards the defendant only one-fifth of the water from the underground stream, and enjoins him perpetually from interfering with plaintiff's right to the remaining four-fifths thereof. If the underground stream actually does extend southerly beneath the surface of defendant's parcel 2, he is thereby deprived of his just proportion of that water as riparian owner of that parcel of land for supplying the needs of that portion of his resort which is situated on parcel 2. The court further found that the defendant wrongfully diverted a portion of the water from Hoberg Tunnel for use on parcel 2, and assessed damages against him in the sum of $2,500 for that diversion. Assuming that a portion of the water from Hoberg Tunnel came from the underground stream to which parcel 2 is riparian, it would follow that the judgment is erroneous to that extent. We conclude that, to make a just apportionment of the water between the parties to this action for necessary use in the respective resorts, it is essential to determine whether defendant's parcel 2 is riparian to the underground stream and that the court erred in failing to so determine.

For the reason stated in the last paragraph, the damages which were awarded against the defendant for wrongfully diverting the water from Hoberg Tunnel for use on his parcel 2 is uncertain and unwarranted for the reason that an undetermined portion thereof may have been for the use of water on parcel 2, to which the defendant is entitled if that parcel is riparian to the underground stream.

Moreover, the court awarded to the plaintiff four-fifths of the water from the Hoberg Tunnel which it estimates to be 258 gallons per minute for use in and about his Adams Springs Resort, in addition to two acre feet for agricultural purposes on 15 acres of tract 1. It appears that said last mentioned 15 acres of land had not been cultivated by the plaintiff for several years, during which period of time he conveyed by means of pipes and ditches all of the water, including the portion allotted to said 15 acres, used by him on his tract 2, upon which his resort is situated. It is the present correlative needs of the separate riparian tracts of land which should be con-

sidered in apportioning the water from said stream. In other words, it appears that the plaintiff has for several years diverted and used for resort purpose on his separate tract 2, to the detriment of the defendant, all of the water which was allotted to his tract 1. This diversion of water to the detriment of an upper riparian owner of land, from one separate tract of land to another, is contrary to the established rule of apportionment.

[12] In 25 California Jurisprudence 1124, § 134, it is said in that regard: "One who owns two or more tracts riparian to the same stream may not take water to which he is entitled by virtue of the ownership of one and use it on the other. * * If both tracts adjoin, he is entitled to divert water from the upper for the lower *to the extent that his lower holding entitles him to water; but he may not in addition take, for use there, the water which he is entitled to use as upper owner.*" (Italics added)

[13] To the same effect it is said in Parker v. Swett, 188 Cal. 474, at page 485, 205 P. 1065, at page 1069: "The rights of riparian proprietors on the same stream, with respect to each other, are mutual and reciprocal. Neither has a right to the whole stream as against the rights of the others. Each is entitled only to his reasonable share thereof, considering the rights and needs of the others, and *such rights must be exercised and the use must be made only on the parcel to which the rights attach. Swett could not use her riparian rights on tract 3 to feed or increase her right on tract 1, or to collect it on tract 3 for the purpose of using it all on tract 1, without allowing to the plaintiff, for use on his land, his rightful share of the water so collected.*" (Italics added.)

[14] Applying the language of the preceding authorities to the present case, the plaintiff is not entitled to divert from the creek the water allowed to cultivate 15 acres of tract 1, to the detriment of defendant's fair share thereof, so as to increase the quantity apportioned to plaintiff for use only on his tract 2. That would result in plaintiff's augmenting the quantity of water apportioned to him for use in and about his resort on tract 2, by the quantity of water which was specifically allowed for necessary use on tract 1 only.

[15] The defendant contends that the findings are conflicting and unsupported by the evidence in awarding to him one-fifth of the supply from the underground stream, and in then fixing that one-fifth proportion at a maximum quantity of 6,000 gallons per day, which is only 4⅙th gallons per minute, as compared with 258 gallons per minute which were allowed plaintiffs for a similar use at Adams Springs.

There appears to be merit in that contention. The court separately apportioned for plaintiffs' use for cultivating 15 acres of land on their Price Ranch the additional quantity of 2 acre feet per annum, which does not appear to be unreasonable or disproportionate for that purpose. But it does appear that the remaining uses to which the respective parties apply the water of the combined supply from the underground stream, Prather Spring and Big Canyon Creek is almost exclusively for the maintenance of their summer resorts. These enterprises are quite similar in character and in their magnitude. It is true that in addition to the necessary and beneficial use of water for Adams Springs the plaintiffs did maintain a vegetable garden and a small dairy consisting of a few milk cows. It is also true that, until defendant diverted the water from the underground stream by means of Hoberg Tunnel, the plaintiffs enjoyed a much larger patronage of guests at Adams Springs than did the defendants at Hoberg's Resort. It also appears to be true that as a result of the diversion of water the patronage at Adams Springs decreased, and the patronage at Hoberg's Resort increased until, as the court finds, at the time of trial, the patronage of defendant's resort "approximated" that of the plaintiffs' resort. We may assume that the court properly took into account, for the purpose of making an equitable apportionment of the water, that, except for the unlawful diversion of water by the defendant, the normal patronage of visitors at Adams Springs would be much greater than that of Hoberg's Resort, and that plaintiffs would be entitled to much more water on that account in addition to the quantity necessary to maintain their vegetable garden and small dairy. But it does seem disproportionate and inequitable that for the benefit of purposes so similar in nature and in magnitude the defendant should be allowed only 4⅙ gallons per minute, while the plaintiffs are awarded 258 gallons per minute, which approximately amounts to sixty times the quantity which the defendant receives. The evi-

dence shows that the defendant pumped from Hoberg's Tunnel a quantity of water varying from 20 gallons per minute to 70 gallons per minute. We are directed to no evidence that Prather Spring or Big Canyon Creek was supplied from water from any source other than the underground stream. Yet the defendant is restricted to the use of one-fifth of the supply from the underground stream, which one-fifth share was estimated to be not to exceed 6,000 gallons per day, or 4⅙ gallons per minute. That estimate was determined on the basis of a maximum daily flow from Hoberg Tunnel of 30,000 gallons per day. It seems impossible that plaintiffs' share of that supply, which would amount to only 24,000 gallons per day, or less than 17 gallons per minute, would be all the water accessible to them for their various needs. The court found that plaintiffs required 258 gallons per minute for the benefit of Adams Springs, independently of the quantity awarded for use on the Price Ranch. Since the underground stream, Prather Spring and Big Canyon Creek are deemed to be one common source of supply for the purpose of riparian apportionment, it appears that the court inadvertently awarded to plaintiffs all of the water of Big Canyon Creek and Prather Spring in addition to four-fifths of the water of the underground stream.

[16] The respective owners of lands riparian to a stream are entitled to correlative and reasonably proportionate shares of the water for necessary beneficial use for agricultural, domestic or industrial purposes on their respective riparian properties. It has been said such owners of riparian land have a community interest in the water in proportion to their respective needs thereon. They are entitled to share equally in the water, taking into consideration the relative purposes for which it is necessarily and beneficially used. The apportionment of water in the present case appears to be grossly disproportionate under the circumstances of this case.

It is not necessary to determine whether the court abused its discretion in refusing to open the case for further evidence after it had been submitted for decision. That motion was presented on affidavits from which it is contended the sinking of several deep wells in the vicinity of Prather Spring definitely shows that the quantity of water in that and other springs and reservoirs in that vicinity, after unusually heavy rains in the season of 1938, was greatly increased to the extent of doubling the quantity of water in at least one of said springs, and that the court should take into consideration that increase of water in making its awards of apportionment based on specific gallons per minute. For the reason previously stated, we refrain from determining that alleged abuse of discretion.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

23 Cal.2d 137

CHALLENGE CREAM & BUTTER ASS'N v. PARKER, Director of Agriculture.
S. F. 16634.

Supreme Court of California.
Oct. 29, 1943.

As Modified on Denial of Rehearing Nov. 22, 1943.

1. Food ⇐4

The Milk Control Act does not prevent a particular producer or distributor from selling at minimum price, notwithstanding, by use of more expensive equipment or unwise management, he is marketing his product at a price less than enough to return to him a reasonable profit. St.1935, p. 922 et seq., St.1937, p. 1376.

2. Food ⇐1

In determining whether Milk Control Act authorizes Director of Agriculture to fix minimum price for milk delivered in fiber containers which is higher than that established for same quantity and quality delivered in glass bottles, a fiber container has no inherent value so as to bring its sale within category of an "unfair practice", and distributor using glass bottles is at no disadvantage because those using cartons are selling at same price which he charges, since amount fixed for bottled product includes a reasonable profit. St.1937, p. 1373, § 736.12.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Practice".

3. Food ⇐1

A ruling of Director of Agriculture fixing minimum price for milk delivered in fiber containers which is higher than that established for same quantity and quality delivered in glass bottles could not be sustained on theory that, by using cartons and selling at minimum price charged by competitors, a reasonably efficient distributor would not profitably be able to stay in business, and milk supply would be inadequate to meet consumers' demand, since such conclusion must be based upon dubious assumption that business would be discontinued rather than changed over to use bottles. St.1937, p. 1373, § 736.12.

4. Food ⇐1

The clause in Milk Control Act requiring Director of Agriculture to consider reasonable cost of handling milk did not authorize him to take into consideration the cost differential of various types of container in establishing minimum price, where in 1937, when clause was added, it was unlawful to sell or dispose of milk except in sterilized standard bottles. St. 1937, p. 1373, § 736.12; St.1939, p. 1041, § 479(b).

5. Food ⇐1

The Milk Control Act does not authorize Director of Agriculture to fix a minimum price for milk delivered in fiber containers which is higher than that established for same quantity and quality delivered in glass bottles. St.1937, p. 1373, § 736.12.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Challenge Cream & Butter Association against W. B. Parker, as Director of Agriculture, to enjoin enforcement of an order fixing minimum wholesale price of milk sold in paper or fiber containers. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion 125 P.2d 864.

Earl Warren, Atty. Gen., W. T. Sweigert, Asst. Atty. Gen., and W. R. Augustine and Walter L. Bowers, Deputy Attys. Gen., for appellant.

Webb, Webb & Olds and U. S. Webb, all of San Francisco, for respondent.

Landels & Weigel and William F. Cleary, all of San Francisco, amici curiae for Natural Milk Producers Ass'n of California.

EDMONDS, Justice.

By an order of the Director of Agriculture, Challenge Cream & Butter Association, a nonprofit cooperative marketing organization of 32,000 milk producers, is directed to sell milk for a higher price than it wishes to charge. The appeal of the director is from a decree by which he is perpetually enjoined from enforcing, or attempting to enforce the provisions of an order establishing minimum wholesale and retail prices for fluid milk in Alameda County.

The facts were presented to the trial court by stipulation and the question for decision may be simply stated: Does the statute generally referred to as the Milk Control Act, Agricultural Code, div. IV, chap. 10, secs. 735–738, St.1935, p. 922 et

seq., St.1937, p. 1376, authorize the Director of Agriculture to fix a minimum price for milk delivered in a fibre container which is higher than that established for the same quantity and quality delivered in a glass bottle, and if so, does the legislation violate the state and federal constitutions?

Since August, 1939, the association has used fibre containers exclusively. They are expressly authorized by section 479 of the Agricultural Code. Under General Order No. 58, fixing minimum prices, no differential existed between milk delivered in bottles and in cartons. But on June 9, 1940, the Director of Agriculture issued General Order No. 80 establishing a new schedule of minimum prices for wholesale, retail store and retail home sales, and providing: "If fluid milk is sold or delivered in containers for which a deposit is not required, which milk is sold for consumption off the premises, the prices for such fluid milk shall be one-half cent (½c) above the minimum wholesale prices established in Parts A, C, and D of this Schedule. If fluid milk is sold or delivered in fibre containers, which milk is sold for consumption on the premises, the prices for such fluid milk shall be one-half cent (½c) above the minimum wholesale prices established in Parts A and D of this Schedule."

As it is the universal trade practice in the area served by the association to require a deposit for milk in bottles sold for consumption off the premises but no deposit is asked for the single-trip carton, the effect of the regulation is to require milk producers and distributors who use fibre containers to charge one-half cent more for their milk than those who deliver it in bottles.

The association maintains a plant representing an investment in excess of $25,000. Since Order No. 80 became effective, and until its enforcement was enjoined, the association was compelled to and did charge its customers one-half cent more per container unit for fluid milk distributed by it than was charged by other distributors for the same quality and quantity of milk delivered by them in glass bottles. The customers of the association complained of this upcharge and many ceased to patronize it, or purchased less milk than before the order became effective. And for the purpose of the appeal, it has been stipulated that the association's business has been damaged to an extent sufficient to warrant the intervention of a court of equity and the granting of the relief given if the order made by the director is invalid.

In challenging the ruling of the trial court, the director supports his authority to establish the differential upon the provision of section 736.12 of the Agricultural Code, St.1937, p. 1373, requiring him, in determining minimum prices for any marketing area, to take into consideration, among other economic factors, the "reasonable cost of handling fluid milk * * * incurred by distributors and retail stores, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and delivery, * * *." It is stipulated, he says, that upon the evidence taken at the hearing held prior to the issuance of General Order No. 80, he found "that the reasonable cost of handling fluid milk in single service or fibre containers, including all costs of hauling, processing, selling, delivery and distributing incurred by distributors in the Alameda County Marketing Area was in excess of one-half cent (½c) per container above the reasonable cost of handling fluid milk in deposit returnable multiple service glass containers." And since the association does not question the sufficiency of the evidence to support this finding, the basis for the price differential between milk sold in cartons and in bottles is not only justified but is required by section 736.12, supra.

It is true that there is no attack upon the findings, either as to the excess in the cost of using cartons rather than bottles, or the more general determination that the prices established by Order No. 80 "are not more than reasonably sufficient to cover all necessary costs according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores. * * *" The association's claim is that the Milk Control Act, supra, does not contemplate or authorize the establishment of a differential as to price based upon the type of container in which milk of the same quantity and quality is delivered. But if the statute does so provide, the respondent argues, it to that extent violates the due process and equal protection clauses of the Fourteenth Amendment of the federal Constitution, and also sections 11, 13 and 21 of article I of the Constitution of California.

The general authority of the Director of Agriculture to fix minimum prices under

the Milk Control Act, supra, has been considered and upheld. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665. The primary question for determination in the present action, however, concerns the formula to be used in exercising that authority and is one of statutory interpretation in which the objectives sought by the Legislature must be considered.

Looking to the provisions of the statute for evidence of the legislative intent, it appears that one of its purposes is to eliminate unfair, unjust, destructive and demoralizing trade practices in the production, marketing, sale, processing or distribution of milk which "tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced." Agricultural Code, sec. 735(b), St.1937, p. 43. Another declared objective is to authorize the director to prescribe marketing areas and to determine prices which are necessary due to the varying factors in the costs of production and distribution in them "provided that the cost to distributors within any marketing area * * * shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions." Sec. 735.1, subd. (b). Also the act is to "bring about a reasonable amount of stability and prosperity in the production and marketing" of milk. Sec. 735.1, subd. (d). But nothing in the statute "shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution" of milk. And the terms and conditions governing the production and distribution of milk shall be such as will "insure an adequate and continuous supply of pure fresh wholesome" milk "to consumers thereof at fair and reasonable prices." Sec. 735. Again, in section 736, appears the legislative intention that a marketing area shall include only the territory where "the conditions affecting the production, distribution and sale of fluid milk * * * are reasonably uniform."

Section 736.12 specifies the formula by which minimum prices may be established. The factors to be considered are the quantities of milk distributed in the area, the quantities normally required by consumers in the area, the cost of milk to the distributors and retail stores (the prices paid by the distributors to producers and the minimum wholesale prices, respectively), the amount of the available capacity for processing and distributing milk and the estimated extent to which such capacity is being used. The purchasing power of consumers in the area must also be taken into account. Another item of cost which the director must include in his computation, and the one of principal importance in the present case, is the reasonable cost of handling milk "including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area."

Certain restrictions are placed upon the director in fixing minimum prices. They must not be "more than [reasonably] sufficient, to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution" of milk. The prices must also "tend to maintain * * * such number of reasonably efficient retail stores and distributors * * * as * * * is necessary to insure to consumers * * * sufficient distribution facilities of the several types or methods commonly used by consumers"; and be no more than is necessary to maintain "adequate and efficient distribution facilities of the several types or methods commonly used by them."

The purpose of the act can be fairly summarized as follows: That the people shall be able to purchase milk at the lowest price at which enough distributors operating with average efficiency will be able to do business at a reasonable profit so as to supply the demand of all the consumers in the marketing area. In order to effect this purpose producers and distributors must be prohibited from selling their milk at a lower price than that at which the entire consumer demand can be supplied at no more than a reasonable profit. Without such restriction, when one sells milk at amounts less than that at which some or many of his competitors can profitably do business, in an effort to meet the reduced prices they will be forced out of business, leaving the public with an inadequate milk supply. But each marketing area by which regulation is to be accomplished must have substantially similar economic conditions so that a uniform price will be fair to all concerned. Thus under the present law no injury can be done to a reasonably efficient distributor or producer unless some-

one operating in the same area sells at a price lower than the minimum at which he can do business or gives special inducements to customers which amount to an unfair practice within the meaning of the act. Agricultural Code, sec. 736.3.

[1] It is of particular significance in this connection that nothing in the act prevents a particular producer or distributor from selling at the minimum price even though, by the use of more expensive equipment or unwise management, he is marketing his product at a price less than enough to return to him a reasonable profit. In such an event, the sanitary laws regulating the industry must be considered adequate to insure a good quality of milk. And ordinary business practice would seem to make certain that if a distributor cannot use cartons and make sufficient profit to remain in business when selling at the minimum price, he will discontinue marketing his product in the single-trip container and return to delivery in bottles. For, obviously, if he sells at a higher price than that charged for milk in glass bottles, the consumer will buy the same grade and quality from his competitor at the lower rate unless there is some special inducement in the fibre container itself which makes it worth the added cost.

[2] The director does not claim, nor is there anything in his findings to indicate, that a fibre container has any inherent value so as to bring its sale within the category of an unfair practice, and a distributor using glass bottles is at no disadvantage because those using cartons are selling at the same price which he charges, for concededly the amount fixed by the director for the bottled product includes a reasonable profit. And certainly a consumer who prefers the milk furnished by a distributor using fibre containers has no basis for complaint if he pays no more for it than do those who buy the bottled product of other distributors.

[3] The only theory upon which the director's ruling may be sustained is that, by using cartons and selling at the minimum price charged by competitors, a reasonably efficient distributor will not profitably be able to stay in business, and, without such facilities, the milk supply will be inadequate to meet the necessary consumer demand. But such a conclusion must be based upon the dubious assumption that if an individual or organization operating with average efficiency could not carry on at a profit using the single-trip container, the business would be discontinued rather than changed over to use bottles. Such an assumption is not in accord with realities.

True, the director has made a general finding, in the words of section 736.12, supra, that the prices fixed by him "are * * * not more than [reasonably] sufficient to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores" in the Alameda County area. Then, in his schedules, the director includes but one minimum price for a particular grade and quantity of milk and for a particular type of delivery (wholesale, retail-store carry-out, home-delivered). The reference to the additional half-cent charge for milk delivered in cartons is made in a directive below each schedule. From the stipulation of the parties that the director found the reasonable cost of handling milk in cartons to be one-half cent per container more than that of handling milk in glass containers, the inference may be drawn that if, for example, an average operator could only make a reasonable profit by selling at eleven cents per quart in glass containers, he would be selling at less than a reasonable profit if he marketed his milk for the same price at a cost of one-half cent per unit more to himself, occasioned by the use of cartons. There is, however, no specific finding to this effect.

[4] Although on its face the clause requiring the director to consider the reasonable cost of handling milk would appear to authorize him to take into consideration the cost differential of various types of container, such a factor could not have been in the minds of the legislators in referring to the "several methods" of hauling, processing, selling and delivering milk, or "distribution facilities of the several types or methods commonly used by consumers." In 1937, when this language was added to the statute, it was unlawful, according to section 479(b) of the Agricultural Code, St. 1937, p. 642, to sell or dispose of milk except in sterilized standard bottles. Two years passed before the statute was amended to allow the sale of market milk to the retail trade "in standard * * * bottles or single service containers." Deering 1939 Supp., § 479; the same provision is now in section 476, Deering 1941 Supp. And at the 1941 session, the Legislature re-

fused passage of a bill to amend section 736.12 so as to require the director to take into consideration, in determining minimum prices, the differences in costs, if any, between distribution of milk in multiple service and single service containers.[1]

[5] In view of these indications of the want of legislative intent to include the type of container in which a given quantity and quality of milk is delivered as a cost factor in the determination of minimum prices, together with the undeniable fact that the purpose of the act to protect the producers and distributors from being under-sold is not affected by such a cost factor in the business of a competitor and the realistic acknowledgment of the fact that, if a distributor could not profitably operate by the use of one type of container, he would make use of the alternative cheaper one, the words in section 736.12 supra, "by the several methods used in such marketing area in accomplishing such hauling, processing, selling and delivery," reasonably refer only to the variations of method involved in serving wholesale, retail store, and home-delivery customers. The differing needs of these customers has a definite effect upon cost factors in the types of vehicles in which deliveries are made. Wholesale deliveries require large trucks and relatively few stops. In making home deliveries, with frequent stops, smaller trucks may be utilized. And the use of large containers effects a saving in labor costs. These factors are uniform with all producers and distributors. But a differential in price for the same quantity, quality and type of delivery, merely because of a difference in the construction of the container in which the milk is distributed, serves only to increase intertrade friction and violates the aim of a uniform minimum price in the particular marketing area.

For all these reasons, in the absence of any express legislative declaration to a contrary effect, the statute must be held not to include as a cost factor which the Director of Agriculture may consider in determining minimum prices, any differential in the type of container used for the delivery of the same quantity and quality of milk.

Counsel for the appellant has called attention to rulings of the federal Office of Price Administration recognizing differentials in maximum prices based on whether the milk is sold in glass bottles or in cartons. Such rulings have no effect upon the conclusions reached in this opinion, however, for they are entirely permissive in nature and merely hold that if the differential between the two types of container is recognized and has been actually in effect in a state, the same differential will be given effect under the Office of Price Administration price schedules for the area.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

[1] In 1943 the Legislature also refused passage of Senate Bill 187, which was proposed to amend section 736.11 of the Agricultural Code as follows: "The Director is not authorized to make differences in said wholesale or retail prices as herein defined based on milk fat content, types of containers or differences in the method of capping milk or cream containers."



23 Cal.2d 94

CAMINETTI, Insurance Com'r, et al. v. MANIERRE et al.
L. A. 18395.

Supreme Court of California.
Oct. 25, 1943.

1. Appeal and error ⚿205

Where an entire class of evidence has been formally declared inadmissible by trial court, or court has clearly intimated that it will receive no evidence on the subject, a specific offer of proof is not necessary before error in exclusion of such evidence may be claimed on appeal.

2. Appeal and error ⚿205

Where issues are limited by trial court, and no evidence is to be received upon the excluded issues, no offer of proof on the excluded issues is necessary in order to urge error on appeal.

3. Appeal and error ⚿205

Where main issue was proper measure of damages payable to holders of noncancellable disability policies who rejected reinsurance offered by new insurer under rehabilitation plan, and court ruled that

measure used by insurance commissioner was proper, and that no evidence on any other measure would be received, issue of proper measure of damages was reviewable on appeal, even though policyholders' offer of proof was not technically sufficient.

4. Insurance ⇐44

The insolvency of an insurer results in termination of policies and furnishes basis for claim for damages by insured as creditor of insurer.

5. Insurance ⇐44

Where insolvency of insurer results in termination of noncancellable disability policy, damages of insured are not limited to unearned premium for portion of year in which insolvency of insurer occurred.

6. Damages ⇐120(1)

Where right to promised performance is conditional upon happening of some fortuitous event, promisee can recover damages measured by value of conditional right at time of breach, if it is possible to determine with reasonable certainty whether event would have occurred if there had been no breach or if breach causes injured party reasonably to make a new contract for assumption of same risk by another contractor.

7. Damages ⇐6

Where right to promised performance is conditional upon happening of some fortuitous event, to authorize recovery of damages for anticipatory breach, proof must establish with reasonable certainty and probability that damages will result in future to person wronged, and nature of damages must be ascertainable. Civ.Code, §§ 3283, 3301.

8. Contracts ⇐313(1)

Anticipatory breach of contract is recognized in California.

9. Contracts ⇐313(1)

On anticipatory repudiation of contract, promisee may immediately bring an action for future damages.

10. Insurance ⇐237

Premiums paid by insured is not the proper measure of damages for insurer's wrongful breach of disability policy.

11. Insurance ⇐44

The difference between total premiums payable under noncancellable disability policy for life expectancy of insured computed according to appropriate rate of interest at its value at time of wrongful termination, and total amount reduced to its present value of premiums that would be required to purchase similar insurance in a solvent company for insured's life expectancy, cannot be used as measure of damages recoverable for wrongful termination of policy where insurer is insolvent. Civ.Code, § 3358; St.1935, p. 637, § 10111.

12. Insurance ⇐44

Where noncancellable disability policy was terminated by insolvency of insurer, proper measure of damages recoverable by insured was insured's share of the reserve.

13. Insurance ⇐44

The "reserve" of a policy, viewed prospectively at any particular time, is the amount discounted at appropriate rates of interest to its value at that time, which will be required to meet the claims under the policy in the future.

See Words and Phrases, Permanent Edition, for all other definitions of "Reserve".

In Bank.

Appeal from Superior Court, Los Angeles county; Joseph W. Vickers, Judge.

Proceeding by A. Caminetti, Jr., as Insurance Commissioner in charge of liquidation of the Pacific Mutual Life Insurance Company of California, and others, wherein George W. Manierre and others filed claims, and wherein the claimants filed petition to test the validity of the Commissioner's allowances. From orders refusing to disturb the allowances by the Insurance Commissioner, the claimants appeal.

Affirmed.

Manierre & Cuthbertson, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Mitchell, Silberberg & Knupp, Peery Price, Special Counsel, Lyman P. Robertson, Henry H. Childress, and Guthrie & Darling, all of Los Angeles, for respondents.

CARTER, Justice.

Appellants in this case were the holders of noncancellable (non-can) disability insurance policies issued by The Pacific Mutual Life Insurance Company of California, called the old company. They belong to the same general group of "non-can" pol-

icyholders referred to in the case of Caminetti v. Pacific Mutual, etc., Co., 22 Cal.2d 77, 136 P.2d 779. They gave notice of rejection of the reinsurance offered by Pacific Mutual Life Insurance Company, the new company, in conformity with the rehabilitation and reinsurance agreement and plan discussed in the above-cited case, and within the proper time filed their claims for damages with the insurance commissioner as liquidator of the old company pursuant to the order for liquidation referred to in the above-cited case. Their claims being allowed for a lesser sum than demanded, they petitioned the superior court under section 1032 of the Insurance Code, St.1935, p. 544, to test the validity of the commissioner's allowance. They were denied relief and now appeal. Appellants' insurance policies were in full force and effect and all premiums had been paid on July 22, 1936, the date as of which their right to damages was fixed.

According to the bill of exceptions, appellants' (petitioners') petition requested the issuance of an order to the commissioner to show cause why their claims should not be allowed in full. They named the new company and the commissioner as parties. The petition charged that they had been prejudiced by the application of an erroneous measure of damages. The order to show cause was issued and came on for hearing. Counsel for the commissioner stated that pursuant to the suggestion of the court conferences had been held between counsel for the parties from which it appeared that the principal point of disagreement was the proper measure of damages to apply to certain facts; that agreement had been reached as to some facts including the information disclosed by the records of the old company and its underwriting and claims experience, but they could not agree upon the evidence appellants claimed to be available to establish the price at which appellants might have obtained equivalent policies in another company within a reasonable time after July 22, 1936, nor whether any company regularly issued similar policies. It was stipulated that counsel for each party would express his views of the proper legal measure of damages, and what he would be able to prove in support thereof, and upon the determination of the court as to the correct measure, the parties could present such evidence as they desired. Thereupon, counsel for the commissioner made a statement of facts and the law relied upon by the commissioner. He stated that the correct measure was the difference between the premiums that would have been paid under all the "non-can" policies and the benefits that would have been payable thereunder, except for the insolvency, each calculated at its present value, those factors being based upon the past experience of the old company and other data; that each policyholder would be entitled to his share of the total difference. This might be called the theory of averages or probabilities. He stated that:

"The *Commissioner has* therefore taken the difference between these two figures for each policyholder on the basis of his attained age on July 22, 1936, as the measure of the damages for such policyholder. * * *

"In *making this computation, we have computed* when the disability payments would, on the basis of past experience, have been made in the future. These would have been paid over a number of years. We have discounted these payments to their present value, computing such an amount as, if put at simple interest at seven per cent, would permit the future payments at the times when it is computed they would have been payable, and there has also been deducted the premiums which such policyholders would have been compelled to pay to keep their policies in effect, also discounted to their present worth on a similar seven per cent simple interest basis. *By following this theory and this method the Commissioner has computed that petitioner George W. Manierre would be entitled to $1411.23 and* petitioner Victor Levine would be entitled to $246.41 (the amounts allowed by the commissioner)." (Emphasis added.)

Counsel for the new company then stated its theory of the measure of damages as being the return of the unearned portion of the last premium paid. No appeal was taken by the new company.

Counsel for appellants stated their theory to be the reasonable replacement cost of the insurance, that is, the cost of obtaining similar insurance in another company from July 22, 1936, to the maturity specified in the old policy. The court then rendered an oral opinion "that the measure of damages advanced by the Insurance Commissioner and used by him in the computation of the damages allowed to the petitioners * * * (appellants) was the proper legal measure of damages." Thereupon, appel-

lants made an offer to prove by testimony of actuarial experts the replacement value of appellants' policies, supported by a comparison with similar policies of other insurance companies, experience tables computed by companies showing similar insurance, and experience of the old company; and testimony of investment experts that a reasonable rate of interest for investments is 3½%. Counsel for the commissioner objected to the offer on various grounds including its failure to show what, if any, policies similar to those of appellants were available. The objection was sustained and appellants rested. The court dismissed the petition.

[1-3] It is contended by respondent that the objection to the offer of proof was properly sustained because of various deficiencies therein; that neither the ruling on the offer of proof nor the oral opinion of the court that the commissioner had adopted the correct measure of damages prevented appellants from presenting any evidence; that hence the issue of the measure of damages is not before this court.

Such contention is untenable. The rule applicable under the circumstances here presented is that where an entire class of evidence has been formally declared inadmissible by the trial court or the court has clearly intimated that it will receive no evidence on the subject, a specific offer of proof is not necessary before error in the exclusion of such evidence may be claimed on appeal. An offer under those circumstances would be an idle gesture. Also, where the issues are limited by the trial court, and no evidence is to be received upon the excluded issues, no offer of proof on the latter is necessary in order to urge error on appeal. See Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 P. 917; Pastene v. Pardini, 135 Cal. 431, 67 P. 681; Ballsun v. Star Petroleum Co., 105 Cal. App. 679, 288 P. 437; San Joaquin L. & P. Co. v. Barlow, 43 Cal.App. 241, 184 P. 899; Mahoney v. Atchison, etc., Ry. Co., 101 Cal.App. 652, 281 P. 1108; People v. Duane, 21 Cal.2d 71, 130 P.2d 123; Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal.App.2d 520, 125 P.2d 113; Wigmore on Evidence, vol. 1, sec. 17; 64 C.J. 123. In the instant case it was conceded that the main issue was the proper measure of damages. The facts with relation to the validity and standing of appellants' policies, the filing of a claim for damages, and its allowance in part, and all the other factors except the issue of the measure and amount of damages were conceded by stipulation. It was understood that counsel for the respective parties would in argument express their views on the correct measure of damages, and what they expected to prove if the court would receive evidence; that following the "*conclusion*" of the court on the legal measure, the parties might present such evidence as they desired. Obviously, the evidence contemplated was that which would conform to the measure selected by the court rather than evidence bearing upon or pertinent to some other measure. In presenting his theory based upon averages or probabilities counsel for the commissioner positively stated that in computing the damages allowed to appellants that measure had been used by the commissioner. After the parties had each presented his theory of the proper measure of damages and counsel for the commission had stated the measure used by the commissioner, the court formally and positively ruled that the theory advanced and used by the commissioner was the proper and legal measure. It would have been idle for appellants to have presented any evidence which bore relation to any measure other than that used by the commissioner. No offer of proof was necessary except possibly in the event appellants wished to attack the correctness of the computation made by the commissioner, conceding the measure used by him was proper. Hence, we are not impressed with respondent's claim of the insufficiency of appellants' offer of proof. The court had ruled in advance that no evidence on any other measure would be received. Appellants' offer of proof patently was aimed at the measure of damages contended for by them. It was made after they had clearly set forth their theory in their argument and stated that there would be produced "Testimony of actuarial experts establishing that the replacement value of Mr. Manierre's policy, as of July 22, 1936, requires an annual premium of $650.00 for the balance of the policy period of some eight and one-half years, showing total damages, after computing present value of premiums payable in the future, of $3,749.91. This testimony will be supported by: (a) A comparison with similar non-can disability policies of the Massachusetts Indemnity Company and other companies." The argument and offer clearly manifested the theory upon which appellants were relying even if the form of the offer was not technically sufficient. The ruling of the trial

court effectively prevented them from having a hearing on the merits of the case, and they have suffered prejudicial injury, if the measure of damages adopted by the trial court was incorrect. The trial court's adoption of the commissioner's theory left appellants with no opportunity to show that under their theory the amount allowable would be more than that allowed by the commissioner, and whether they could so show would have to be ascertained from the evidence rather than a mere offer of proof. Their offer did state that to replace the policies would cost substantially more than the commissioner allowed. Although respondent's objection to appellant's offer of proof did not include the ground that it was based upon an incorrect measure of damages, the prior ruling of the court clearly indicates that it sustained the objection on that ground.

It is no answer to the foregoing conclusion that appellants produced no evidence that policies similar to those held by appellants were obtainable from other companies. That would be a factor in proving the damages under appellants' theory, but as we have seen they were prevented from proving any facts which related to their theory or any theory other than that adopted by the commissioner and the court.

The insurance policies held by appellants provide for the payment of benefits for the loss of life (as to appellant Manierre) through accidental means within a fixed time after an injury, and for disability resulting from sickness or injury during the term of the policies, and that the insured has the right to renew it from year to year by the payment of annual premiums, until a certain time, that is, as to appellant Manierre, until he reaches 66 years of age, and as to appellant Levine, for 20 years.

[4] The insolvency of the insurer, the old company, resulted in a termination of the policies inasmuch as it is no longer in a position to perform thereunder. The insolvency of the insurer is tantamount to a breach of the policy furnishing the basis for a claim for damages by the insured as a creditor of the insurer. Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581, 36 S.Ct. 412, 60 L.Ed. 811, L.R.A. 1917B, 580; 20 Am.Jur., Insurance, sec. 71; 106 A.L.R. 1513.

[5-7] The new company argues in its brief amicus curiae that the only claim which appellants are entitled to make is for the unearned premium for the portion of the year in which the insolvency of the insurer occurred; that that result is required by the rule that the fact that damages will be suffered as distinguished from the amount thereof must be certain; and that in the instant case whether or not damages will be suffered depends upon contingencies which may never occur such as that the insured may never become disabled during the term of his policy, that he will keep the premiums paid, and that he may die before the term of his policy expires. The effect of that argument would be to render wholly valueless the noncancellable feature of the policy, a definite and concrete promise of the insurer. The courts are not so impotent that they will permit a total loss of such a right merely because of a claimed uncertainty or difficulty in determining the extent to which the insured may be damaged by the breach of the promise. The rule has been stated as follows: "Where a right to a promised performance is conditional upon the happening of some fortuitous event, the promisee can recover damages measured by the value of the conditional right at the time of breach, (a) if it is impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach; or (b) if the breach causes the injured party reasonably to make a new contract for the assumption of the same risk by another contractor." Rest. Contracts, sec. 332. The insured, the promisee, has a valuable contract right in a chance. One of the chief features of disability insurance is the *protection* afforded to the insured against the financial effects of the possible occurrence of the contingencies. Where the covenant is to continue the protection for a definite term, the right is the more valuable. If that right has no value then such insurance had no value where the term expires without the insured's being disabled, and the premiums paid would have purchased nothing. Of course, the proof must establish with reasonable certainty and probability that damages will result in the future to the person wronged. Civ.Code, sec. 3283. And the nature of the damages should be ascertainable. Civ. Code, sec. 3301. In considering damages in cases similar to breach by anticipatory repudiation there are usually uncertainties as to what will transpire, and probabilities must be substituted for certainties. See Standard Oil Co. v. Siraco, 226 App.Div. 266, 235 N.Y.S. 1; Goldfarb v. Campe Corp., 99 Misc. 475, 164 N.Y.S. 583; Wil-

liston on Contracts (rev. ed.), sec. 1397. It is a question of the degree of proof necessary to establish with reasonable certainty that damage will result. If the proof does establish with reasonable certainty that future damages will result from the wrong then they may be allowed. Williston, Contracts, rev. ed., sec. 1346; Meyers v. Nolan, 18 Cal.App.2d 319, 63 P.2d 1216; see Bellman v. San Francisco H. S. Dist., 11 Cal. 2d 576, 81 P.2d 894. Although it may be that in the majority of disability policies the insured will not become disabled, hence, the insurer will not be required to make any payments, the fact remains that he may be disabled and the very purpose of an insurance contract is to give him protection against that possibility. The same comment is applicable to fire insurance contracts. If the value of that protection may be proved directly or by circumstances establishing the reasonable equivalent thereof, there should be no obstacle to recovery.

[8, 9] The wrongful cancellation of a contract of insurance under the certain circumstances is somewhat analogous to a breach by anticipatory repudiation. In the instant case the old company is insolvent and is being liquidated. It cannot perform under the noncancellable policies it had issued. They have been in effect cancelled. The situation is thus analogous to a breach by anticipatory repudiation. Anticipatory breach is recognized in California. 6 Cal. Jur. 457. Upon the repudiation the promisee may immediately bring an action for future damages. Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 17 P.2d 712; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. And "It is true that in most cases the determination of future damage is surrounded with many difficulties, but it hardly rests with defendant to complain of such difficulties, since they exist only because of the wrongful act of the defendant, itself. Seymour v. Oelrichs, supra." Hollywood Cleaning & P. Co. v. Hollywood L. Service, supra, 217 Cal. 134, 17 P.2d 713.

The cases of Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 51 P.2d 84; Brix v. People's Mutual Life Ins. Co., 2 Cal.2d 446, 41 P.2d 537, and Robinson v. Exempt Fire Co., 103 Cal. 1, 36 P. 955, 24 L.R.A. 715, 42 Am.St.Rep. 93, were concerned only with the question of the recovery of the payments that might become due for continuance in the future of the existing disability, as well as payments past due. There was not involved the issue of damages for a total repudiation of the contract of insurance where it is beyond the power of the insurer to respond in the future for future damages.

That the insureds will be damaged in the instant case is clear. They have forever lost the protection against possible loss which was secured to them by their policies. They have lost the chance they had to be specifically benefited by that protection. While it may be true that the majority of the policyholders would in the ordinary course of events pay their premiums but never receive disability payments, yet taken as a group the probabilities based upon actuarial tables and other data may definitely establish as to each policyholder that he had a reasonably certain chance which is of ascertainable value. The fact of the loss may clearly appear. The chief difficulty is the correct method for ascertaining the value of that contract right, that is, the amount of damages that will be suffered.

[10] One view with respect to the wrongful repudiation of life insurance policies which has been approved with variations, is that the insured is entitled to recover the premiums he has paid with or without interest thereon, and with or without consideration being given to the value to the insured and loss to the insurer of the coverage of the risk during the period prior to the cancellation of the policy. Sutherland Damages, sec. 838; 29 Am.Jur., Insurance, secs. 314, 315; Cooley's Briefs on Insurance, 2d ed., vol. 5, p. 4704; Couch on Insurance, sec. 1870; American Ins. Union v. Woodard, 118 Okl. 248, 247 P. 398, 48 A.L.R. 107; Life & C. Ins. Co. v. Baber, 168 Tenn. 347, 79 S.W.2d 36, 107 A.L.R. 1233. That rule is subject to criticism. Many of the cases supporting this view proceed on the theory that the wrongful repudiation of the policy by the insurer was a rescission of the policy although slight attention was given to whether the insured's conduct in truth established a mutual rescission of the contract. The prevailing thought was to place the parties in statu quo when in fact there was no true mutual rescission. In some of the cases the insured's only claim was for a return of the premiums. In many instances no allowance was made to the insurer for the value of the protection afforded during

the time prior to the repudiation which, although less in the early years in level premium policies, had some value. The most convincing objection to that measure is that nothing whatever is given for the breach of the noncancellable feature of the policy. The insured receives nothing for the loss of the continued protection against the certain eventuality of death. The same criticism is pertinent to a rule which would allow a recovery of merely the unearned portion of the current premium in a noncancellable disability policy, although the certainty of the occurrence of the contingency is not present.

It has been said generally that the proper measure of damages for the wrongful repudiation by the insurer of a life insurance policy is the value of the policy at the time of cancellation. Rest. Contracts, sec. 332; Joyce on Insurance, 2d Ed., sec. 1454; 20 Am.Jur., Insurance, sec. 316; Couch on Insurance, sec. 1870. Questions arise as to how the value of the policy is to be determined and what is meant by the term value. In life insurance policies it is sometimes stated that the value is the face value of the policy less the premiums payable, both discounted to their present value.

[11] The measure advanced by appellants is the cost of similar insurance in another insurer. More accurately stated that rule would be the difference between the total premiums payable under the policy for the life expectancy of the insured computed according to an appropriate rate of interest at its value at the time of cancellation, and the total amount reduced to its present value of premiums that would be required to purchase similar insurance in a solvent company for insured's life expectancy. See Mutual Reserve Fund Life Ass'n v. Ferrenbach, 8 Cir., 144 F. 342, 75 C.C.A. 304, 7 L.R.A.,N.S., 1163; Keyser v. Mutual Reserve Fund Life Ass'n, 60 App.Div. 297, 70 N.Y.S. 32; Speer v. Phœnix Mutual Life Ins. Co., 36 Hun, N.Y., 322; Conlew, Inc., v. Kaufmann, 269 N.Y. 481, 199 N.E. 767, 770; Federal Life Ins. Co. v. Maxam, 70 Ind.App. 266, 117 N.E. 801, 118 N.E. 839; Provident Savings Life Assur. Society v. Ellinger, Tex.Civ.App., 164 S.W. 1024; Illinois Bankers' Life Assur. Co. v. Payne, Tex.Civ.App., 62 S.W.2d 315; Latta v. Sovereign Camp, W. O. W., 179 S.C. 376, 184 S.E. 157; Pack v. Metropolitan Life Ins. Co., 178 S.C. 272, 182 S.E. 747; Pinckney v. American Workmen, 196 S.C. 446, 14 S.E.2d 273; Franklin v. Northern Life Ins. Co., 4 Wash.2d 541, 104 P.2d 310. If the insured is no longer insurable then he may recover the face value of the policy less the premiums payable during his life expectancy, each reduced to its value at the time of cancellation. See authorities cited supra.

It is not a serious objection to the replacement rule that the estimated period of the life expectancy of the insured probably will not exactly fix the time of his death (it will be more likely not to inasmuch as it is based on average and the person would have to be the exact average) because it is based upon reasonable probabilities which is sufficient in the absence of the availability of better proof. It is probably true that under a level premium policy, the cost of insurance in a different company would be to some extent out of proportion with the premiums fixed in the policy issued by the repudiating company because the former company would not have had the benefit of the earlier premiums when the insured was younger and when the premiums, being in excess of the risk, were being accumulated to meet the obligation when the risk became greater, but the repudiating insurer has had the advantage and use of premiums that have been paid. It may be impossible to have exact similarity in regard to the financial responsibility of some other insurer which would carry the insurance, or the features of the policy it would write, but as long as there is a substantial likeness, and the other insurer is solvent, substantial justice will be accomplished.

The foregoing rule is in harmony with section 3358 of the Civil Code which provides that no person may recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance on both sides. Section 10111 of the Insurance Code, St.1935, p. 637, reads: "In life or disability insurance, the only measure of liability and damage is the sum or sums payable in the manner and at the times as provided in the policy to the person entitled thereto." Assuming, but not deciding, that that section is applicable to the instant case, it adds little if anything to section 3358 of the Civil Code. The insured is enabled to place himself in the same position he would been in if his insurance policy had not been cancelled by receiving sufficient to obtain simi-

lar insurance, and the insurer is receiving credit for the premiums it would have received if the policy had continued in force.

However, the difficulties with the application of the replacement measure where disability policies rather than life policies are involved, and the insurer is *insolvent*, are apparent. The insured may or may not be acceptable as a risk by any other insurer, although he does not qualify for benefits under the cancelled policy. It may be that similar insurance in another company is not available. In the case of a life policy the measure may be altered to cover such a situation. The insured may be awarded the face amount of his policy less the premiums payable for his life expectancy, each computed at its present value. But there is no fixed amount to be paid in any event in a disability policy. Where the company is insolvent and there are many policyholders, the difficulty of determining whether or not each insured is still an insurable risk would be practically insurmountable. That factor is indicated in People v. Security Life Insurance & Annuity Co., 78 N.Y. 114, 126, 34 Am.St.Rep. 522, where the court said:

"But the health of a policy-holder may since his insurance have become so impaired that his life is not now reinsurable, and hence in his particular case the value to be arrived at upon this basis would not be the measure of his damage. But yet I am inclined to think that even in such cases the basis would have to be generally adhered to, for the reasons stated by Lord Cairns in Lancaster's Case [2 Cairn's Dec. 81], to be found in a note to Holdich's Case [L.R. 14 Eq. 72] above cited, because it would be wholly impracticable in the cases of thousands of policy-holders to determine the state of health for re-insurance of each policy-holder, compared with his state of health at the date of his policy." Whether in the instant case there are many or few holders of "non-can" disability policies who filed claims rather than accept new policies in the new company is not significant. A definite and uniform rule for the measure of damages when an insurer becomes insolvent is necessary. In order that the plan adopted for the liquidation of the old company, the reinsurance by the new company and the payment of the liabilities of the old company may operate uniformly and fairly to all concerned, all "non-can" disability policyholders who did not choose to accept policies in the new company should be treated the same.

[12, 13] The measure of damages used by the commissioner is that there be ascertained from actuarial tables, the past experience of the old company, the age and life expectancy and other data, the probable amount of benefits which would have been payable in the future, except for the insolvency, to all holders of "non-can" disability policies, and the amount of premiums that would have been received from that group in the future except for the insolvency of the old company. Both of these amounts are discounted to their present value at 7 per cent simple interest and the latter subtracted from the former. That amount is apportioned among the policy-holders in accordance with their number, and the amount so apportioned is the damages. In that manner the amount received would be the value of their policies, that is, the value of the chance, based upon reasonable probabilities which is the essence of the insurance business. It may be expressed in another way. It is each policyholder's share of the reserve. The reserve, viewed prospectively at any particular time, is the amount discounted at appropriate rates of interest to its value at that time, which will be required to meet the claims under the policies in the future. The view finds support in insolvency cases of life insurers. See People v. Security Life Insurance & Annuity Co., supra; and Commonwealth v. American Life Ins. Co., 162 Pa. 586, 29 A. 660, 42 Am.St.Rep. 844. In People v. Security Life Insurance & Annuity Co., supra, 78 N.Y. 125, 34 Am.St.Rep. 522, it is said:

"What is the damage sustained by each of these policy-holders? *Clearly the value of the policy which has been destroyed.* When such value has been ascertained, the true measure of damage has been arrived at. But the difficulty is to determine the value. In any given case, the precise value cannot be ascertained. If the time of death were certain and the rate of interest determined, there would be no difficulty. Then the present value of the amount to be paid at death, diminished by the amount of the present value of all the premiums to be paid would give the value. But the time of death is uncertain, and hence the present value of a running policy must always be somewhat speculative and uncertain. Yet, as in all cases of difficulty, the

courts charged with the duty of ascertaining value must take the best light the nature of the case admits. To persons of a certain age there is an average expectancy of life; and this is shown in certain tables used in the business of life insurance showing the expectancy of life for persons of all ages. These tables are built upon long and varied experience and are deemed sufficiently reliable, in the absence of a better basis, for the guidance of the courts, of public officers and of insurers. One of such tables is annexed to the act, chapter 623 of the Laws of 1868, and that is the table used by the referee in this case. As before stated, the annual premiums are not the consideration of insurance for the year in which they are paid; for they are equal in amount, whereas the risk in the early years of life is much less than in the later. *Therefore during the early years, the assured has paid more than sufficient to carry the risk during those years; and this excess is to aid in carrying the risk during the later years when the annual premiums would be insufficient for such years. This excess is called the equitable value of the policy and goes to make up what is called the reserve fund.* This reserve, together with the same annual premiums, ought to be sufficient to enable the assured to obtain a policy for the remainder of his life for the same amount in another solvent company, and hence may be taken as the measure of present value, assuming that there has been no change in the value of his life since his insurance, except that caused by the efflux of time." (Emphasis added.)

Life insurance policies are usually level premium policies in which the early premiums are in excess of the risk and later premiums are less than the risk. Although the risk incident to the accident feature of the disability policy may not increase with age (see Henricks v. Metropolitan Life Ins. Co., 7 Cal.2d 619, 61 P.2d 1162), it may fairly be assumed that it will with respect to illness. Hence, they are level premium policies.

For the foregoing reasons we believe that the measure of damages adopted by the commissioner is the correct measure of the amount to be allowed disability policyholders of the character involved where the insurer becomes insolvent. We do not express any views with respect to the proper measure to be used in life or disability policies where the insurer has repudiated a policy but is not prevented by insolvency from being compelled to continue the insurance.

The orders from which the appeal is taken are affirmed.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, J., did not participate.



61 Cal.App.2d 304

GRIMES v. WILLIAMS et al.

Civ. 3239.

District Court of Appeal, Fourth District, California.

Nov. 8, 1943.

1. Carriers ⊂320(21)

In passenger's action against taxicab owners for injuries, evidence that taxicab driver entered intersection at 15 miles an hour, saw an automobile about half a block to his right traveling at about 30 or 35 miles an hour, that taxicab was struck by automobile when almost through intersection, and that automobile had defective brakes, did not establish negligence as a matter of law on part of taxicab driver. Civ.Code, § 2100.

2. Appeal and error ⊂1010(1)

In passenger's action against taxicab owners, trial court's findings, when sitting without jury, could not be disturbed on appeal when supported by evidence.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Katherine M. Grimes against Mirtie A. Williams and others, doing business under the fictitious firm name and style of Broadway Cab Company, or Blue Cab Company, for injuries sustained by plaintiff in an automobile collision while riding as a passenger in defendant's tax-

icab. The case was tried to the court without a jury, judgment was entered for defendants, and plaintiff appeals.

Affirmed.

Harry C. Westover, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

GRIFFIN, Justice.

On December 2, 1941, at 1:45 p. m., plaintiff, aged 68 years, called a taxicab to convey her on a short trip. The taxicab belonged to and was being operated by defendants. Defendant Furgeson drove the cab, in which plaintiff was riding with one other passenger, east on Pine Street in Santa Ana, and at the intersection of Orange Avenue (which avenue runs north and south) an accident occurred, resulting in an injury to plaintiff.

Furgeson testified that as he approached the intersection he was driving 15 miles per hour; that he continued across the intersection at approximately the same speed; that he did not apply the brakes of the cab nor toot its horn; that as he drove into the intersection he looked to the right and to the left to see whether or not there was any approaching traffic on Orange Avenue; that he didn't see any approaching from the north but when he looked to the south (his right) he saw a car (a Ford coupe) coming north up Orange Avenue about the middle of the block; that at that time he was just entering the intersection; that the approaching car on the right was traveling 30 to 35 miles per hour and that as he passed through the intersection he continued to observe the approaching car. Orange Avenue, at the intersection where the accident took place, is 60 feet wide. He testified that he could not see the car approaching on his right until he got to the intersection as there was shrubbery in front of the house "and you can't see until you get past it". He then testified that as the front end of the cab had practically crossed the intersection and was just starting into the dip of the gutter on the easterly curb line of Orange Avenue, the Ford coupe which was approaching from the south struck the last eight inches of the rear end of the cab "behind the wheels". He then testified that he did not have that car within his vision during the last few feet he traveled before the collision occurred.

There was evidence by a police officer that immediately after the accident he stepped into the Ford coupe which collided with the rear end of the taxicab and that the brakes on that car, from a test conducted by him, were in poor condition, i. e., "there were no brakes at all".

Plaintiff here elected to sue only the owners and operator of the taxicab. A jury trial was waived. The trial court found in all respects in favor of defendants, i. e., that Furgeson, at the time of and prior to said collision, "drove and operated said taxicab in a careful and prudent manner". Judgment was entered for defendants accordingly.

Plaintiff appealed and now argues that she was a passenger for hire and that since, under the law, carriers of passengers for hire are required to exercise the utmost care and diligence towards the safe carriage of their passengers, Sec. 2100, Civ.Code; McCurrie v. Southern Pac. Co., 122 Cal. 558, 55 P. 324, she was entitled to recover because the uncontradicted evidence shows the defendants to be guilty of negligence as a matter of law. It is mainly contended that the driver of the taxicab failed to make the necessary observations and because the cab driver observed that the driver of the Ford coupe was violating the prima facie speed limit, he failed to properly act in protecting the passenger from the approaching vehicle.

[1, 2] From the facts related the trial court may well have believed that the defendant violated no law and acted as a reasonably prudent person under similar circumstances should have acted; and that the cause of plaintiff's injuries was due solely to the negligence of the driver of the Ford coupe. It cannot reasonably be held here that Furgeson was guilty of negligence as a matter of law in the operation of the taxicab. The question of his negligence was one of fact for the trial court and its findings in defendants' favor cannot be disturbed on appeal. McDevitt v. Rogers, 58 Cal.App.2d 307, 136 P.2d 323; Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

CALIFORNIA EMPLOYMENT COMMISSION v. BATES et al.

Civ. 14145.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1943.

Rehearing Denied Nov. 24, 1943.

Hearing Granted Dec. 31, 1943.

1. Appeal and error ⇐931(1)

On appeal from judgment for defendants, evidence must be viewed in light most favorable to defendants.

2. Appeal and error ⇐989

The power of appellate court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support finding of fact.

3. Appeal and error ⇐931(1), 1010(1), 1012(1)

An appellate court will not weigh the evidence, will indulge all intendments which favor sustaining finding of fact, and will not disturb finding if supported by substantial evidence.

4. Taxation ⇐59

Evidence including showing that newspaper carrier boys entered into contract whereby they purchased the papers, that a carrier boy received half of subscriptions which he collected with a minimum guaranty, and that newspaper owners exercised limited control, sustained finding that boys were "independent contractors", and not "employees", and hence owners were not liable for unemployment insurance taxes. St.1935, pp. 1232, 1233, §§ 38, 40.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

5. Appeal and error ⇐110

An order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the California Employment Commission (formerly Unemployment Reserve Commission) against E. D. Bates and another individually and as copartners doing business as Pasadena Independent, and others for collection of unemployment insurance taxes alleged to be due. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals.

Judgment affirmed, and appeal from order dismissed.

Robert W. Kenny and Clarence A. Linn, both of San Francisco, and Forrest M. Hill and Doris H. Maier, both of Sacramento, for plaintiff and appellant.

William M. Crandall, E. M. Wachner, and John C. Campbell, all of Los Angeles, for defendants and respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action for the collection of unemployment insurance taxes alleged to be due for the period from January 1, 1936, to and including March 31, 1940, under the provisions of section 38 and 40 of the California Unemployment Insurance Act, St.1935, pp. 1232, 1233, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to the defendants (respondents), the essential facts are:

Defendants published and distributed throughout the City of Pasadena and its environs a newspaper of general circulation as defined in section 4460 of the Political Code. The publication was known as the "Pasadena Independent," and was delivered on Monday, Wednesday and Friday of each week. The actual distribution being performed by carrier boys practically all of whom were under the age of eighteen years. Defendants entered into a written contract * with each of the carrier boys which contained the terms and conditions

* The typical form of contract was as follows:

Agreement

Route Carrier's Contract

This Agreement made this ——— of ———, 19—, at Pasadena California, by and between the Pasadena Independent, hereinafter called the "Company," and ——— of ———, California, hereinafter called the "Carrier."

Witnesseth:

That in consideration of the promises hereby agreed to be performed by the Carrier, the Company, publishers of the Pasadena Independent, hereby leases to the Carrier, the paper route known as Route Number ———, upon the following terms and conditions:

1. The Carrier understands and agrees that he is not an employee of the

under which they made deliveries of the Pasadena Independent. The carrier boys purchased from defendants papers at the rate of $7.50 per one hundred copies. The subscription price to the subscribers was fifteen cents per month. The carrier boy received half of the subscriptions which he collected, with a minimum guarantee by defendants that he would receive at least five dollars per month.

Defendants did not require the carrier boys (a) to deliver the paper to every house in their territory, though defendants told the boys if they did so, their earnings

Company, but is an independent contractor and as such, shall furnish and provide at his own expense, all equipment required by him to operate his route.

2. The Carrier promises to deliver the Pasadena Independent each Monday, Wednesday and Friday to every subscriber on this route at the earliest possible moment and in a manner satisfactory to the subscribers and to obey all State Laws and City Ordinances and do all in his power to increase the number of subscribers to the Pasadena Independent.

3. The Carrier promises that he will pay the Company at its office in Pasadena, on or before the 10th of each month for all papers supplied to him by the Company for delivery to regular subscribers during the previous month at the rate of $7.50 per One Hundred (100) copies, and that the price of the Pasadena Independent shall be 15¢ per month. The Carrier to make all collections monthly from every subscriber. The Carrier also agrees to pay to the Company in addition to his regular paper bill, 50% of all collections from new subscribers gained through the use of sample copies, which sample copies the Company agrees to furnish free of charge to the Carrier who is authorized to distribute them in such a manner as he in his judgment may deem best for the purpose of securing new subscribers for the route.

4. It is understood that until the bill for all papers received by the Carrier during the previous month has been paid, all money collected by said Carrier from the subscribers shall belong to the Company. It is further agreed that all advance payments on Pasadena Independent subscriptions made by the subscribers to the Carrier shall be paid to the Company when said subscription is paid in advance for a period exceeding 31 days. Any money thus received will be held by the Company for the purpose of reimbursing the Carrier monthly, as said advance subscriptions mature.

5. It is understood that the title of the route shall remain in the Company and the Carrier shall have no right or ownership in the goodwill and the subscription list. The Carrier agrees that he will not sell, assign or transfer, either voluntarily or involuntarily, any interest in this route or in this agreement. The Carrier has the exclusive right to sell and deliver Pasedena Independents in the territory covered by this route under the terms of this agreement, but this shall not include the right to sell said papers to newsboys or news stands.

6. The Carrier shall have the right to cancel this agreement upon giving the Company one week's notice and upon ending this relationship, shall return to the Circulation Manager of the Company, the route book and subscription lists.

7. The Carrier agrees that if in case of sickness, or for any other reason he cannot deliver or collect his route, he will hire a substitute, or will notify the Company at once so that a substitute may be secured and paid for at his own expense.

8. The Company reserves the right to take over and assume charge of the route at any time, in event that the Carrier fails to comply with this agreement.

9. It is understood that the Carrier shall furnish his own means of transportation on the route and the Carrier is urged to provide adequate liability insurance which will protect himself and relieve the Company of any claims for liability resulting from accident, collision, fire or theft.

10. The Carrier agrees to deposit with the Company the sum of $1.00 in cash, which sum the Company agrees to refund at the time this lease is cancelled. It is agreed and understood the above mentioned cash deposit will not be returned to the Carrier until his successor has received all route lists containing full and complete addresses of all Pasadena Independent subscribers on this route, and has a reasonable length of time to verify collections.

11. The Company guarantees that the Carrier's profit derived from the sales of papers on this route shall not be less than $——— per month and that the average earnings on this route during the past year has been: $———.

The Pasadena Independent

By ———

Circulation Manager.

Carrier ———

Approved ———

would be larger; (b) to have bicycles nor to rig their bicycles if they had them, but if asked by the carrier boys how other boys rigged their bicycles for carrying papers, defendants' circulation manager would explain the manner of rigging a bicycle in detail; (c) to pick up the papers at any particular time; (d) to make distribution of the Pasadena Independent within any particular length of time or on the day the paper was available for distribution. However, the customers frequently asked to receive the paper on the day it was available for distribution; (e) to fold the papers in any particular manner, but if asked by the carrier boys, defendants showed them how other boys folded papers; (f) to call on the customers to make collections, however, defendants urged the boys to do so; (g) to attend meetings, or (h) to perform any other service than those the boys agreed to perform by the terms of the contract.

Defendants did not tell the carrier boys not to put the papers on sidewalks or lawns, but did tell the boys that customers usually requested that papers be put on the porch, and the boys were told they would please more people by so doing. Likewise, defendants urged the boys to throw papers for stores into the stores or under the door, but did not require it. Most of the carrier boys used their own paper bags, though some were sold to them by defendants.

This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's finding that the carrier boys were independent contractors and not employees of defendants?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[2] (1) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720; 2 McK. Dig. (1930) page 701, Appeal and Error, sec. 1235.)

[3] (2) It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondents (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558; California Emp. Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 350, 128 P.2d 874.)

[4] Applying the foregoing rules to the facts of the instant case, it is evident that the facts set forth above, which are supported by substantial evidence in the record, clearly sustain the finding of the trial court that the carrier boys acted as "independent contractors" in making deliveries of the Pasadena Independent for defendants, and that the carrier boys were not employees of defendants. Further discussion of the evidence would serve no useful purpose.

Most of defendants' arguments have been fully answered in the cases of Batt v. San Diego Sun Pub. Co., Ltd., 21 Cal.App.2d 429, 69 P.2d 216, and Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510. The facts in these cases, including the contracts involved, were analogous to the facts in the case now before us, and the question presented for decision was identical with the question before us in the instant case. In each of the cited cases it was held that the contract created the relationship of independent contractor and not of employee or master and servant. (See also Mountain Meadow Creameries v. Industrial Acc. Comm., 25 Cal.App.2d 123, 76 P.2d 724.)

The case of Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820, is factually distinguishable from the case at bar for the reason that in such case it was conceded that the carrier was employed upon the same basis as other carriers who were admittedly employees of the Press Publishing Co.

Likewise, cases from other jurisdictions cited by plaintiff, which reach a conclusion contrary to ours are not of assistance to us in view of the decisions of our own appellate courts upon the question here involved. (Chaney v. Los Angeles County, etc., Retirement Board, 59 Cal.App.2d 413, 138 P.2d 735.)

[5] For the foregoing reasons the judgment is affirmed. The purported appeal

from the order denying the motion for a new trial is dismissed. (See 2 McK.New Cal.Dig. (1930) 129, Appeal and Error, sec. 74, and Supp. thereto.)

We concur: MOORE, P. J., and W. J. WOOD, J.



61 Cal.App.2d 275

LLOYD CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14127.

District Court of Appeal, Second District, Division 3, California.

Nov. 5, 1943.

1. Workmen's compensation ⇐1432

Evidence sustained finding that deceased workman, who was in the general employment of drilling company, was, at the time he received fatal injuries, in the special employment of oil well company so as to authorize compensation award against oil well company and its insurer.

2. Workmen's compensation ⇐443

Where wife of workman is living with him at the time he receives fatal injuries, or if he is legally liable for her support, it is conclusively presumed that wife is wholly dependent for support upon workman. St.1937, p. 268, § 3501(a).

3. Workmen's compensation ⇐443

Where wife of deceased workman was living with him as his wife at time workman received fatal injuries, it was conclusively presumed that wife was wholly dependent for support upon deceased workman for compensation purposes, notwithstanding that wife had previously obtained an interlocutory decree of divorce. St. 1937, p. 268, § 3501(a).

4. Husband and wife ⇐279(1, 3)

A husband's obligation of support is suspended while wife is living separate from him by agreement, but resumption of marital relation, following a reconciliation, cancels executory obligations of separation agreement. Civ.Code, § 175.

5. Workmen's compensation ⇐443

Where workman and wife separated under separation agreement, and wife later obtained an interlocutory decree of divorce, but thereafter parties were reconciled and resumed marital relation, workman was again legally liable to support wife, which liability gave rise to conclusive presumption, for compensation purposes, that wife was wholly dependent on him for support at time he received fatal injury. Civ.Code, § 175; St.1937, p. 268, § 3501(a).

6. Workmen's compensation ⇐443

The fact that interlocutory decree of divorce obtained by wife of deceased workman did not provide for her support, and that workman had made one payment under separation agreement after reconciliation, and that wife had claimed and received from workman's estate unpaid balance to which she was entitled under such agreement, did not preclude operation of presumption that wife was wholly dependent upon husband for support so as to authorize an award of compensation. St.1937, p. 268, § 3501(a).

Original proceeding by Lloyd Corporation, Limited, and Zurich General Accident & Liability Insurance Company, Limited, petitioners, against the Industrial Accident Commission, Drilling & Exploration Company, Inc., of Delaware, the Workmen's Compensation Insurance Fund, and Celeste Wilson, respondents, for writ to review award of Industrial Accident Commission in favor of Celeste Wilson, and against petitioners.

Award affirmed.

J. L. Kearney and Herbert S. McCartney, Jr., both of Los Angeles, for petitioners.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

SHINN, Acting Presiding Justice.

Isaac F. Wilson was fatally injured by an explosion in an oil rig. The Industrial Accident Commission awarded his widow a death benefit against Zurich General Accident and Liability Insurance Company, Ltd., compensation insurance carrier of Lloyd Corporation, found to be the special employer, and State Compensation Insurance Fund, insurer of Drilling & Exploration Company, Inc., found to be the general employer of Mr. Wilson. Lloyd Corpora-

tion and Zurich seek annulment of the award upon the ground of insufficiency of the evidence to prove (a) a special employment by Lloyd, and (b) dependency of the wife at the time of the injury.

D. & E. Company was under contract to do repair work on two oil wells of Lloyd, the owner, as ordered by the latter, was to receive its payroll expense and a flat per diem charge for use of its regular drilling equipment tools, and Lloyd was to furnish drilling mud and any other needed tools. The contractor was to do all work, including that required for the completion and bringing in of the well. Drilling for deepening of the well had been finished and work was in progress for bringing in the well at the time of the accident.

[1] The first point brings in question the sufficiency of the evidence to prove that Lloyd had actual control of the workmen while the well was being brought in and at the time of the accident. The evidence was held sufficient to prove that fact in Lloyd Corporation v. Industrial Acc. Com., 1943, 60 Cal.App.2d 5, 140 P.2d 77, where an award was affirmed in favor of the widow and children of Arthur A. Burleson, who came to his death in the same accident, and it was held further that the measure of control by Lloyd there proved was sufficient to show a special employment of Burleson. From the record in the instant case, which is before us in response to the writ, we have reached a like conclusion as to the status of the decedent Wilson. He was a rotary helper on the D. & E. Company drilling crew, while Burleson was a welder. The evidence was not as specific as to the duties of Wilson as it was as to those of Burleson in the other case, but, as we shall see, it was sufficient to support a finding that Wilson was under special employment to Lloyd.

The record shows that the fatal explosion occurred while Burleson was welding in the cellar of the well and while Wilson was under the derrick floor but above ground. Wilson emerged fatally injured and died two days later. No one was able to state just what he was doing, but it is admitted that he was on duty with the rest of the crew and there was testimony that about an hour before the accident he and another employee had been helping Lloyd's foreman putting clamps on top of the "Christmas tree" under orders that were being given the foreman by Lloyd's production manager. Apparently he had no specific duties at the time but assisted, as other members of the crew did, as he was needed in the progress of the work. The real point is not that Wilson's injury did not arise out of and in the course of his employment but that he was not under the control or special employment of Lloyd at the time.

There was direct evidence that Lloyd had furnished and assembled a "Christmas tree" and lines to handle the flow of gas and oil, including a line for the pumping of oil into the hole to remove drilling mud. Installation of the equipment was within the duties of D. & E. Company and employees of both companies were engaged in that work. Lloyd's production manager and foreman were on the job and giving orders. None were being given by D. & E. Company or its employees. This was by common consent and understanding, although not under express agreement. While D. & E. Company paid the wages of its crew and had to complete the work in which the crew was engaged, there was direct evidence that control of the workmen, who were installing Lloyd's equipment and had started the mud pump, was actually with Lloyd. The D. & E. crew was not engaged in any work other than that pertaining to the bringing in of the well, and the natural inference would be that Wilson was on duty and prepared to asist in the only work that was under way, which would place him under Lloyd's control. The evidence of the existence of a special employment was substantial. Lloyd Corp v. Industrial Acc. Com., supra, 60 Cal.App.2d 5, 140 P.2d 77.

[2] Petitioners' attack upon the finding that Mrs. Wilson was wholly dependent for support upon her husband also is untenable. The presumption that she was so dependent is conclusive if she was living with him at the time of his injury or if he was then legally liable for her support. Labor Code, sec. 3501(a), St.1937, p. 268. The finding should be construed as implying that both grounds of dependency existed.

[3] The evidence was sufficient to prove that the parties were living together as husband and wife. It is true that Mrs. Wilson sued for divorce in Ventura County March 11, 1942, and was given an interlocutory decree on the following day. The parties had entered into a property settlement agreement on March 10, 1942, under which their property was divided, Mr. Wil-

son paid his wife $550 and was to pay her in addition $1,320 at the rate of $55 per month, and Mrs. Wilson released her husband from the obligation of support. It is also true that they "separated" on March 10, that is to say, they slept in separate rooms in the same apartment for two nights. But Mrs. Wilson had told her husband after she brought suit, in reply to his suggestion that they had acted hastily, that they would have a year to think it over before a decree would become final, and they apparently had not agreed upon a permanent separation. Their married life had not been unruffled and it would seem that Mrs. Wilson considered an interlocutory decree as something that might prove handy in an emergency. However, on the evening of the 12th, after satisfying the court that there had been a separation and that she had a cause of action for divorce, Mrs. Wilson accepted her husband's invitation that they have steaks for dinner and they spent the night together. On the following day they drove to Los Angeles, bringing some household furniture and personal belongings. Mrs. Wilson was established in an apartment which they had previously rented and continued to live there while Mr. Wilson resumed his work at Ventura. Thenceforth until the time of his injury, April 28th, Mr. Wilson came to Los Angeles every week or ten days to be with his wife, spent the night with her and returned to Ventura the following morning. Upon one occasion they spent two days together. During this six weeks period the relations of the parties were the usual ones of a husband and wife living under such circumstances. Mrs. Wilson kept house, prepared meals and laundered clothes which her husband brought to the apartment. Mr. Wilson made payments on furniture which they purchased, paid his wife's medical bills, gave her money and on two occasions sent money from Ventura. He purchased the necessities of life so as to meet their requirements. His total contributions for these purposes was about $115. His last trip to Los Angeles was during the week before his injury. Mrs. Wilson testified that he expressed an intention to move to Los Angeles and to make his home with her. We must presume that the commission believed that the parties resumed their relations in good faith. In this view of their conduct which is altogether reasonable, there was ample evidence to support the implied finding that if there had been a bona fide separation there had also been a reconciliation, from which it would follow that they were living together as husband and wife.

[4, 5] The conclusive presumption of dependency arising from the existence of a legal liability of a husband to support his wife is, of course, independent of the one we have discussed. A husband's obligation of support is suspended while his wife is living separate from him by agreement (Civil Code, sec. 175), but the resumption of marital relations, following a reconciliation, cancels the executory obligations of separation agreements. Mundt v. Connecticut Gen. Life Ins. Co., 1939, 35 Cal. App.2d 416, 95 P.2d 966. Mrs. Wilson's right to support, which she had surrendered by agreement, was restored by the reconciliation and the resumption of marital relations. The truth of this statement does not depend upon, but it is fortified by, the nature of the technical separation. Dependency was sufficiently shown by the proof as to the conduct of the parties, as the resumption of marital relations revived Mr. Wilson's liability for support.

[6] Certain additional facts, namely, that the interlocutory decree did not provide for Mrs. Wilson's support, that Mr. Wilson made one payment of $55 under the agreement, and that Mrs. Wilson claimed and received from Mr. Wilson's estate the unpaid balance to which she was entitled under the agreement, do not militate against our conclusions.

The fact that Mr. Wilson made one payment on the agreement after the reconciliation would indicate that he regarded his obligation to pay the full amount as one which pertained to the division of property, which had been fully executed by Mrs. Wilson. He did not seek to obtain credit on the debt for sums which he voluntarily paid for Mrs. Wilson's support. The conditions which governed in the determination of the question of dependency were those which existed during Mr. Wilson's lifetime. By his will he left nothing to his wife. She was willing to accept the balance of the sum specified in the agreement, and the estate was willing to pay the amount, in lieu of any interest she might have had if the agreement had been rescinded. We cannot see that the manner in which Mrs. Wilson settled with the estate

bears in any way upon the facts which controlled in the matter of dependency or that it was relevant to that issue.

The award is affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.



61 Cal.App.2d 298

COMMUNITY INDUSTRIAL LAND CO., Inc., v. WALKER.

Civ. 3237.

District Court of Appeal, Fourth District, California.

Nov. 8, 1943.

1. Vendor and purchaser ⇐95(2), 101

Where time was of the essence of contract for sale of land, but first and only payment after down payment was accepted some four weeks late when vendor recognized that purchaser had justice in his position and attempted to adjust the matter and entered into negotiations, vendor waived strict performance and was required to give notice to purchaser before vendor could again require strict performance.

2. Vendor and purchaser ⇐97, 303

Where contract for sale of land makes purchase price payable in installments and deed is to be made when the whole is paid, and vendor allows full purchase price to become due, payment of purchase price becomes a dependent and concurrent condition with giving of deed, and vendor must tender deed as condition to declaring forfeiture or to maintaining suit for purchase price.

3. Vendor and purchaser ⇐95(2), 97, 101

Where vendor recognized that purchaser had grievance and acquiesced in delay of installment payment under contract for sale of land, there was such a suspension of right of forfeiture that it could only be revived by giving of specific notice of intention to rely on that right or by tender of a deed.

4. Vendor and purchaser ⇐97

A vendor could not maintain quiet title action on theory that tender of deed would have been useless because purchaser had not paid amount due under contract when vendor's prior justice court action was filed, where giving of notice or tender of deed was as much a requisite for maintaining justice court action as it was for subsequent action, and purchaser made repeated efforts to pay full amount due and to obtain a deed.

5. Vendor and purchaser ⇐18(3)

Where purchaser, notified vendor of exercise of option to purchase land but did not pay or tender necessary amounts, and did not otherwise comply with option agreement, vendor could quiet title to such land.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action to quiet title by the Community Industrial Land Company, Inc., against N. W. Walker, individually and doing business as Norwalk Foundry & Machine Company. From a judgment, defendant appeals.

Affirmed in part and reversed in part.

Henry C. Rohr, of Los Angeles, for appellant.

Friis & Schutz, of Anaheim, for respondent.

BARNARD, Presiding Justice.

This is a quiet title action involving two parcels of land. By a written agreement dated November 25, 1940, the defendant agreed to purchase from the plaintiff about two acres, referred to as Parcel 1, for $1,000, payable $50 down, $50 on February 1, 1941, and varying monthly payments thereafter, the final payment being due February 1, 1942. No interest was provided for in the contract. Under the agreement the defendant also leased from the plaintiff an adjoining tract of land, known as Parcel 2, for $1 a year plus taxes, with an option to purchase the same at any time prior to September 6, 1942, for $500 an acre payable in cash. It is conceded that before this agreement was entered into the parties had talked over the fact that in years past the land had been flooded at times and that the secretary of the plaintiff corporation had informed the defendant that a new dam had been installed in

the Santa Ana River. While the plaintiff disputes this, the defendant testified that he was also told that this dam would prevent any future flooding of the land.

The defendant moved a building upon Parcel 1, as provided for in the agreement, and began operating a factory therein. There is evidence that this and other improvements were of the value of several thousand dollars. He paid the down payment of $50, and the $50 payment due February 1, 1941, was paid and accepted on February 27, 1941. At that time he also paid $1 as the rental for Parcel 2 for the first year. Shortly thereafter the land became flooded, there being a foot or two of water on the floor of the building.

The defendant notified the officers of the plaintiff corporation about the flooded condition, asked them what they were going to do about it, and later sought a modification of the agreement. He made no further payments and did not pay the taxes as they became due. It is admitted that the officers of the plaintiff expressed a willingness to adjust the matter and entered into negotiations with the defendant which extended over a considerable period. The defendant was away for some months and nothing very definite seems to have been done until the spring of 1942, more than a year after the negotiations started.

In April, 1942, the defendant appeared at a meeting of the directors of the plaintiff corporation and the parties arrived at a tentative agreement to the effect that the defendant would be permitted to purchase a somewhat different parcel of approximately one acre, which embraced the land on which the building stood, for $750, payable in twenty-four equal instalments. The secretary of the corporation was instructed to have its attorney draw up such an agreement. This was done about two weeks later but the agreement was never delivered to or shown to the defendant. There is a conflict in the evidence as to whether failure of the defendant to sign the new agreement was due to his own fault or to neglect on the part of the plaintiff. The secretary of the plaintiff corporation testified that on several occasions he asked the defendant to sign it or told him where it could be found, that the last of these conversations was late in July or early in August, 1942, and that the defendant then said he would sign the contract soon.

Nothing further occurred until August 13, 1942, when the plaintiff brought an action against the defendant in the Santa Ana justice court seeking to recover $900 as the balance of the purchase price under the original agreement. Very soon thereafter that action was dismissed. A witness for the plaintiff testified that this action was dismissed because an attorney for the defendant had informed them that a defense on the ground of fraud would be interposed in that action and because they preferred to try that issue in the superior court.

On September 2, 1942, the defendant notified the plaintiff, in writing, that "I hereby exercise my option" to purchase Parcel 2. On September 14, 1942, the plaintiff brought this action to quiet its title to both parcels of land mentioned in the original agreement. It is conceded that no notice of intended forfeiture was ever served upon the defendant and that no tender of deed was ever made. The defendant filed an answer which included a separate defense on the ground of misrepresentation in connection with flood conditions on the land. Two days before the trial the defendant asked the plaintiff's attorney if they would accept $900 for Parcel 1 and received a negative reply. On the morning of the trial, the defendant in writing notified the plaintiff that he stood ready to pay the balance of the purchase price for Parcel 1 under the original agreement, stating that "according to my calculations the approximate balance is $900", and demanding a deed for these two acres. He also, at the beginning of the trial and by permission of the court, filed an amended answer in which, among other things, he alleged that he had tendered to the plaintiff the balance of the purchase price for Parcel 1, that he was and is ready, willing and able to pay this balance, and that he "now brings" the sum of $900 into court "ready to be paid to the plaintiff." His offers were not accepted and no objections were made to them other than they were made too late.

The court found that an officer of the plaintiff corporation had informed the defendant before the agreement was entered into that a dam had been constructed on the Santa Ana River; that such a dam had in fact been constructed; that the flooded condition of this land which developed in March of 1941 was due to no

fault on the part of the plaintiff; that defendant, by his subsequent conduct, had waived any possible misrepresentation; and that by discussing the terms of another agreement some fifteen months later the defendant had waived any objection he may have had to the condition of the land in question. As conclusions of law, it was found that the defendant had waived any objections to previous representations as to the condition of the property by attempting on September 2, 1942, on December 14, 1942, and on December 16, 1942, to purchase a part or all of Parcels 1 and 2; that at each of said times the defendant was in default under said contract; and that the plaintiff was entitled to judgment quieting its title. Judgment was entered quieting title to both parcels of land in the plaintiff and this appeal followed.

[1] The original contract provided that time was of the essence. However, the first and only payment after the down payment was made and accepted some four weeks late. Apparently, the appellant had a more or less valid reason for seeking an adjustment before making the subsequent payments. The respondent seems to have recognized that there was some justice in his position although it disclaimed full responsibility for the situation which had arisen. In any event, it attempted to adjust the matter and entered into negotiations which were continued for about a year and a half and long after the final payment became due under the terms of the contract. By its own actions the respondent waived strict performance in accordance with the terms of the contract, and it was therefore necessary for the respondent to give notice to the appellant before it could again require strict performance or claim a forfeiture for a failure in that regard.

[2] A further consideration is that the respondent allowed the matter to rest until long after the final payment was due on the purchase price, during which time its negotiations with the appellant were continued and during which it continued to recognize the original agreement as still in force, as shown by the fact that it filed an action in August, 1942, seeking to recover the balance of the purchase price provided for therein. It was held in Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126, that where such a contract makes the purchase price payable in instalments and the deed is to be made when the whole is paid, and where the vendor allows the full purchase price to become due, the payment of the purchase price becomes a dependent and concurrent condition with the giving of a deed and the vendor must tender a deed as a condition to declaring a forfeiture or to maintaining a suit for the purchase price. That rule has been followed in many cases since that time. In McCartney v. Campbell, 216 Cal. 715, 16 P.2d 729, this rule was applied and it was held that where the vendor had still recognized the contract as in existence after a default in making payments he had no right to commence a quiet title action without a prior demand of performance or a tender of a deed. In a number of cases it has been held that where all of the instalments were past due a vendor could not maintain a quiet title action until he had tendered a deed. Bank of America v. Ries, 128 Cal.App. 75, 16 P.2d 1018; Ohanian v. Kazarian, 123 Cal.App. 196, 11 P.2d 42; Caspar Lumber Co. v. Stowell, 37 Cal.App. 2d 58, 98 P.2d 744; Ross v. McDougal, 31 Cal.App.2d 114, 87 P.2d 709. The same rule was approved in Grimes v. Steele, 56 Cal.App.2d 786, 133 P.2d 874, although it was there held that a tender of a deed would have been unavailing.

[3] The circumstances of this case are such as to bring it within these equitable rules and to make their application peculiarly appropriate. Assuming that the appellant was actually in default, this is not the controlling fact. The respondent recognized that he had a grievance and acquiesced in the delay, at least to a large extent, and it must be held, in view of the acts of the respondent, that there was such a suspension of the right of forfeiture that it could only be revived by the giving of a definite and specific notice of an intention to rely on that right, or by the tender of a deed.

[4] Nor do we agree with the respondent's contention that the tender of a deed would have been useless. It is argued that the fact that the appellant did not pay the amount due when the justice court action was filed sufficiently indicates that the tender of a deed would have been an idle act. The giving of a notice or the tender of a deed was as much a requisite for maintaining the justice court action as it was for this action, which was later filed. The fact that the appellant stood upon his rights at that time, if he did, cannot be said

to indicate that he would not have responded to a proper tender, had it been made, or that he would not then have done the thing necessary to protect his rights. Even without the notice or tender to which he was entitled, the appellant made repeated efforts to pay the full amount due for Parcel 1 and to obtain a deed thereto, before this action was tried. This not only indicates that a tender of a deed would have accomplished its purpose but presents an equitable situation which we think required the court to apply the well established rules and to refuse to quiet respondent's title to Parcel 1.

[5] A different situation appears with respect to Parcel 2. The appellant had not agreed to purchase that land, and there is no question of default, waiver, notice or tender of deed in that connection. He simply had an option to purchase that land at $500 an acre, payable in cash, provided this was done not later than September 6, 1942. While he notified the respondent that he exercised his option, it does not appear that he paid or tendered the necessary amount, or that he otherwise complied with the option agreement. We are pointed to nothing which in any way indicates any error affecting that part of the judgment which relates to Parcel 2.

For the reasons given, that part of the judgment relating to Parcel 2 is affirmed, and that part of the judgment which relates to Parcel 1 is reversed.

MARKS and GRIFFIN, JJ., concur.



61 Cal.App.2d 248

CITY AND COUNTY OF SAN FRANCISCO v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12536.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1943.

Hearing Denied Dec. 29, 1943.

1. Workmen's compensation ⇐719, 734

Injuries sustained by employee while going to or coming from place of employment are ordinarily not compensable except that if employer, as incident of employment, furnishes transportation to and from work and means of transportation are under control of employer, an injury sustained by employee during such transportation "arises out of and in course of the employment" and is compensable. St. 1937, p. 265, § 3201.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in the Course of Employment".

2. Workmen's compensation ⇐1574

Where there was evidence that for at least 30 years municipal street railway had furnished transportation to its employees as an accepted condition of employment, Industrial Commission was not bound to accept statement on pass issued to employee to effect that pass was issued as courtesy and not as part of consideration for employment.

3. Contracts ⇐170(1)

What has been uniformly done in execution of a contract by both parties to contract may be regarded as having been adopted by them as one of the terms of contract.

4. Workmen's compensation ⇐51

The provisions of the Workmen's Compensation Act are to be liberally construed. St.1937, p. 265, § 3201.

5. Workmen's compensation ⇐734

The exception to the general rule against compensation for injuries sustained by employee while going to or coming from place of employment which arises when employer, as an incident of employment, furnishes transportation, authorizes payment of compensation to employee injured while being so transported, notwithstanding that employee was free to use other means of going to and from place of employment, or that conveyance, although operated by employer, was a public carrier. St.1937, p. 265, § 3201.

6. Workmen's compensation ⇐734

The legal consequences of employer furnishing transportation to and from work as an incident of employment in a conveyance under its control are not changed by fact that employer also furnishes transportation for other purposes in such conveyance. St.1937, p. 265, § 3201.

7. Workmen's compensation ⇐740

Where employee of municipal street railway was injured in a streetcar accident while riding on a pass furnished by employer and returning home from work, employee was entitled to compensation under rule permitting compensation when employer, as incident to employment, furnishes employee with transportation to and from work and means of transportation are under control of employer. St.1937, p. 265, § 3201.

WARD, J., dissenting.

Certiorari by the City and County of San Francisco, petitioner, against the Industrial Accident Commission and Raymond K. Tompkins, respondents, to review a compensation award of the Commission in favor of individual respondent.

Award affirmed.

John J. O'Toole, City Atty., and Albert F. Skelly, Deputy City Atty., both of San Francisco, for petitioner.

Everett A. Corten, and Fred G. Goldsworthy, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

By this proceeding in certiorari petitioner seeks to annul an award of the Industrial Accident Commission in favor of respondent Tompkins. Tompkins is employed by the City and County of San Francisco as a streetcar conductor on its Municipal Railway. At 12:41 a. m. on February 8, 1943, he finished his "run" for the night at the car barn of the Municipal Railway at Mariposa and Hampshire Streets in San Francisco. He was allowed ten minutes thereafter to turn in the cash collected by him as conductor, and at 12:51 his wages for the night terminated. Shortly thereafter Tompkins boarded another streetcar operated by the Municipal Railway in order to go to his home. He was traveling on a pass entitling him to ride free at any time on all Municipal Railway cars and busses. While riding on this latter car, the car collided with a truck and Tompkins received the injuries for which the award under attack was made.

[1] The questions presented herein may be brought into focus by the following quotation from the recent opinion of our Supreme Court in California Cas. Indem. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 463, 132 P.2d 815, 816: "Petitioner contends that the case falls within the general rule that injuries sustained by an employee while going to or coming from his place of employment are not compensable under the Workmen's Compensation Act. See 27 Cal.Jur. 380. It is well recognized, however, that if an employer, as an incident of the employment, furnishes his employee with transportation to and from the place of employment and the means of transportation are under the control of the employer, an injury sustained by the employee during such transportation arises out of and is in the course of the employment and is compensable."

It is petitioner's claim that this case falls within the general "going and coming" rule above stated and the injury is therefore not compensable. Respondents rely on the exception to the "going and coming" rule stated in the second sentence of the above quotation, their position being that since Tompkins was being transported from his place of work to his home by means of a vehicle under the control of the employer and as an incident of his employment, his injury is compensable.

The pass that was furnished the injured employee contained a printed recital on its back reading in part: "This pass for free transportation on cars or buses of the Municipal Railway is issued as a courtesy and not as part of consideration for employment. * * * Pass must be surrendered upon its expiration date, upon termination of employment, or when its surrender is requested by proper authority."

Petitioner argues that this language compels a finding that the pass was a mere gratuity revocable at will and not a part of the contract, nor an incident of the employment.

The witness Hauser, called by petitioner herein, testified that he was an inspector employed on the Municipal Railway and had been with the Municipal Railway for over thirty years; that each employee of the Municipal Railway is given a pass of the kind issued to Tompkins; that such passes have been issued since 1942; that prior to that time badges were issued to all Municipal Railway employees giving them the same privileges, and that the use of badges and passes for free transportation on the Municipal Railway has been an accepted condition of employment for the

entire period of his connection with the Municipal Railway.

[2, 3] The Industrial Accident Commission was not bound to accept the printed statement on the pass, but was entitled to consider evidence showing "the inception of the agreement, the situation of the parties at the time of the execution of the contract, and the practical construction of the contract by the parties." Pacific Lbr. Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 139 P.2d 892, 895. Herein the established and unvarying custom of at least thirty years duration as "an accepted condition of employment" to furnish such transportation was entitled to be considered in determining whether it was furnished as a part of the contract of employment and incidental thereto. "Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms." In re Donovan, 217 Mass. 76, 104 N.E. 431, 432, Ann.Cas.1915C, 778; Phifer's Dependents v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147, 148.

The language of Mr. Justice Traynor in California Cas. Indem. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at pages 464, 465, 132 P.2d at page 817, is particularly apposite:

"The employer, however, supplied transportation to and from its office as a regular practice, and the employee regularly used that transportation. An agreement by an employer to furnish transportation need not be express; it may be implied from the circumstances of the case and the uniform course of conduct of the parties. * * *

"The employer's right to withdraw the privilege of using the car was merely a right to terminate the contract at will, and was not inconsistent with the existence of the agreement. A contract at will remains a contract until it is terminated. * * *

"Petitioner contends that even if the evidence shows an agreement to furnish transportation it was not part of the contract of hire and therefore not an incident of the employment. Transportation may be incidental to the employment, however, even though it is only a collateral or subsidiary part of the contract of employment, or 'something added to the principal part of that contract as a minor, but none the less a real, feature or detail of the contract.' In re Donovan, 217 Mass. 76, 104 N.E. 431, Ann.Cas.1915C, 778. Since the transportation was regularly furnished to the employee solely because of her status as an employee, the inference is reasonable that the transportation depended upon the fact of the employment and was incidental to it."

Petitioner cites and relies upon certain New York cases of which Tallon v. Interborough Rapid Transit Co., 232 N.Y. 410, 134 N.E. 327, is the leading authority in that jurisdiction. In that case one Tallon, an employee of the Interborough Rapid Transit Company, was killed while riding to work on one of its trains using a pass given to him for that purpose by his employer. The New York Court of Appeals held by a divided court, three justices dissenting, that his death was not compensable. The reasoning of the majority opinion is found in the following quotation (pages 327 and 328 of 134 N.E.):

"The passenger trains of the defendant were public conveyances. Anybody and everybody had a right to ride in them upon paying the fare. Tallon was not obliged to use these trains in going to his work under any agreement with the defendant. He could have traveled by any other conveyance or could have walked. * * *

"Now this case differs materially from those cases where the employer, in order to get his employees to and from their work, provides conveyances exclusively for their use which in no sense are public conveyances and in which the employees undertake to ride as part of their contract of employment in going to and from their work."

The holding is thus put on two grounds: (1) That the employee was free to use other means of going to and from his place of employment; and (2) that the conveyance, although operated by the employer, was a public carrier and not provided exclusively for the purpose of transporting the employees. Neither of these bases of decision has found acceptance in the other jurisdictions of this country.

The first ground was the basis of the decision of the House of Lords in St. Helens Colliery Co., Ltd. v. Hewitson, [1924] Appeal Cases 59. In that case an employee was injured on a train furnished by his employer to transport its employees to and from their place of employment.

The House of Lords held that the injury was not covered by the British Workmen's Compensation Act because the employee was not obligated to use the train in going to and coming from his work. This decision overruled a long line of earlier British cases. See note in 62 A.L.R. pages 1445, 1446. In California Cas. Indem. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at page 463, 132 P.2d at page 816 our Supreme Court said of the St. Helens Colliery Co. case that it "represents the English rule but not the law in the United States"; and, at page 464 of 21 Cal.2d, at page 817 of 132 P.2d, expressly rejected its holding in the following language: "Likewise, the employee's freedom to use other transportation no more precludes the existence of an agreement than the freedom of the purchaser of a railroad ticket to use other transportation than that for which he paid." Citing American Coal Mining Co. v. Crenshaw, 77 Ind.App. 644, 133 N.E. 394, and Konopka v. Jackson County Road Comm., 270 Mich. 174, 258 N.W. 429, 97 A.L.R. 552.

The second ground of decision in the Tallon case is opposed to the great weight of American authority. The courts of this country, outside of New York, have refused to make a distinction between transportation by private and public conveyance operated by the employer and have accepted the view expressed in the dissenting opinion of McLaughlin, J., in the Tallon case that (page 329 of 134 N.E.): "The transportation is the same whether it be in a private or public conveyance." Radermacher v. St. Paul City Ry. Co., Minn. 8 N.W.2d 466, 469, 145 A.L.R. 1027; De Camp v. Youngstown Municipal Ry. Co., 110 Ohio St. 376, 144 N.E. 128; Micieli v. Erie R. Co., 18 N.J.Misc. 466, 14 A.2d 56; Manchester St. Ry. v. Barrett, 1 Cir., 265 F. 557; Knorr v. Central Railroad of New Jersey, 268 Pa. 172, 110 A. 797; Central Const. Corporation v. Harrison, 137 Md. 256, 112 A. 627; Western Indemnity Co. v. Leonard, Tex.Com.App., 248 S.W. 655; cf. Dellepiani v. Industrial Acc. Comm., 211 Cal. 430, 295 P. 826.

[4, 5] The provisions of the Workmen's Compensation Act are to be liberally construed to extend its benefits for the protection of employees injured in the course of their employment (Pacific Lbr. Co. v. Industrial Acc. Comm., supra, 139 P.2d pages 898, 899, and cases there cited), and we believe that the majority rule is more in keeping with the spirit of the Workmen's Compensation Act and better founded in reason than the peculiar refinement of the rule developed in England and New York.

[6, 7] Finally petitioner argues that, since the employee could use the pass at any time and was not limited in its use to going to and coming from his work, that fact must distinguish this case from those relied upon by respondents. It is said that to affirm this award will create a condition in which a distinction must be made in future cases between those occasions when a pass is used in going to or coming from work and other times when it is being used by an employee on errands of his own in no way connected with his employment. The distinction is no more difficult than many others which courts and administrative bodies are daily called upon to make. It would be unrealistic to hold that an employee traveling to and from work on a pass limited to use for that purpose would be covered by the Workmen's Compensation Act, Labor Code, § 3201 et seq., St.1937, p. 265, and that one traveling to and from work on a pass giving him the greater privilege of also traveling for other purposes of his own would not be covered. The legal consequences of the employer furnishing transportation to and from work as an incident of the employment in a conveyance under its control are not changed by the fact that the employer also furnishes transportation for other purposes in such conveyances. The Supreme Court of Minnesota found no difficulty in disposing of the identical question in Radermacher v. St. Paul City Ry. Co., supra, a case remarkably like the present one on its facts.

The award is affirmed.

PETERS, P. J., concurs.

WARD, Justice (dissenting).

I dissent.

The finding herein—that the injuries sustained by the respondent arose out of and in the course of his employment—purporting to be based upon the evidence presented, is in reality not a finding of fact but a conclusion of law (Hines v. Industrial Acc. Comm., 184 Cal. 1, 192 P. 859, 14 A.L.R. 720), and therefore not subject to the strict rule of the Labor Code as

found in sec. 5953. Crown City Lodge, etc., v. Industrial Acc. Comm., 10 Cal.App. 2d 83, 51 P.2d 143.

The petition for the writ presents a jurisdictional question arising from the interpretation to be given a document—a "courtesy pass"—which permitted the employee to ride at will on petitioner's municipal street railway. The vital question is whether the issuance of such a pass under its "terms and conditions" is legally sufficient to constitute it "an incident of employment" as "a condition of employment" warranting an award for injuries sustained while riding on a street car under its authorization after all duties of the employee had temporarily terminated.

It is not contended that in the Civil Service Classification of Conductors and Motormen any mention is made of a "courtesy" or "free" pass as an attribute of employment or as part consideration for the performance of duties. From the record and from the judicial knowledge that the court may take of charter provisions it is not in law or in fact an integral part of the contract of employment. It was admitted during the argument that other means of transportation were available, and that the respondent made a voluntary selection of the particular transportation facility herein involved. Whether he boarded the car at the barn or a short distance away the respondent testified he could not remember.

The pass entitled the holder thereof, in the course of employment, to ride free of charge at any time, without restriction, on any streetcar or bus belonging to the Municipal Railway, regardless of whether he was bent on business, pleasure, or a personal mission.

The evidence preponderates that the issuance of the pass was not "a condition of employment"; but the commission inferentially found to the contrary. The finding was based upon the affirmative answer of one witness to—be it said in passing—a leading question calling for a legal conclusion that badges and passes "had been an accepted condition of employment." Assuming the statement could be accepted by the commission to be correct as to employees generally, still there was no evidence that the applicant herein agreed to work upon such a stipulation or understanding. The applicant testified that he could have been employed without the issuance of the pass; that it was not an essential part of his employment.

That the pass is not "a condition of employment" is demonstrated by its terms, which include a waiver of liability and a statement that it "is issued as a courtesy and not as part of consideration for employment," to employees or "other person named on face." It may be issued to former employees on pension, to officials and employees of other branches of the city government, to non-officials and to non-employees, and, if deemed proper, to non-residents and persons connected with branches of a railway not connected with the city government.

Assuming that the commission could ignore the fact that it could be issued to "others" and conclude that the "courtesy pass" was "a condition of employment," the facts of the case do not fall within the rule enunciated in California Cas. Indem. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 132 P.2d 815, applied to the facts there presented. The streetcar was not "furnished by the employer to the employees for the purpose of transporting them to and from work." Page 463, of 21 Cal.2d, page 816 of 132 P.2d. It was "merely an accommodation that they might use or not as they wished." Pages 463, 464 of 21 Cal.2d, page 817 of 132 P.2d. There is no evidence that "the employee regularly used that transportation" (page 464 of 21 Cal. 2d, page 817 of 132 P.2d) and no evidence that the transportation was supplied "as a regular practice" (page 464 of 21 Cal.2d, page 817 of 132 P.2d) or, as held in the cited case, "solely because of her status as an employee." Page 465 of 21 Cal.2d, page 817 of 132 P.2d. It is a self-evident fact that streetcar transportation could not be furnished to the last crews finishing their duties at night, or the first crews to report in the early morning, and hence could not be a "feature or detail of the contract." Page 465 of 21 Cal.2d, page 817 of 132 P.2d.

This appears to be the first time that the California Industrial Accident Commission has determined that a "courtesy pass" is "a condition of employment." There seems to be some diversity of opinion as to whether an employee riding free on transportation facilities of an employer may, under the provisions of an industrial accident act, claim compensation for accidental injury. Up to this time California

has followed the so-called New York rule, to which many other jurisdictions have adhered. Campbell, Workmen's Compensation, sec. 178, pp. 167, 168, citing authority therefor. To come within the rule established in California, the transportation must be assumed to be part of the contract of employment and "courtesy rides given by the employer do not give rise to liability under the statutes." Trussless Roof Co. v. Industrial Acc. Comm., 119 Cal.App. 91, 6 P.2d 254, citing Boggess v. Industrial Acc. Comm., 176 Cal. 534, 169 P. 75, L.R.A. 1918F, 883.

Smith v. Industrial Acc. Comm., 18 Cal. 2d 843, 118 P.2d 6, is a case involving the use by an employee of a truck, belonging to his employer, in traveling from his place of employment. Under the facts of that case the court determined that the applicant was entitled to an award, but differentiated the facts of that case from those of cases wherein the employee was riding as a matter of "courtesy." In discussing "incident of the employment," etc., quoting from Trussless Roof Co. v. Industrial Acc. Comm., supra, the court said (page 847 of 18 Cal.2d, page 8 of 118 P.2d): " 'The use of the words "as such" is necessary because courtesy rides given by the employer do not give rise to liability under the statutes. Boggess v. Industrial Acc. Comm., 1917, 176 Cal. 534, 169 P. 75, L.R.A.1918F, 883; Gruber v. Mercy, 1929, 145 A. 106, 7 N.J.Misc. 241. In other words, the transportation has to be furnished as a part of the contract of employment, to come within the rule. In re Donovan, 1914, 217 Mass. 76, 104 N.E. 431, Ann. Cas.1915C, 778.' " It is evident from the above that as late as 1941 California has given approval to the rule that "courtesy rides" do not come within the exception of the "going and coming" rule.

The law is that the conduct of the parties in carrying out the contract of employment may be considered with the contract in determining their respective rights and duties. Burlingham v. Gray, 22 Cal.2d 87, 137 P.2d 9.

Assuming, but not admitting, that the Industrial Accident Commission could ignore the written conditions attached to a contract of courtesy riding and determine the rights of the parties in that regard from all the circumstances surrounding the employment, the evidence shows that the injured employee herein, who was the party in interest, at no time considered the "pass" a condition of employment. Under such circumstances I am unable to agree that in the determination of this legal question the opinion testimony of a third party is competent, standing alone, to prove the meeting of the minds on the "condition of employment" between the injured party and petitioner.

The majority opinion cites certain cases wherein the New York and California rule has not been followed. One of the cases relied upon is Radermacher v. St. Paul City Ry. Co., Minn., 8 N.W.2d 466, 145 A.L.R. 1027, where a specified number of free tickets, the equivalent in value of $7.50 a month, were issued to employees. The court comments upon this additional amount received in consideration of employment and states (page 470 of 8 N.W.2d): "A gratuitous passenger, in the absence of any condition or stipulation as to assumption of risk of personal injury, is entitled to the same degree of care as any other passenger." In the present case on the contrary there was a specific waiver, and passes in identical terms were issued not only to employees but to "others." In brief, the problem we are interested in is a "courtesy pass" and not a pass given in part payment of salary.

In addition to the Tallon case referred to in the majority opinion, see American Mut. Liability Ins. Co. v. Curry, 187 Ga. 342, 200 S.E. 150; Schultz v. Champion Welding & Mfg. Co., 230 N.Y. 309, 130 N.E. 304; Kowalek v. New York Consolidated R. Co., 229 N.Y. 489, 128 N.E. 888; 10 A.L.R. 172; 62 A.L.R. 1445; Dellepiani v. Industrial Acc. Comm., 211 Cal. 430, 295 P. 826; Smith v. Industrial Acc. Comm., supra; Trussless Roof Co. v. Industrial Acc. Comm., supra; Boggess v. Industrial Acc. Comm., supra.

If the "courtesy pass" is construed in this case as "a condition of employment," then it would be just as reasonable to hold that its use on a personal mission could be regarded by the employee as a "condition" or incident of employment upon which the employee advanced from the civil service list to the status of employee, and accordingly that he would be entitled to compensation for an injury received on the way to church, a picnic or high jinks.

In my opinion the award should be annulled.

PEOPLE v. PURITAN ICE CO.

PURITAN ICE CO. v. JOHNSON, State Treasurer.

Civ. 14074.

District Court of Appeal, Second District. Division 2, California.

Nov. 8, 1943.

Rehearing Denied Nov. 24, 1943.

Hearing Granted Dec. 31, 1943.

1. Licenses ⇐32(2)

In action involving validity of delinquency tax assessments under Retail Sales Tax Act against ice manufacturer which sold ice to packers of fresh vegetables, substantial evidence sustained findings that manufacturer made all sales of ice to persons, firms and corporations who purchased ice for purpose of resale, in regular course of business, in form of tangible personalty, and that the ice was in fact resold in regular course of business in form of tangible personalty. Gen.Laws Supp.1939, Act 8493, § 17.

2. Appeal and error ⇐989

When a finding is attacked on ground that there is not any substantial evidence to sustain it, power of appellate court begins and ends with determination regarding whether there is any substantial evidence contradicted or uncontradicted which will support the finding.

3. Appeal and error ⇐931(1)

Generally, appellate court will view evidence in light most favorable to respondent, will not weigh evidence, and will indulge all intendments which favor sustaining the finding of the trier of fact.

4. Appeal and error ⇐1010(1)

Generally, an appellate court will not disturb finding of trier of fact if there is substantial evidence in record in support thereof.

5. Licenses ⇐32(2)

If maker or vendor of personalty takes from vendee a resale certificate which provides that acquired property is purchased for resale, burden of proving that property was not in fact purchased for resale rests with Board of Equalization in suit to recover tax allegedly due under Retail Sales Tax Act. Gen.Laws Supp.1939, Act 8493, § 17.

6. States ⇐215

Trial court, properly determining that ice manufacturer was not liable for taxes assessed under Retail Sales Tax Act, improperly awarded costs against the state and officer of state acting in representative capacity. Gen.Laws Supp.1939, Act 8493, § 17; Code Civ.Proc. § 1032.

7. States ⇐215

In absence of statute making contrary provision, costs may not be allowed against state or officers of state acting in their representative capacity.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by the People of the State of California against Puritan Ice Company to recover unpaid balance of taxes allegedly due under the Retail Sales Tax Act consolidated with four actions by the Puritan Ice Company against Charles G. Johnson, Treasurer of the State of California, to recover taxes paid under protest. From judgments for the Puritan Ice Company, the People of the State of California and Charles G. Johnson, Treasurer of the State of California, appeal.

Judgments modified and, as modified, affirmed.

Robert W. Kenny, H. H. Linney, and Adrian Kragen, all of San Francisco, for appellants.

Schauer, Ryon & McMahon, of Santa Barbara, for respondent.

McCOMB, Justice.

This matter involves five cases that were by stipulation of the parties consolidated for trial and appeal. They arose out of assessments by the State Board of Equalization against respondent, Puritan Ice Company, totaling approximately $33,000, together with interest charges thereon, with respect to allegedly delinquent taxes arising under the California Retail Sales Tax Act of 1933, St.1933, p. 2599, as amended.

After the assessments were levied, and after petitions for reassessment were denied, respondent paid approximately $17,000 of the amount levied under protest. The amount so paid by respondent is the subject of four suits for refund of the sum. In the fifth suit, the Board of Equalization sued respondent for an unpaid balance of

$16,000.00 together with interest and penalties.

All five suits were decided in favor of respondent (Puritan Ice Company) and against appellant (People of the State of California and Charles G. Johnson, Treasurer of the State of California).

The evidence being viewed in the light most favorable to respondent, the essential facts are:

Respondent operates in Santa Barbara County an ice manufacturing plant. From August 1, 1933, to September 30, 1938, it manufactured and sold approximately $1,019,000.00 worth of ice to packers of fresh vegetables and to the Pacific Fruit Express Company. Seventy-five per cent of the foregoing sum was sold to vegetable packers and twenty-five per cent of it to Pacific Fruit Express. Of the twenty-five per cent of its products sold to Pacific Fruit Express, ninety to ninety-five per cent was specifically rebilled at a fixed price per ton to the ultimate buyer of the vegetable car involved, and five to ten per cent was represented by a standard refrigeration charge, billed to the ultimate buyer of the car, which included in the elements under which it was computed for the tariff the price of the ice per ton.

The remaining seventy-five per cent of the ice was sold to vegetable packers in Santa Barbara County, who packed cauliflower, lettuce, carrots, celery and other green vegetables. Respondent took from all of these packers resale certificates certifying to the fact that the ice so sold was purchased by the independent packers for resale in the form of tangible personal property.

The procedure employed by the packers and sellers of a car of lettuce, with minor variations, was typical of the method used by the other packers of vegetables in Santa Barbara County during the period here involved. This practice was as follows:

The lettuce was harvested in the field, taken to the packing shed, graded, sorted, and placed in a crate composed of shook and nails. Heavy parchment paper was placed in the crate, then a layer of lettuce, a layer of crushed ice, and so on, until the crate was full, when a shovel-full of crushed ice was placed on the top of it. The paper was then folded over the top in such a way as to make a complete envelope and the lid then applied with the proper amount of bulge being allowed for the ice and the contents. The crate was then taken to a car waiting on a siding. This, according to the custom and usage of the vegetable business in Santa Barbara County, was the "packaged unit" consisting of the crate, paper lining, the vegetable commodity, the label and the ice. The car was loaded with these crate units, room being allowed at the top and at the doors. Whole blocks of ice were placed at the doors. Blocks of ice were then crushed to a fine snow (known as "top ice") and blown into the car in the space above the crates. The amount of ice placed in the doorway and blown in as "top ice" during the later movement of the car solidified into a solid mass and constituted what was known to the trade as the "iceberg pack." After the "top ice" and the "door ice" were in place, the car was sealed.

When the car arrived at the terminal market it was opened by the buyer and some seventy to seventy-five per cent of the "top" and "door ice" placed in the car would be intact. After the car was opened the crates were dug from the ice, which was now a solid mass, and inspected by the owner and loaded on trucks for delivery to the retailer. A portion of the ice was usually shovelled on the loaded truck. If the buyer of the car had resold to a small retailer a number of crates would be delivered to his store. He would open one or two crates at a time, take the ice, a considerable amount of which was still intact, throw away the deteriorated paper on the bulged crate, and throw the ice on the remaining crates, discard it or place it on his sales counter along with the lettuce. This was the first time there was any breakdown of the crate and its contents as a unit.

These carloads were in every case in question sold as a unit, as a car containing the entire contents ice, shook, or crate, wrapping paper and vegetables, by the vegetable packer to the buyer. The ice comprising a portion of this car unit was itemized separately as a part of the whole, varying between thirty dollars and sixty dollars per car in accordance with the tonnage used. The ice was billed by the vegetable packer to the buyer of the car unit at a profit.

Seventy-five per cent of the vegetable car units made up as aforesaid, during the period in question, were sold f. o. b. Santa Barbara County, transfer of title taking place immediately to the buyer of the car unit and he being liable for any risk or

loss in transit. If the car had been "initially iced"—that is, ice put in the bunkers by the Pacific Fruit Express Company—the charge for this ice followed the billing of the car and was paid for by the buyer at $3.50 per ton.

The remaining twenty-five per cent of the vegetable car units that were not sold f. o. b. Santa Barbara County were started by the vegetable packers on their way to market and were known as "rollers." They were either sold by the vegetable packer to the ultimate car buyer in transit, delivered into the major terminal markets in the East and sold by the car to Eastern receivers, or in rare cases, consigned to a brokerage house in the terminal to be sold.

Respondent received from all of its packer customers "resale certificates" by the terms of which the packers certified that they resold all ice which they purchased from respondent in the form of tangible personal property.

The Board of Equalization did not offer any evidence excepting formal certificates of sales tax delinquency.

There are two questions presented for our determination which will be stated and answered hereunder seriatim.

[1] First: *Was there substantial evidence to sustain the trial court's findings that respondent made all sales of ice involved in the present action to persons, firms, and corporations who purchased the same for the purpose of resale, in the regular course of business, in the form of tangible personal property and that such ice was in fact resold in the regular course of business in the form of tangible personal property?*

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[2] (1) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720; 2 McK. Dig. (1930) page 701, Appeal and Error, sec. 1235.)

[3, 4] (2) It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (California Emp. Comm. v. Bethesda Foundation, 54 Cal.App.2d 348, 350, 128 P.2d 874; People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558.)

[5] (3) If the maker or vendor of personal property takes from the vendee a resale certificate which provides that the acquired property is purchased for resale, the burden of proving that such property was not in fact purchased for resale rests with the Board of Equalization in a suit to recover a tax alleged to be due under the terms of the Retail Sales Tax Act of 1933 and amendments thereto. (Act 8493, sec. 17, Deering (1939) Supplement to the Codes, General Laws and Constitution of California, page 1582.)

Applying the foregoing rules to the facts set forth above, which are supported by substantial evidence in the record, the trial court reasonably inferred that all the ice, involved in the present action, manufactured and sold by respondent was sold to persons, firms or corporations who purchased the same for the purpose of resale and that in fact the vendees sold the same as tangible personal property.

People v. Monterey Ice & Dev. Co., 29 Cal.App.2d 421, 84 P.2d 1069, and National Ice, etc., Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 79 P.2d 380, are factually distinguishable from the instant case, for the reason that in each of the cited cases the trial court found upon conflicting evidence that the manufacturer and vendor of the ice involved in each case was a retailer of its ice, and that the ice which it sold was not sold for resale purposes. On appeal, the reviewing court simply applied rules (1) and (2), supra, and affirmed the judgment of the lower court.

[6, 7] Second: *Did the trial court err in awarding costs in favor of respondent and against appellants, the State of California and an officer of said state?*

This question must also be answered in the affirmative and is governed by the established rule in California, that in the absence of a statute authorizing the same costs may not be allowed against (a) the State of California, or (b) officers of the state acting in their representative capacity. (Innes v. McColgan, 52 Cal.App.2d 698,

700, 126 P.2d 930; Connecticut Gen. Life Ins. Co. v. State, 47 Cal.App.2d 88, 89, 117 P.2d 377; People v. One 1937 Plymouth 6, 40 Cal.App.2d 38, 39, 104 P.2d 372; People v. One Plymouth Sedan, 21 Cal.App. 2d 715, 717, 69 P.2d 1011.)

There is no merit in respondent's contention that Section 1032 of the Code of Civil Procedure authorizes the allowance of costs against the state and its representatives in the present action. (See People v. 1937 Plymouth 6, supra, 40 Cal. App.2d page 39 et seq., 104 P.2d 372.)

In view of our conclusions, it is unnecessary to consider other points discussed by counsel.

For the foregoing reasons, the provisions in the judgments for costs are and each is stricken; as thus modified the judgments are and each is affirmed.

We concur: MOORE, J.; W. J. WOOD, J.



61 Cal.App.2d 310

Ex parte RYAN

Cr. 1842.

District Court of Appeal, Third District, California.

Nov. 10, 1943.

1. Automobiles ⇐332

To sustain a conviction under statute, it must appear not only that accused was driving while under the influence of intoxicating liquor and that while in such condition he committed some act forbidden by law or that he neglected to perform some duty imposed by law, but that such act or such neglect proximately caused bodily injury to another. Vehicle Code, § 501, St.1935, p. 174.

2. Automobiles ⇐331

Under statutes relating to the basic automobile speed and prima facie speed limits, speed alone is not unlawful without additional evidence as regards such speed in relation to the physical facts of the surface, width, and general characteristics of the highway, together with traffic conditions as of that time. Vehicle Code, § 510, St.1935, p. 176; § 511, St.1941, p. 2716.

3. Automobiles ⇐332

Where petitioner driving his automobile at an estimated speed of 55 miles per hour momentarily drove onto the left portion of a highway and then back again to the right side and ultimately over an embankment, killing a guest passenger, violation of statute making it a felony to drive a motor vehicle while under the influence of intoxicating liquor so as to cause bodily injury to another was not shown. Vehicle Code, §§ 501, 510, St. 1935, pp. 174, 176; §§ 511, 525, St.1941, pp. 2716, 2722.

4. Automobiles ⇐332

In prosecutions for driving a motor vehicle while under influence of intoxicating liquor so as to cause bodily injury to another, the criterion as to unlawful speed must be the reasonableness of the speed in relation to the physical facts surrounding the highway and its use at the particular time. Vehicle Code, §§ 501, 510, St.1935, pp. 174, 176; §§ 511, 525, St.1941, pp. 2716, 2722.

5. Habeas corpus ⇐85(1)

Where Auburn highway No. 49, runs in a southerly direction from Grass Valley for approximately 15 miles before crossing the Placer county line, evidence placing the scene of an automobile accident 6½ miles south of Grass Valley on such highway did not fail to show venue of prosecution under statute making it a felony to drive a motor vehicle while under the influence of intoxicating liquor so as to cause bodily injury to another, in Grass Valley township, county of Nevada. Code Civ.Proc. § 1875; Vehicle Code, § 501, St.1935, p. 174.

6. Criminal law ⇐564(2)

Venue in a criminal case need not be proven beyond a reasonable doubt.

7. Habeas corpus ⇐21

Where record disclosed that petitioner had been committed on a criminal charge without reasonable or probable cause, he was discharged on habeas corpus.

Appeal from Superior Court, Nevada County.

Proceeding in the matter of the application of Edward D. Ryan for a writ of

habeas corpus for and on behalf of the said Edward D. Ryan.

Petitioner discharged.

James Snell, of Grass Valley, for petitioner.

H. Ward Sheldon, Dist. Atty., of Nevada City, for respondent.

PEEK, Justice.

On May 3, 1943, while riding as a guest in the car operated by petitioner, Michael Nevins was killed when the car went over an embankment approximately six and one-half miles south of the city of Grass Valley on state highway number 49.

The petitioner is being held for trial for a violation of Section 501 of the Vehicle Code St.1935, p. 174, which, in part, provides: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony * * * ."

The complaint filed in the Justice's Court of Grass Valley Township, County of Nevada, charged that petitioner violated the provisions of said section in that he "wilfully and unlawfully drove a motor vehicle, * * * while under the influence of intoxicating liquor", and while so driving failed "to drive said vehicle at a speed that is reasonable and prudent and does not endanger the safety of persons or property; and said neglect and the violation of said duties did then and there proximately cause * * * the death of one Michael Nevins." At the conclusion of the hearing the defendant was held to answer in the Superior Court. Thereafter an application was made by defendant in the Superior Court in and for the County of Nevada, for a writ of habeas corpus, which was denied.

It is claimed by the petitioner that the evidence produced at the preliminary hearing failed to show (1) that he was under the influence of intoxicating liquor, (2) that he committed any act forbidden by law or neglected to perform a duty imposed by law, and (3) that the offense, if any was committed in the County of Nevada, State of California.

The only facts testified to by the state's first witness were that while sitting alongside of the highway near a sign "forty-nine" they saw the car of petitioner pass at a speed which he estimated to be fifty-five miles an hour, although on cross-examination he stated he had never attempted to estimate speed before; that he observed the car turning out over the center white line of the highway and back again to a point where it went over the bank.

The second witness, Officer Kitts of the state highway patrol, testified that the accident occurred at a point approximately six and one-half miles south of Grass Valley, where the road was open and comparatively straight, and at such location the speed limit was fifty-five miles per hour. He also told of skid marks extending some distance back from where the car left the pavement; that the car had a blown out tire; that he found a mark on the pavement where something had struck it, gouging a hole, and leaving wood splinters. He further testified that the pupils of defendant's eyes were dilated; that his speech was somewhat incoherent; that when standing in one spot he swayed and was not too steady on his feet although he did not detect liquor on his breath.

Captain Blake of the state highway patrol stated that petitioner told him he had had two bottles of beer. Blake further stated that defendant's eyes were dilated; that he was unsteady on his feet; that his speech was thick; that he had difficulty in walking and that it was necessary to escort him.

Dr. Foster, who treated defendant at the county hospital for injuries he had sustained as a result of the accident, testified that he would say the petitioner had been drinking; that no clinical test for liquor was given the defendant; that his opinion was based solely upon what he observed; that the defendant gave reasonable answers to questions; that his manner was rather abrupt and excited; that he thought it was more than beer; that his impression was that he had had some wine.

The state rested its case on such showing.

It is obvious that such evidence is extremely weak, particularly on the two necessarily concurrent elements of the crime as charged; that is (1) that the defendant was under the influence of intoxicating liquor, and (2) that while driving his car in such condition, he committed an act forbidden by law or neglected to perform a duty imposed by law, which proximately caused bodily injury to a person.

[1] As stated in People v. Levens, 28 Cal.App.2d 455, 459, 82 P.2d 698, 699: "In order to sustain a conviction under section 501 of the Vehicle Code, it must appear in the evidence adduced at the trial not only that the defendant therein was driving an automobile while under the influence of intoxicating liquor, and that while in such condition he committed some act forbidden by law, or that he neglected to perform some duty imposed by law, but in addition that such act, or such neglect, proximately caused bodily injury to some person." And as stated in People v. Freeman, 16 Cal.App.2d 101, 103, 60 P.2d 333, 334: "The mere act of driving a vehicle upon a public highway while intoxicated is an unlawful act. Section 502, Vehicle Code (St.1935, p. 174). Whether it is a felony or misdemeanor depends upon the facts and circumstances in the case. Section 501, Vehicle Code (St.1935, p. 174)." The facts of each particular case must, therefore, determine whether the acts shown to have been committed constitute a violation of the statute upon which the charge is based.

Assuming, but not so deciding, the evidence that the petitioner was under the influence of intoxicating liquor was sufficient under the rule as stated in People v. Dingle, 56 Cal.App. 445, 205 P. 705, and People v. McKee, 80 Cal.App. 200, 251 P. 675, was the mere showing that petitioner drove his car at an estimated speed of fifty-five miles an hour, and during which time he momentarily drove onto the left portion of the highway then back again to the right side and ultimately over the embankment, sufficient to come within the provisions of Section 501 of the Vehicle Code? Respondent insists that the question should be answered in the affirmative and that no further evidence is necessary.

[2-4] Under Vehicle Code, Sections 510, St.1935, p. 176 (basic speed law) and 511, St.1941, p. 2716 (prima facie speed limits), speed alone cannot be considered as unlawful without additional evidence as regards such speed in relation to the physical facts of the surface, width and general characteristics of the highway, together with traffic conditions as of that time. In the absence of a showing herein, either that the circumstances required a slower speed than the evidence disclosed or that the one failure to comply with the terms of Section 525 of the Vehicle Code, St. 1941, p. 2722 (driving on the right side of highway), proximately caused the fatal injury to Nevins, it cannot be said that petitioner's driving was such as to bring his actions within the prohibitions of Section 501 of the Vehicle Code. The criterion in such cases must be the reasonableness of the speed in relation to the physical facts surrounding the highway and its use at the particular time. People v. McKee, supra.

[5, 6] We cannot agree with petitioner's final contention that the evidence which placed the scene of the accident six and one-half miles south of Grass Valley on the Auburn highway, number 49, fails to show venue. It is true such evidence is not wholly satisfactory, but as this court said in People v. Bastio, 55 Cal.App.2d 615, 617, 131 P.2d 614, 616: "Venue in a criminal case need not be proven beyond a reasonable doubt." People v. Montgomery, 32 Cal.App.2d 43, 89 P.2d 184; People v. De Soto, 33 Cal.App.2d 478, 92 P.2d 466.

Courts may take judicial notice of geographical facts. Sec. 1875, C. C. P. By an examination of a map of this state showing the county subdivisions, it is readily apparent that the highway in question runs in a southerly direction from the city of Grass Valley for a distance of approximately fifteen miles before crossing the Placer county line. Such facts are well established and authoritatively settled. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889.

[7] From the record as presented to this court the conclusion is inescapable that the petitioner was committed on a criminal charge without reasonable or probable cause. Ex parte Whitlatch, 60 Cal.App.2d 189, 140 P.2d 457.

The petitioner is discharged.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 281

DRAPER et al. v. GRIFFIN.

Civ. 3204.

District Court of Appeal, Fourth District, California.

Nov. 8, 1943.

1. Boundaries ⇐37(5)

In action to quiet title, wherein defense was based on an agreed boundary line, evidence did not sustain finding that there was no agreement as to the boundary line.

2. Boundaries ⇐46(3)

Where parties have acquiesced in location of agreed boundary line for period equal to that of statute of limitations or under such circumstances that substantial loss would be caused by a change, line located becomes the true line regardless of accuracy of agreed location.

3. Boundaries ⇐46(3)

A calf or pig pen erected on disputed property was not a "valuable improvement" so as to bring into operation the rule requiring enforcement of agreed boundary contract, where owner of one parcel erects valuable improvements on his property up to the agreed boundary without objection from other owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Valuable Improvement".

4. Boundaries ⇐46(3)

A boundary agreed to by plaintiffs' and defendant's predecessors was no defense to action to quiet title, where agreement did not remain unchallenged for period equal to statute of limitations and it was not inequitable to disregard the agreement.

5. Boundaries ⇐46(2)

An enforceable contract establishing agreed boundary line is binding on parties and their successors in interest, but a stranger to chain of title may not benefit by such agreement.

6. Appeal and error ⇐1071(5)

A finding is immaterial where contrary finding would not require entry of judgment different from the one rendered.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by F. A. Draper and another against E. B. Griffin to quiet title to a lot. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for appellant.

Charles D. Warner, of Chino, for respondents.

MARKS, Justice.

Plaintiffs brought this action to quiet their title to Lot 15, Section 34, Township 1 South, Range 8 West, S. B. B. & M., in San Bernardino County. Defendant's answer interposed several defenses but we are only concerned with one here, that of an agreed boundary line. The trial court found against this defense, quieted plaintiffs' title to all of Lot 15, and defendant has appealed. The sole ground urged for a reversal of the judgment is that the finding against there being an agreed boundary line between the properties of the parties, under an agreement between former owners, is contrary to all of the evidence in the case.

Prior to August 16, 1937, Lawrence M. Lowry, and perhaps Della B. Lowry, his wife, were the owners of Fractional Lot 2 and Lot 15 in the subdivision in question. A map of the tract had been duly recorded in San Bernardino County, subdividing it into acreage lots. No measurements of the dimensions of these lots appear on what purports to be a copy of the map we have before us although the trial court found that measurements and distances appear on the recorded map. Both lots were farmed by Mr. Lowry who had not had them surveyed. There was nothing on the ground to indicate the dividing line between the two lots.

Fractional Lot 2 adjoins Lot 15 on the north. A road which runs from northeast to southwest forms the northern boundary of Lot 2 so that its east boundary is longer than its west boundary. On August 16, 1937, Mr. and Mrs. Lowry deeded Fractional Lot 2 to Anna E. Humphrey and A. Elizabeth Lane, who we will assume were defendant's predecessors in interest although proof of the chain of title is lacking. The deed called for "4 or more acres".

Mrs. Humphrey and Mrs. Lane went into possession a short time after the date of their deed and not long thereafter had a

conversation with Mr. Lowry about the location of the boundary line between the two lots. Neither party knew where the line ran. There is undisputed evidence to the effect that Mr. Lowry pointed to an irrigation stand pipe and told the two ladies that they would start the line there and run it down the center of a space between the two rows of walnut trees to the lines of the property; that this would give both owners turning room in the space; that stakes were placed along this line and remained there for at least thirteen months; that both parties acquiesced in this and cultivated their properties up to that line for that period of time. The west end of this agreed boundary line was 68.15 feet south of the true southwest corner of Fractional Lot 2, and 9.98 feet south of its true southeast corner so that a little more than one-half acre was added to the lot by the agreed line. Defendant was in possession up to that line when this action was filed. A chicken house was on Lot 2 but extended over onto the disputed property. During their ownership Mrs. Humphrey and Mrs. Lane built a calf or pig pen partly on Lot 2 and extending over onto the disputed property.

Defendant purchased Fractional Lot 2 from James M. Knight and Leafa M. Knight, his wife, and took title under a grant deed dated November 19, 1940. He went into possession of Fractional Lot 2 together with the part of Lot 15 between the true south boundary and the agreed boundary. His possession was not questioned until shortly before this action was filed on October 11, 1941.

Under date of September 26, 1939, Lawrence M. Lowry conveyed Lot 15 to Della B. Lowry, his wife, as her separate property. By deed dated January 19, 1940, Della B. Lowry conveyed "Fractional Lot 15 * * *" to plaintiffs F. A. Draper and Mary M. Draper, his wife. There is evidence in the record to the effect that Mr. Lowry pointed out the agreed boundary line as the north line of Lot 15 to Mr. Draper before this conveyance, although there is other evidence to the contrary.

After Mr. and Mrs. Draper went into possession they employed an engineer who located the true boundaries of Fractional Lot 2 and of Lot 15 and discovered that defendant was in possession of the northerly part of Lot 15. Plaintiffs notified defendant of that fact, and, as he refused to surrender possession, this litigation followed.

[1] From what we have said it is clear that Mrs. Humphrey and Mrs. Lane and Mr. Lowry were uncertain as to the boundary separating their properties; that to avoid trouble between themselves, and to settle the uncertainty, they agreed on the boundary line we have already described. To that extent the finding to the effect that there was no agreement as to this boundary line is contrary to the evidence. However, there remains the question of the legal effect of this agreement and its binding force on the parties to this litigation.

There are numerous reported cases in California where the question of an agreed boundary was before the court. While there is some divergence of opinion on some details, the main principles on which the doctrine rests are well settled.

[2] The general rule in effect here governing cases of this kind is thus stated in Young v. Blakeman, 153 Cal. 477, 95 P. 888, 889: "* * * the rule has been established that when such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. * * * It is stated by the authorities that the line so agreed on becomes in legal effect the true line; that the agreement as to the line may be in parol, and that it does not operate to convey title to the land which may lie between the agreed line and the true line, but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds, and not by virtue of the parol agreement; that 'the division line, when thus established, attaches itself to the deeds of the respective parties and simply defines, not adds to, the lands described in each deed'; and that, if more is thus given to one than the calls of his deed actually requires, he 'holds the excess by the same tenure that he holds the main body of his lands.'" (Citing cases.)

In Loustalot v. McKeel, 157 Cal. 634, 108 P. 707, 710, quoting from Sneed v. Osborn, 25 Cal. 619, 626, it is said: "'The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry.'" (Citing cases.)

The foregoing rules have been very generally followed in numerous cases, of which we cite the following: Dierssen v. Nelson, 138 Cal. 394, 71 P. 456; Price v. De Reyes, 161 Cal. 484, 119 P. 893; Grants Pass Land, etc., Co. v. Brown, 168 Cal. 456, 143 P. 754; Marcone v. Dowell, 178 Cal. 396, 173 P. 465; Silva v. Azevedo, 178 Cal. 495, 173 P. 929; Huddart v. McGirk, 186 Cal. 386, 199 P. 494; Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 200 P. 651; Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 P. 803; Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Cosgrave v. Donovan, 52 Cal. App. 625, 199 P. 808, 810; Agmar v. Solomon, 87 Cal.App. 127, 261 P. 1029; Phelan v. Drescher, 92 Cal.App. 393, 268 P. 465; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877.

As we have already pointed out, the agreement between Mr. Lowry and Mrs. Humphrey and Mrs. Lane, fixing the boundary line, was entered into within two months after August 16, 1937. This action was filed on October 11, 1941. The owners of Fractional Lot 2 did not have possession of the property up to the agreed boundary line for a period equal to the statute of limitations so we must next explore the question of the sufficiency of the evidence to show a substantial loss to defendant making it inequitable to refuse to recognize the agreed boundary as the true boundary line dividing the properties.

One instance of such inequity is where the owner of one parcel points out the agreed boundary as the true boundary to a prospective purchaser who parts with the purchase price while relying on that representation, believing it to be true. Grants Pass Land, etc., Co. v. Brown, supra. We have no such situation here. The agreement was made after the purchase of the property by Mrs. Humphrey and Mrs. Lane and no claim is made that defendant or his predecessors in interest parted with anything of value in reliance on any such boundary agreement.

[3] Another frequent example of the enforcement of an agreed boundary contract is where the owner of one parcel erects valuable and permanent improvements on his property up to the agreed boundary without objection from the other owner. The only improvement erected on the disputed property was the calf or pig pen we have mentioned. It can hardly be classed as a valuable improvement bringing the case within this rule.

[4] We can see nothing inequitable in requiring the parties to recognize the true boundary between their properties. The deed to Mrs. Humphrey and Mrs. Lane purported to convey "4 acres or more". They were 4.58 acres in Fractional Lot 2, so without adding to their property any part of Lot 15 lying north of the agreed boundary they received that for which they paid. The deed to defendant conveyed "Fractional Lot 2", without estimating its acreage, so the judgment gives him exactly the land for which he bargained. There can be no inequity in this award.

We have thus far assumed that defendant was a successor in interest of Mrs. Humphrey and Mrs. Lane. The evidence does not show this to be a fact as it is silent on that question.

[5] In the decisions already cited it is repeatedly held that a valid and enforceable contract establishing an agreed boundary line is binding on the parties and their successors in interest. We have been cited to no case holding that a party may benefit by such an agreement made by one who is a stranger to his chain of title.

[6] From what we have said it is evident that the finding that Mr. Lowry and Mrs. Humphrey and Mrs. Lane did not agree on a line dividing their properties, thus settling an uncertainty as to the location of the true line, is contrary to the evidence. However, that fact cannot affect our decision. That agreement cannot be enforced because it did not remain unchallenged for a peroid equal to the statute of limitations and because it is not inequitable to disregard it. A finding is immaterial where a contrary finding would not require the entry of a judgment different from the one actually rendered. Janke v. McMahon, 21 Cal.App. 781, 133 P. 21.

The judgment is affirmed.

BARNARD, P. J., and Griffin, J., concur.

61 Cal.App.2d 315

**ADAMS v. BLOOM et al.
(DUNGAN, Intervener).
Civ. 12366.**

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1943.

Rehearing Denied Dec. 11, 1943.

Hearing Denied Jan. 11, 1944.

1. Trusts ⇐103(1)

In transfer of property, if there is evidence of strong affection, high regard, and great confidence in business and personal integrity of transferee, relationship demands a high degree of fidelity on part of transferee.

2. Trusts ⇐103(1)

If parties be friends and grantor repose confidence in grantee, especially if in addition there exist an advisory business relationship and the one reposing confidence be of advanced age, an "implied trust" may result.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Trust".

3. Appeal and error ⇐1008(1)

The amount of evidence necessary to establish confidential relationship ordinarily rests with trier of facts.

4. Trusts ⇐91

The purpose of decree declaring a constructive trust is to defeat or prevent fraud.

5. Trusts ⇐103(1)

That transferee agreed to discharge encumbrance on transferred property, to pay transferor's debts, and to reconvey the property, and that transferee made payments, did not preclude creation of "constructive trust" on theory that transferee was not unjustly enriched where promises constituted but one consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

6. Trusts ⇐91

Ordinarily the inducement, irrespective of number of promises, is the test in determining creation of "constructive trust".

7. Trusts ⇐371(2)

In action to quiet title to property conveyed to plaintiff by defendant, cross-complaint, considered as a whole, sufficiently alleged a confidential relationship between defendant and plaintiff and that plaintiff had promised to reconvey the property as basis for declaration of a constructive trust.

8. Trusts ⇐110

In action to quiet title to property conveyed to plaintiff by defendant, evidence warranted judgment for defendant on his cross-complaint on theory of a constructive trust on ground that property had been conveyed when confidential relationship existed between defendant and plaintiff and property was to be reconveyed to defendant.

9. Appeal and error ⇐1012(1)

The weight and value of evidence are for trial court.

10. Trusts ⇐365(1)

In action to quiet title to land conveyed by defendant to plaintiff, wherein cross-complaint sought to have declared a constructive trust which arose by operation of law upon plaintiff's repudiation of oral promise to reconvey the land and because of unjust enrichment, defendant was not precluded from obtaining relief because no time had been fixed for reconveyance, and reasonable time had elapsed, since repudiation definitely occurred when plaintiff filed the action to quiet title.

11. Judgment ⇐539

Under judgment in quiet title action, which provided that upon defendant's failure to pay a certain sum within 90 days plaintiff would be entitled to decree, and which required an accounting by plaintiff as trustee, plaintiff was not entitled to decree quieting her title on ground that defendant had not made an unconditional deposit to credit of plaintiff immediately, where, in accordance with suggestion of plaintiff's attorney defendant deposited amount required with an abstract company in escrow and attorney was advised of such deposit. Civ.Code, § 1500.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by D. Adams against Paul Talbott to quiet title to certain property conveyed to plaintiff by defendant, wherein defendant filed a cross-complaint, seeking a reconveyance thereof, and wherein J. M. Dungan intervened. From a judgment for defend-

ant, the plaintiff appeals and, following defendant's death, Hazel Bloom and another, executrices of defendant's estate, were substituted as defendants and respondents.

Affirmed.

George Olshausen, of San Francisco, for appellant.

Harvey C. Miller and Fred A. Wool, both of San Jose, for respondents.

WARD, Justice.

This is an action to quiet title to certain property conveyed to plaintiff by defendant Paul Talbott, who cross-complained, seeking a reconveyance thereof. A judgment in defendant's favor, dated June 19, 1939, holding that the property was held in trust and directing its reconveyance upon certain conditions, further declared that an intervener, creditor of Talbott, was the holder of a junior lien on the property in a specified amount. Subsequent to the present appeal by plaintiff, Talbott died, and his daughters, the executrices of his estate, were substituted as defendants and respondents. The intervener has not appealed. For convenience Talbott will be referred to herein as the defendant.

The defendant, at the time of the conveyance, was a widower eighty-one years of age; he had recently undergone a serious operation, as the result of which he was nervous and excitable; he had also being drinking more than was usual for him, but he was, nevertheless, mentally alert. Business relations between plaintiff and himself over a period of years had been followed by friendly social relations, which had ripened into a regard and affection, demonstrated in embraces and kisses. One witness described plaintiff's manner toward defendant as "loving and sort of gushing like." She gave him business advice, assisted him in negotiating sales, and conducted negotiations for him with bank officials. She also loaned him money from time to time which was repaid.

The complaint, in the ordinary form of an action to quiet title, recites the deed and a consideration of ten dollars, the conveyance on its face being absolute. The answer was a general denial; the cross-complaint alleged that a confidential relationship existed between the parties; that plaintiff promised defendant that if he would transfer the property to her she would preserve and manage it, from the proceeds thereof pay his debts, discharge an encumbrance on the property, and otherwise aid him in extricating himself from his financial difficulties; and, further, would reconvey the property to him when all of his debts were paid. Defendant prayed that it be reconveyed to him subject to any amount found to be due plaintiff.

The answer to the cross-complaint alleged that defendant was threatened with foreclosure of the property, the value of which was less than the encumbrance against it; that he feared a deficiency judgment, and, because he was a county supervisor, dreaded the humiliation, chagrin and loss of prestige incident to a sale of his property from the "courthouse steps," as plaintiff testified; that he asked her to take over the property, pay his debts and discharge the encumbrance, reserving for himself the right to repurchase the property within one year for a specified amount, with interest; and that these were the conditions under which the property was conveyed to her. The answer to the cross-complaint further alleged that defendant subsequently advised plaintiff that he would not be able to repurchase the property within the agreed period of time and that, relying thereon, plaintiff improved the property at great expense to herself.

The trial court, with immaterial exceptions, found generally in favor of the defendant. The findings sustain the allegations of the cross-complaint. Specifically the court found that:

"On and prior to said date, the most confidential relations existed between the plaintiff and the defendant, and the defendant reposed the greatest trust and confidence in said plaintiff, and advised with her in his business affairs, and believed that the plaintiff would deal fairly and justly with him in all things.

"That on and prior to said date, the plaintiff, knowing him to be an old man of ill health, frequently and falsely represented to him, the said defendant, that she was the defendant's special and warm friend; that she was anxious to befriend him, protect and aid him in his business affairs, that she was worth a million dollars and could easily advance money to pay the debts of the defendant; that the plaintiff requested the defendant to transfer said property to her, and promised and agreed that if the defendant so transferred said property to her and let her in possession of the same, she would protect, care for,

preserve and manage the same for the plaintiff and in his interest, and out of the proceeds therefrom pay the plaintiff's debts and provide him with sufficient money to furnish him with the necessities of life, and that she would reconvey the said property to him when all of his debts were paid."

The reconveyance, however, was never made. As a conclusion of law it was determined that the plaintiff should reconvey the property upon defendant's payment to her of approximately $4,000. The court further found "that * * * it is not true that plaintiff has failed or refused to pay the debts of the defendant as she promised and agreed to do, and in this behalf the Court finds that the plaintiff has complied with her promise to pay the indebtedness of said defendant, out of the trustee estate, except that she did not pay the indebtedness to the Intervener's Assignor." (Appellant in her opening brief states that any ambiguity as to whether she "agreed to use her own money" in the management and preservation of the property is immaterial.) There was a further finding that upon a reconveyance of the property, but not otherwise, it should be subject to a junior lien of the intervener. The judgment will be discussed later.

Appellant contends as follows: "First: The oral agreement between the parties was of no legal significance and could in no way modify the deeds on any theory of constructive trust for two reasons: (1) There was other consideration besides the promise to reconvey; (2) The parties were not in confidential relations. Second: The oral agreement is not effective on the ground of actual fraud, because there is no evidence to support actual fraud. Third: If the agreement be considered, the plaintiff is entitled to judgment even under the respondent's version of the facts."

The recent case of Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31, involving the relationship of uncle and nephew, wherein the court referred in detail to many cited cases, is of assistance in the consideration of the above contentions. There, as in the present case, the statute of frauds and the parol evidence rule were involved, and it was held (60 Cal.App.2d at page 119, 140 P.2d at page 33) primarily upon the authority of Taylor v. Morris, 163 Cal. 717, 127 P. 66, that fraud arises upon repudiation of a trust even if the trust rests in parol; that (60 Cal.App.2d at pages 119, 120, 140 P.2d 33): " 'When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail.' " "* * * a constructive trust arises and will be enforced to compel restitution upon violation of the oral promise." The court further declared (60 Cal.App.2d at page 122, 140 P.2d at page 34): "The basis of the confidential relationship exception is that under § 2224 of the Civil Code the equity courts will prevent one person who is in a confidential relation with another from becoming unjustly enriched by reason of a breach of the trust. It would seem, therefore, that a confidential relation in fact should be the test. Under such a test relief would be afforded in practically every case where there is a breach of the oral promise to reconvey. Few cases will arise where one person will convey property to another by absolute deed, and where the grantor will be satisfied with the oral promise of the grantee to reconvey, unless the grantor, in fact, has trust and confidence in the integrity and fidelity of the grantee. The result is that under such a test the exception tends to swallow up the rule to which it is supposed to be an exception. That is exactly what has happened in this state. The cases are clear that where there is some sort of a status between the grantor and the grantee, and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey. * * * [Citing cases.]"

[1] The trend of judicial decision on this question is definitely not to confine the application of the principle to established business or blood relationship or the relationship of husband and wife, as in People v. Ahern, 31 Cal.App.2d 655, 88 P.2d 787, involving an aunt and a nephew by marriage. In McRae v. McRae, 67 Cal.App. 480, 227 P. 933, the parties were merely engaged, but subsequently married. It was held that a trust had been imposed prior to marriage in respect of the wife's separate estate. In Anderson v. Broadwell, 119 Cal. App. 130, 6 P.2d 260, the parties were brothers-in-law. In the transfer of property, if there is evidence of strong affection, high regard and great confidence in the business and personal integrity of the transferee (Steinberger v. Steinberger, supra), a relationship is created which demands a high degree of fidelity on the part of the transferee.

[2, 3] It is not essential to show a relationship by affinity or consanguinity, or that the business transacted established a particular relationship between the parties, such as attorney and client or principal and agent. If the parties be friends, and the grantor repose confidence in the grantee, especially if in addition there exist an advisory business relationship, and the one reposing confidence be of advanced age, an implied trust may result. Bradley Co. v. Bradley, 37 Cal.App. 268, 173 P. 1013; Cox v. Schnerr, 172 Cal. 371, 156 P. 509. The amount of evidence necessary to establish such relationship ordinarily rests with the trier of the facts. Airola v. Gorham, 56 Cal.App.2d 42, 133 P.2d 78. No rule may be declared which would definitely determine in every case whether such relationship existed. The relationship of husband and wife, or attorney and client, in and of itself lightens the burden of proof borne by the party alleging a confidential relationship, but does not necessarily prove, unless the evidence be clear, satisfactory and legally sufficient, that a trust has been imposed. Steinberger v. Steinberger, supra, contains references and citations interesting on this question. "The trust may be enforced where it appears that they were merely friends." 25 Cal.Jur., pp. 163–164, sec. 33; Scovill v. Guy, 205 Cal. 386, 270 P. 934. In Bank of America v. Sanchez, 3 Cal.App.2d 238, 243, 38 P.2d 787, 789, the court said: "The first exception above noted is not limited to those cases in which there exist confidential or fiduciary relations in the strict sense of those terms as ordinarily understood to apply to persons in various legal relations in which the law imports a fiduciary relationship, but has been extended to every possible case in which a fiduciary relation exists as a fact. Such relation need not be legal; it may be moral, social, domestic, or merely personal." 2 Jones on Evidence, 1913 Ed., sec. 190; Cox v. Schnerr, supra; Feeny v. Smiley, 115 Cal.App. 597, 2 P.2d 220.

Appellant calls attention to the finding of the court that there was not only the contingent obligation to reconvey, but also that appellant agreed to discharge the encumbrance on the property and to pay defendant's debts, and that such payments were in fact made. From the findings appellant argues that it is necessary that there be no other consideration for the deed than the promise to reconvey or hold in trust, because the purpose of imposing a constructive trust is to preclude the transferee from being unjustly enriched so that where the transferer receives other benefits the transferee is not unjustly enriched and the transferer does not suffer an unjust disadvantage.

[4-6] Appellant's fundamental concept of the purpose of a decree declaring a constructive trust is correct; it is to defeat or prevent fraud. But the fallacy of appellant's further contention is demonstrated when applied to the facts of this case. It is just as inequitable where the transferer contracts to receive two designated considerations and receives only one, as where he is promised only one and there is a failure to obtain that one. If appellant's theory were correct, a transferee with a fraudulent intent could insert several considerations disconnected one from the other, and thereby prevent the party aggrieved from obtaining a judicial declaration of a constructive trust. In the present case the promise to pay the indebtedness is interwoven with the promise to reconvey. The parties agreed that the transferee should be indemnified from the profits and proceeds of the property. There was to be no reconveyance unless there was reimbursement. The promises, though referred to by appellant as separate, constituted in fact one promise, the first contingent upon the happening of a specific event. The two promises made up but one consideration. Under such circumstances the language used in certain decisions cited by appellant are not appropriate to the facts in the present case. Relative to recently decided cases, in Burns v. Campbell, 17 Cal.2d 768, 112 P.2d 237, 240, the decision is based in part upon the distinction between "no consideration" and "inadequacy of consideration." In Holtze v. Holtze, 2 Cal.2d 566, 42 P.2d 323, it was held that the grounds for a constructive trust were entirely lacking—the three parties therein were to devote their efforts to putting property on a paying basis, and when sold the proceeds were to be divided equally. In that case there might have been an unjust enrichment. Such facts are unlike those here as hereinbefore indicated. Ordinarily the inducement, irrespective of the number of promises, is the factor in determining whether a constructive trust has been raised. Constructive trusts have been declared in California although there appeared consideration additional to the promise to reconvey or hold in trust. Co-

oney v. Glynn, 157 Cal. 583, 108 P. 506; Bradley Co. v. Bradley, 37 Cal.App. 263, 173 P. 1011; Hays v. Gloster, 88 Cal. 560, 26 P. 367.

It is a matter of indifference "whether it be said that plaintiff is seeking to enforce a voluntary trust which has been repudiated by the trustee, or whether it is seeking to enforce an involuntary trust arising in law from that repudiation." Bradley Co. v. Bradley, 165 Cal. 237, 240, 131 P. 750, 751. The inducement, whether expressed in one or more promises, which may be reasonably construed as an entire transaction containing one consideration, is the test in determining the creation of a constructive trust. Lasher v. Faw, 209 Cal. 726, 289 P. 821. In Airola v. Gorham, supra, though the specific point herein was not raised, it was held that subsequent promises may be considered in determining good faith and inducement as applied to the facts of the case. Upon the facts herein we are not called upon to decide definitely whether two considerations, one independent of the other, may create such a trust.

[7-9] Appellant urges that the allegations of fact creating the confidential relationship, and hence the findings thereon, are insufficient. When the cross-complaint is read and analyzed, there is more than a general averment of such a relationship. If the allegations are separately considered, there may be some merit to the contention, but when considered together a complete story is related which is sufficient in detail to resemble, though based upon slightly different facts, the cases of Cooney v. Glynn, supra; Cole v. Manning, 79 Cal. App. 55, 248 P. 1065; Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; Becker v. Schwerdtle, 141 Cal. 386, 74 P. 1029; Wilson v. Cooper, 126 Cal.App. 607, 15 P.2d 174, which are founded upon allegations showing a violation of a parol promise and which, if established, constitute the fraud which would give rise to the trust. The evidence is sufficient to support the findings, and the findings justify the judgment on the points thus far considered. It is the province of the trial, not the reviewing, court to determine the weight and value of the evidence. Cox v. Klatte, 29 Cal.App.2d 150, 84 P.2d 290.

[10] Appellant contends that if the oral agreement is binding as found by the court, there was still no definite time fixed for reconveyance; that under such circumstances a reasonable time has elapsed and that since the defendant has not repaid advances made by her, she is under no duty to reconvey. In support of this contention attention is called to the date of the conveyance to her, the date of the filing of the cross-complaint and that the first offer of payment was not made until some time later. Attention is also called to certain testimony, given by defendant in a supplementary proceeding, wherein he stated in effect that he had no interest in the property and did not expect it to be returned to him.

The contention is without merit. Without discussing the cases cited by appellant, some of which were actions to enforce an oral agreement, which was met by the defense of the statute of frauds and the parol evidence rule, it is sufficient to say that the present action is to have declared a constructive trust, which arose by operation of law upon the repudiation of the promise to reconvey, and because of the unjust enrichment of the promisor. Regardless of any implied time, appellant has been unjustly enriched, and the repudiation definitely occurred when she filed this action to quiet title. The constructive trust could have continued for many years following her repudiation of the agreement. The offer to reimburse may also be considered under another heading.

The judgment herein was entered on June 19, 1939, and notice thereof served on plaintiff on June 21, 1939. In Adams v. Talbott, 20 Cal.2d 415, 126 P.2d 347, the defendant herein contended that the notice of appeal, filed on November 9, 1939, was from the judgment of June 19, 1939, and that the time for its filing had expired, or, if the judgment be considered interlocutory, an appeal would not lie therefrom. The court did not determine whether the judgment was interlocutory or final, saying in this regard (20 Cal.2d at page 418, 126 P. 2d at page 349):

"If the judgment of June 21, 1939, was interlocutory, the order of October 23, 1939, became a final adjudication of the issues and the appeal therefrom was proper and timely. If the judgment of June 21, 1939, was the final judgment, the order of Ocotober 23, 1939, would be a special order made after final judgment and be appealable. § 963, subd. 2, Code Civ.Proc.

"The trial court was therefore in error in terminating the proceedings on appeal on

the ground that the appeal was filed too late."

In view of our conclusion herein on the vital issues, it is not necessary to consider respondents' contention that the June judgment was final and that the issues, the existence of a trust and the compliance with the oral agreement, adjudicated by that judgment, are issues already adjudicated. If the June judgment was final, there was still something to be adjudicated which could not be considered intelligently without reference to the record prior to the June judgment.

[11] Approaching the next contention of appellant—that under the terms of the June judgment she is entitled to judgment herein—the historical background is specifically set forth in Adams v. Talbott, supra, 20 Cal.2d at pages 416, 417, 126 P.2d at page 348, as follows: "The judgment provided that the plaintiff hold the real property as trustee for the defendant and that she reconvey it to him upon the condition that the defendant pay to her the sum of $4,909.97, together wtih accruals to be determined by the court on the final account of the trustee. The judgment provided that in the event of failure to perform the condition within ninety days from the entry of judgment the plaintiff would be entitled to a decree quieting her title in the property. Notice of entry of judgment was served on the plaintiff on June 21, 1939. The plaintiff filed a 'First and Final Account of Trustee and Application to Settle said Account and Dismiss trustee,' on October 10, 1939. On October 16, 1939, the court entered its order that the trust estate was indebted to the plaintiff as trustee in the sum of $2,893.50, and settling and approving the trustee's account. On October 17, 1939, the plaintiff filed a notice of motion for a judgment quieting her title upon the ground that the defendant had not complied with the condition stated in the judgment. On October 23, 1939, the court entered an order denying the motion based upon a finding that the defendant had been ready, willing and able and had offered to comply with the condition within the ninety-day period, and that the plaintiff forthwith reconvey the property pursuant to the judgment of June 21, 1939."

It should be noted that on September 13, 1939, defendant requested an accounting as required by the judgment. There is testimony to the effect that at that time the attorney for plaintiff stated that a short delay would be necessary, and in accordance with his suggestion defendant deposited the amount required with an abstract company in escrow, the abstract company advising plaintiff's attorney of the deposit. About a month later the account was settled, and the next day plaintiff filed a notice of motion for judgment quieting her title to the property. She contended that defendant had not substantially or otherwise complied with the conditions specified by the court to be performed by him within ninety days. Her main contention was that Civil Code, section 1500 had not been complied with; that an unconditional deposit to the credit of plaintiff had not been immediately made. Bourdieu v. Baker, 6 Cal.App.2d 150, 44 P.2d 587, and similar cases are cited as authority in support of this contention. The Bourdieu case involved an option to purchase, in effect an offer to sell, land, which, if accepted unconditionally and upon the exact terms thereof, would constitute a binding agreement. In the Bourdieu case the escrow instructions accompanying a deposit differed so materially from the terms of the agreement as to constitute a rejection thereof. In the present case plaintiff had not expeditiously rendered an account of her trusteeship and defendant could not make a deposit to her credit in accordance with the order of court in the exact amount due until the account was rendered. The defendant herein had been informed by plaintiff of her inability to "immediately" render the account; in the Bourdieu case the definite sum of money was not paid within the time limit set. In the Bourdieu case a contract was involved; in the present case an order of court.

In the present case the payment to be made was not of an ascertained amount but, under the order of decree, was dependent upon an "account rendered." If the account was not promptly rendered, the court was qualified and empowered to control, modify or extend by direct order or otherwise the conditions specified in order to conform to and bring about equity. Plaintiff in this proceeding has invoked equity; she must therefore do equity.

The judgment is affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.

61 Cal.App.2d 292

WRIGHT et al. v. MUTZ.

Civ. 3232.

District Court of Appeal, Fourth District, California.

Nov. 8, 1943.

1. Partnership ⇐159

Where partner on whom notice of claim of lien upon cattle distrained as estrays was served was in charge of the cattle, the notice, though addressed only to partner on whom it was served, and not to both partners, was sufficient to comply with statute. St.1933, p. 124, § 392; Civ.Code, §§ 2332, 2403, 2406.

2. Animals ⇐61

Under statute requiring service of notice on owner of claim of lien upon animals distrained as estrays, without specifying precise manner in which notice should be given, even if personal service of notice were required, proof of service of notice by registered mail constituted "personal service" and conformed to requirements of statute. St.1933, p. 124, § 392; Civ.Code, §§ 2332, 2403, 2406.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Service".

3. Animals ⇐61

Where there were four separate seizures of cattle as estrays under estrays law, a separate lien attached on each distraint. St.1933, pp. 124–127, §§ 391–402; p. 124, § 392.

4. Animals ⇐61

Purpose of statute requiring service of notice to owner of claim of lien upon animals distrained as estrays is to give owner opportunity to redeem his animals and prevent foreclosure of the lien. St. 1933, p. 124, § 392.

5. Animals ⇐61

Where four separate seizures of cattle as estrays were made on four consecutive days, a single notice to owner of claim of lien within five days from first seizure and within a lesser number of days after subsequent seizures was sufficient to comply with statute, though separate liens attached on each seizure. St.1933, pp. 124–127, §§ 391–402; p. 124 § 392.

6. Animals ⇐61

Fact that distrainer of cattle as estrays under statute demanded a sum in excess of amounts he was authorized to recover did not render his liens void or constitute a waiver of them. St.1933, pp. 124–127, p. 125, §§ 391–402, § 395.

7. Animals ⇐61

An offer by owner of cattle distrained as estrays under statute to distrainer of $100 for distrainer's damages, costs and expenses of distraint and right to pasture owners' cattle on distrainer's property during remainder of season was not a "tender" to distrainer of his costs as required by statute. St.1933, pp. 124–127, §§ 391–402.

See Words and Phrases, Permanent Edition, for all other definitions of "Tender".

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action in claim and delivery by J. Buford Wright and another against Earl C. Mutz to recover possession of thirty cows and six calves. From a judgment for plaintiffs, the defendant appeals.

Reversed.

Luckel, Robnett & Monningh, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiffs possession of thirty cows and six calves, together with costs of suit. Defendant claimed lawful possession of the cattle under the estray laws of the State. Secs. 391 to 402, Inc., Agricultural Code, St.1933, pp. 124–127.

The evidence establishes the following facts: That plaintiffs Cyrus J. Langford and J. Buford Wright, as copartners, were the owners of the cattle; that the cows were branded with the Arrowhead brand; that the calves were unbranded; that these cattle, running unattended, trespassed on defendant's land and were distrained by defendant; that plaintiffs filed this action in claim and delivery on April 29, 1942, and had possession of the cattle taken from defendant and delivered to them.

Defendant attempted to justify his possession of twenty-two of the cows and

four of the calves under a notice or claim of lien, dated April 22, 1942. Objection was made to the introduction of this document, the grounds of objection being restated by counsel for plaintiffs as follows: "* * * one being, as you will recall, that with regard to Mr. Langford there was not personal service, and with respect to Mr. Wright there was not any attempt of service of any kind. The third ground I would like to urge is that the notice itself is not directed to Mr. Wright. It just says, 'to Mr. Cyrus Langford and his agents, to all owners and their agents, and to whom it may concern.'" This objection was sustained.

The same objection was made to a second notice or claim of lien dated April 29, 1942, wherein a lien was sought on eight cows and two calves; to certified copies of the two notices which had been recorded in the office of the County Recorder of San Bernardino County in due time; to affidavits of publication of the two notices in a paper of general circulation in San Bernardino County for the time prescribed by law, and to a receipted bill for the costs of such publications. In this connection it should be noted that counsel for plaintiffs stipulated that the bill was reasonable and defendant testified he had paid the same. It is timely to note that had the objections to the affidavits of publication been made on proper grounds we may concede that they should have been sustained, but not on the grounds stated in the objections. Soares v. Ghisletta, 1 Cal.App.2d 402, 36 P.2d 668.

The basis of the trial court's rulings on all objections appears in the following:

"If I may again ask Your Honor, the ruling at this time is again based upon your theory that we have no lien simply because we failed to give personal notice on the Plaintiff?

"The Court: Yes. That is the theory I am ruling on." It will, then, first be necessary to consider the notices and claims of liens and the manner of their service on plaintiffs.

The notice dated April 22, 1942, opens as follows:

"Notice to Owners, and Others, of
Animals Caught Doing Damage
and Trespassing and
Notice of Time and Place of Sale

"To Mr. Cyrus Langford and his agents, to All Owners and their agents, and to Whom It May Concern:"

This notice was enclosed in an envelope addressed as follows:

"Mr. Cyrus Langford,
14341 Millbrook Dr.,
Los Angeles,
(Sherman Oaks),
Calif."

This was registered, with postage prepaid, and a return receipt requested. Mr. Langford admitted receiving this notice on or about April 23, 1942. It was produced in court by counsel for plaintiffs. We will refer to this notice as Exhibit B.

The notice dated April 29, 1942, claiming the lien on eight cows and two calves distrained on April 26, 1942, has the following:

"Notice to Owners, and Others, of
Animals Caught Doing Damage
and Trespassing and
Notice of Time and Place of Sale

"To Mr. Cyrus Langford and his agents, to Mr. Buford Wright and his agents, to Wright and Langford, a firm name, and its agents, to All Owners and their agents, and to Whom It May Concern:"

It was enclosed in an envelope addressed as follows:

"Mr. Cyrus Langford, and Mr.
Buford Wright,
14341 Millbrook Dr.,
Los Angeles,
(Sherman Oaks),
Calif."

It was also registered with postage prepaid and return receipt requested. Langford admitted receiving this notice and counsel for plaintiffs produced it in court. We will refer to it as Exhibit C.

[1] It is argued that Exhibit B is fatally defective in that it did not notify both owners of the cattle of the claimed lien as it was addressed to Langford only and not to Langford and Wright. This may be true, but the statute does not require such a notice. Section 392 of the Agricultural Code contains the following: "If such lienholder knows the owner of said animal or the person having charge thereof, then, within five days after said animal is seized, he shall, in lieu of filing the notice, notify the owner of said animal, or the person having charge thereof, which notice shall contain the same information as required in a notice to be filed, * * *."

Langford testified that his partner Wright was sick at the time and in a hospi-

tal. The inference is strong from Langford's testimony that he was in charge of the cattle at the time. Under these circumstances notice to Langford was sufficient. Further, we may apply the rule announced in Carstensen v. Gottesburen, 215 Cal. 258, 9 P.2d 831, 832, where it is said: "Nor do we find any merit in the claim that the evidence fails to show that a demand for possession had been made upon the defendant Sheldon. Inasmuch as the appellant and Sheldon were partners and in possession of the barge, a notice to or demand upon either was sufficient. Section 2406 of the Civil Code provides that, 'Notice to any partner of any matter relating to partnership affairs, * * * operates as notice to * * * the partnership. * * *' Moreover, section 2403 of the Civil Code makes an individual partner an agent for the partnership in the transaction of its business, and under section 2332 of the same Code, notice to the agent is notice to the principal."

[2] Plaintiffs argue that service of the notices by mail was not sufficient as the statute requires the lien claimant to notify the owner of the claimed lien. They argue that this requires personal service on the owners, citing Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881.

The Agricultural Code does not specify the precise manner in which the notice of the claim of lien must be given to the owner or the person having charge of cattle. In Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8, 9, it said: "The 'delivery' which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a 'delivery' can be made, and when the notice is so delivered, the service becomes a personal service. The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service, does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency, such as Wells, Fargo & Co., or the instrumentality of the post-office department, with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service."

Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863, and Colyear v. Tobriner, 7 Cal.2d 735, 62 P.2d 741, 109 A.L.R. 191, are to the same effect. We therefore conclude that the notices were properly given and properly served in conformity to the requirements of the statute.

This would seem to dispose of the grounds of the objections made in the trial court. However, as the case must be tried again, and counsel argue other questions which will probably arise at the second trial, it is not out of place to consider them here.

Exhibit B states that ten cows and three calves were distrained on April 18, one cow and one calf on April 19, three cows on April 20, two cows on April 21, and six cows on April 22, 1942. Plaintiffs argue that as separate liens attached on different cattle on each of those four days, four separate notices or claims or liens should have been made.

[3-5] We cannot agree with this argument. It is true that a lien attaches on each distraint. Wigmore v. Buell, 122 Cal. 144, 54 P. 600. To perpetuate such a lien and to permit its enforcement, the notice must be given "within five days after said animal is seized". Here there were four separate seizures of animals on four consecutive days. The notice was given and served within five days from the first seizure and within a lesser number of days after each subsequent seizure. As the purpose of the statute is to give notice to the owner and so permit him to redeem his cattle and prevent foreclosure of the lien, we can see no good reason why four separate notices must be served, where, as here, the notice was served within the time limited by the statute. The same argument cannot be made as to Exhibit C as there was but one distraint and the service of the notice was timely.

[6] Both notices made claims for damages alleged to have been suffered by defendant in excess of the amounts he was authorized to recover. Plaintiffs argue that this rendered his liens void and constituted a waiver of them.

Where the distrainer demands a sum in excess of that to which he is lawfully entitled, section 395 of the Argicultural Code provides the remedy and it does not include waiver or forfeiture of the lien. The argument was made in Blanchard v.

Scarpa, 44 Cal.App. 648, 187 P. 29, 30, under a prior but similar statute, that demand of a larger sum than that legally collectible voided the lien, and was disposed of as follows: "* * * while it is true that the defendant, at the time of the plaintiffs' demand for their said property, claimed a larger sum than that to which he was entitled under the provisions of the Estray Act, nevertheless, under the express terms of section 4 of said act, it was the duty of the plaintiffs, if dissatisfied with the amount charged by the taker-up for costs and expenses, to have tendered to him the amount to which he was properly entitled before commencing suit for the recovery of the possession of their said property. The section of the act in question further expressly provides that 'No return of such animal or animals shall be adjudged until the plaintiff shall pay to the defendant, or deposit in court payable to him, the amount of all such expenses.' These being the terms of the law relating to estrays, it was clearly the duty of the trial court to have sustained the defendant's lien, and to have provided in its judgment for the full payment of the amount to which it had held the defendant entitled. Its judgment was, therefore, erroneous in awarding to the plaintiffs the possession of their said property, and in mulcting the defendant with the costs of the action."

[7] Plaintiffs did not tender defendant his costs as required by the statute, and they deposited nothing in court for him. The judgment did not require them so to do. It is true that Mr. Langford testified that he offered defendant $100 for his damages, costs and expenses of the distraint and the right to pasture plaintiffs' cattle on defendant's property during the remainder of the season. It is clear that this was not such a tender as is required by the statute and contained conditions not contemplated by it.

Nothing we have said should be construed as indicating our belief that all the steps to perpetuate the liens taken by defendant were necessary where he knew the owners of the cattle.

The judgment is reversed.

We concur: BARNARD, P. J., and GRIFFIN, J.

23 Cal.2d 110

DEMPSEY et al. v. MARKET STREET RY. CO. et al.

S. F. 16908.

Supreme Court of California.

Oct. 28, 1943.

Rehearing Denied Nov. 22, 1943.

1. Carriers ⇐347(6)

A street car passenger is not required, as matter of law, to anticipate sudden or violent jerk of sufficient force to throw her to floor of car

2. Appeal and error ⇐1015(2)

In action for injuries to passenger thrown to floor of defendant's street car when it stopped with violent and sudden jerk, where there was substantial conflict in evidence as to whether car was negligently operated, order granting new trial after jury's verdict for defendant will not be disturbed on appeal.

3. Appeal and error ⇐979(2)

Where evidence is in substantial conflict, trial court's exercise of discretion in granting new trial on ground of insufficiency of evidence to support jury's verdict will be upheld on appeal.

4. Appeal and error ⇐933(4)

The statute, providing that order granting new trial for insufficiency of evidence to sustain jury's verdict shall specify such ground in writing and be filed with court clerk within 10 days after motion is granted and that, otherwise, it will be conclusively presumed that order was not based on such ground, does not require that formal order, as distinguished from mere entry in minutes, be written, signed and filed in order to raise such presumption. Code Civ.Proc. § 657.

5. Statutes ⇐181(2)

The Supreme Court should not foster statutory construction which would inaugurate new and complicated procedural steps, when there is another reasonable construction, which achieves purpose of statute, but provides simple and easily understandable method of obtaining same result without departing from well-settled rules of practice.

6. Statutes ⇐231

A Code section should be construed, if possible, so as to give meaning and effect, not only to section as whole, but to each and every part thereof.

7. Constitutional law ⇐12
Statutes ⇐181(2)

Statutes, and even constitutional enactments, must be given reasonable interpretation, and literal construction, which will lead to absurd results should not be given, if avoidable.

8. Appeal and error ⇐933(1)

All intendments on appeal from order granting new trial are in favor of such order.

9. New trial ⇐163(1)

The statutory provision that court may direct party to prepare order granting new trial on ground of insufficiency of evidence to sustain jury's verdict, is not conclusive that minute entry of such order is not sufficient compliance with statutory requirement that order specify such ground in writing and be filed with clerk within 10 days after motion is granted. Code Civ. Proc. § 657.

CURTIS and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by Ilma Dempsey and husband against the Market Street Railway Company for personal injuries to named plaintiff as the result of a fall in defendant's street car. Verdict for defendant, and, from an order granting plaintiff a new trial, defendant appeals.

Affirmed.

Prior opinion, 133 P.2d 849.

Cyril Appel, Ivores R. Dains, George Liebermann, and George E. Baglin, all of San Francisco, for appellants.

George Olshausen and J. K. Hagopian, both of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs, husband and wife, brought this action for damages for personal injuries alleged to have been received by the wife as the result of defendant's negligence. The jury rendered a verdict in favor of defendant, but the trial court granted a new trial, and defendant has appealed from that order.

According to plaintiffs' testimony, they boarded a street car operated by defendant, and Mrs. Dempsey walked through the car to the front. She had her left hand on a stanchion, and was about to step down to the motorman's platform, when the car stopped with a violent and sudden jerk, throwing her forward onto the floor and causing the injuries complained of. Her husband pulled her back to a standing position, where she remained until they had traveled six or eight blocks farther. They left the car without reporting the accident or notifying the motorman or conductor. The accident happened on Friday evening, and on Saturday Mr. Dempsey telephoned to the carbarn and was referred to the office of the company. He called at the office on Saturday afternoon and found it closed, but reported the accident the following Monday morning.

[1] Defendant argues that, as a matter of law, no cause of action was proved for the reason that no unusual movement of the car was shown. While it is true that a certain amount of lurching and jerking is inevitable in the lawful operation of a streetcar (Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Elliott v. Market Street Ry. Co., 4 Cal.App.2d 292, 40 P.2d 547), a passenger is not required, as a matter of law, to anticipate a "sudden" or "violent" jerk that has sufficient force to throw her to the floor. McIntosh v. Los Angeles Ry. Corp., 7 Cal.2d 90, 96, 59 P.2d 959; Karsey v. San Francisco, 130 Cal.App. 655, 659, 20 P.2d 751.

[2, 3] The testimony of plaintiffs was directly contrary to that of the defendant's employees, and created a substantial conflict in the evidence. In this state of the record the jury could have found that the car was negligently operated, and a verdict for the plaintiffs would have been justified. This being so, the lower court's order granting a new trial will not be disturbed, for the rule has long been settled that where the evidence is in substantial conflict the lower court's discretion to grant a new trial on the ground of insufficiency of the evidence will be upheld on appeal. Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010; Peri v. Culley, 119 Cal.App. 117, 6 P. 2d 86.

[4, 5] The order was entered in the minutes within the time prescribed by law and specified the ground of insufficiency of the evidence to justify the verdict. Defendant contends, however, that, under Code of Civil Procedure, section 657, as amended in 1939, there must be a formal order written, signed and filed, as distinguished from a mere written entry in the minutes, when the motion is granted on the ground of insufficiency of the evidence, and that, since there was no such order, we must conclusively presume that the motion was not granted on that ground. With this argument we cannot agree. A litigant should not be deprived of his day in court by technicalities, and we should not foster a statutory construction which would inaugurate new and complicated procedural steps when there is another construction which is reasonable and achieves the purpose of the statute, yet provides a simple and easily understandable method of obtaining the same result without departing from well-settled rules of practice.

[6, 7] A Code section should be construed, if possible, so as to give meaning and effect, not only to the section as a whole, but to each and every part thereof, and it is equally well settled that statutes and even constitutional enactments must be given a reasonable interpretation, and that a literal construction which will lead to absurd results should not be given if it can be avoided. Bakkenson v. Superior Court, 197 Cal. 504, 241 P. 874; Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; Reuter v. Board of Supervisors, 220 Cal. 314, 30 P.2d 417; Walters v. Bank of America Nat. Trust & Savings Ass'n, 9 Cal.2d 46, 69 P.2d 839; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577.

Prior to 1919 there was no requirement that the grounds be stated or specified in an order granting a new trial. In that year, p. 141, and again in 1929 p. 841, and 1939, p. 2234, section 657 was amended, and now provides: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order *shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted;* otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." (Italics added.)

Section 657 is subject to the construction that there must be a separate, formal, written order, in addition to a minute entry,

whenever a new trial is granted for insufficiency of the evidence, but it may also be construed as requiring merely that a written record of that ground must be made within the ten-day period. We feel the latter construction is preferable because it accomplishes the result intended by the Legislature and at the same time conforms to existing practice, retains simplicity and uniformity in procedure, and avoids the introduction of an additional and wholly unnecessary procedural requirement, the failure to observe which would render ineffectual the considered action of a court.

The construction urged by defendant either interprets the amendment as effecting a radical change in long established procedure or it is based on the premise that it is customary for new trial motions to be disposed of by separate written orders. Ordinarily such motions, and in fact most motions, are disposed of by rulings of the court which are entered by the clerk in the minutes. Not only would defendant's interpretation require a decided change in the usual procedure of trial courts, but it would result in a great deal of confusion by providing a new rule different from that applicable to all other orders. Since new trial motions are commonly made on several grounds, it would follow from defendant's construction that if the motion was denied, or if granted on any other ground, the minute entry would suffice and be perfectly valid; but that if the motion was granted in whole or in part on the ground of insufficiency of the evidence, the order would be ineffectual and void insofar as it was based on that ground unless embodied in a separate and supplemental writing. This result would follow notwithstanding that the trial court based its ruling on such ground, that the minute entry expressly so states and that such a construction would nullify the adjudication of the trial court. It would appear just as logical to hold that the Legislature intended a separate written order only when the motion was granted on the single ground of insufficiency of the evidence, and that if granted on any other ground as well, then no separate writing would be required. This result can be reached by a strict, literal interpretation of the Code section, but the result would likewise seem to be absurd. On the other hand, by construing the section as requiring merely that the ground of insufficiency of the evidence be specified in a separate written order or written minute entry made within the time limit, we not only have a reasonable interpretation of the language used, but also one which is in harmony with the existing system of procedure and which, without confusion, accomplishes all the results desired by the Legislature.

The provision of section 657 that the order shall specify the ground of insufficiency of the evidence "in writing and shall be filed with the clerk within ten days," indicates an intent that the ground shall be specified in some unmistakable way and placed of record in writing within the ten-day period. The only essential change in procedure is the requirement that the ground be stated and recorded within the prescribed time limit. "The procedure of recording orders determining new trial motions by minute entry is as old as our judicial system." Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 399, 121 P. 2d 829, 838. The amendments were undoubtedly adopted first, to stop the prior practice by appellate courts of assuming that insufficiency of the evidence was the ground for the order, except where that ground was not stated in the motion or was excluded by the order, and second, to place a limit on the time within which the record may be corrected by a nunc pro tunc order. Both of these purposes are accomplished by a construction which permits the granting of the motion to be by a minute order if the entry specifies the ground of insufficiency of the evidence, and hence it should be immaterial whether the trial court employs a minute entry or a separate formal order, so long as the written record is made within the time limit. This construction of section 657 avoids the undesirable result of requiring a formal, separate written order in this one instance, while permitting a mere minute entry to suffice in all other cases. In a broad sense, an order entered in the minutes is "filed with the clerk" as required by the statute. See Cox v. Tyrone Power Enterprises, supra, 49 Cal.App.2d page 395, 121 P.2d 829.

Section 657, as construed by defendant, would lead to the anomalous result that the order would be valid for all purposes when entered in the minutes if the entry specified the ground of insufficiency of the evidence, but because no formal written order was subsequently deposited with the clerk the order would thereby be deprived of part of

its effectiveness and become partially invalid. It would "constitute a trap for the unwary * * * and produce a multiplicity of miscarriages of justice * * *." Cox v. Tyrone Power Enterprises, supra, 49 Cal.App.2d at page 400, 121 P.2d at page 838. Our procedural statutes are often criticized as containing too many technical, arbitrary distinctions and refinements. Courts should not add to them by construction.

[8] The interpretation of section 657 advocated by defendant would require an appellate court to presume *conclusively* a fact which the certified record itself shows to be false and contrary to fact. It is not reasonable to conclude that this was the intention of the Legislature, especially since such a presumption would conflict with the established policy of the law to have a full hearing on the merits, and with the rule that all intendments on appeal are in favor of an order granting a new trial.

[9] The last sentence of section 657, that "The court may direct a party to prepare the order," may be used to support the claim that a minute entry is not a sufficient compliance with the section. However, it is not conclusive and does not indicate unequivocally what intent the Legislature may have had in amending this section, since it is the common practice of the courts to request counsel to prepare orders and other papers, including proposed minute orders, to assist the court in disposing of its business.

Defendant relies on certain language in Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, 451, wherein two nunc pro tunc orders purporting to grant a new trial on the ground of insufficiency of the evidence were annulled on certiorari. The opinion stated that a prior minute order, which was entered on the day the motion was granted and which specified that it was granted "upon the insufficiency of the weight of the evidence to support the verdict," did not satisfy the requirement of section 657. Whether this statement was dictum, as claimed by plaintiffs, or a necessary part of the opinion, need not be determined here. In view of the conflict with the later cases of Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829, and Gossman v. Gossman, 52 Cal.App.2d 184, 126 P.2d 178, wherein hearings were denied by this court, we have re-examined the question, and we have reached the conclusion that the views in the later cases are correct. Accordingly, the case of Whitley v. Superior Court, supra, is overruled to the extent that it conflicts with the decision herein.

The order granting a new trial is affirmed.

SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

CURTIS, Justice.

I dissent. I cannot agree with the majority opinion in its construction of the last paragraph of section 657 of the Code of Civil Procedure as amended in 1939, which requires that an order granting a new trial on the ground of the insufficiency of the evidence "shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." There is nothing uncertain or ambiguous in the language of this section. It is a cardinal rule of statutory construction that, if possible, a statute or Code section should be construed so as to give meaning and effect, not only to the statute or Code section as a whole, but to each and every part thereof—i. e. to every word and clause and certainly to every distinct or co-ordinate provision or section. 23 Cal. Jur., sec. 133, p. 758.

Prior to 1919, section 657 of the Code of Civil Procedure set forth merely the "Grounds for new trial." In 1919 there was added to the section a new paragraph providing that "When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground." In 1929, the section was again amended, but only in a minor matter. By this amendment the words "on all or part of the issues" were inserted after the word "granted" appearing in the amendment added in 1929. In 1939, the section was amended again by rewriting the amendment of 1919 so as to read as follows: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evi-

dence to sustain the verdict or decision, the order shall so specify *this in writing and shall be filed with the clerk within ten days after the motion is granted;* otherwise, on appeal from such order it will be *conclusively* presumed that the order was not based upon that ground. *The court may direct a party to prepare the order.*" The italicized words appearing above were added by the amendment in 1939 to the section as it formerly read.

Section 657 as thus amended was in force at the date the motion for a new trial was granted in the present action. It is conceded by the majority opinion that no written order was made by the trial court in granting plaintiff's motion for a new trial, but the opinion holds that entry by the clerk in his minutes is a sufficient compliance with the requirement of said section as amended in 1939.

Prior to the amendment of 1939, there was no requirement that the order should be in writing, but by the amendment of that year it was expressly provided that the order should not only be in writing, but that it should be *filed* with the clerk within the time presented. Undoubtedly prior to this last amendment the court could make a verbal order granting such a motion on the ground of insufficiency of the evidence, and its entry in the minutes would be a sufficient compliance with the provisions of the section. That being so, then all that was accomplished by the 1939 amendment, according to the majority opinion, was to require that this order should be made within ten days after the motion was granted. Then why did the Legislature in its 1939 amendment, in providing for a limit to the time in which the order should be made, also expressly provide that the order should be in writing and filed with the clerk? It must have had some reason for making this change in the section, for it followed this express requirement by providing that for a failure to comply therewith, it should be *conclusively* presumed that the order was not based upon the ground of the insufficiency of the evidence. There is another provision of this amended section that tends to support the construction of the section now claimed for it, and that is the last sentence in the 1939 amendment which is not found in the section previous to its amendment in 1939, and which provides that "The court may direct a party to prepare the order." No one, it seems to me, can read the amendment of 1939 as a whole and reasonably conclude that the Legislature had in mind a verbal or oral order as a sufficient compliance with the terms of said section.

The majority opinion holds that a construction of the statute requiring a written order filed by the court might deprive a litigant of his day in court by a technicality, and that the section when so construed would serve as a pitfall into which some innocent and unsuspecting litigant might be entrapped. It must be conceded that the provision of the section in question is certain, definite and unambiguous, and that it expressly provides for a written order filed with the clerk within ten days after the motion for a new trial is granted. No person with ordinary intelligence after reading it, can have any doubt that the section so provides. How then can it be said that the requirement that a litigant observe a plain and unambiguous statute passed by the Legislature would operate to deprive him of his rights by a technicality? How could any litigant be misled or entrapped by such a requirement? The only person who might be misled or entrapped would be one who never read the section as amended in 1939. The respondents surely have no ground on which to base such a complaint. The order granting a new trial in this case was made some two and a half years after the amendment was passed and some eight months after this court had, in the case of Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, construed the section as amended and held that a written order filed by the clerk was required by the section as it then stood. No one who had ever read the Whitley case could have had any doubt as to the meaning of the section as there construed by the court. It is contended that the language of the court in the Whitley case is dictum, or if not dictum, that this court erroneously construed said section of the Code in its decision of that case. Yet at the time the order here was appealed from, that case was the latest expression of this court as to the construction to be given that section of the Code. It was signed by five members of this court without any dissent by any member of the court, and it at least served as a warning to the profession as well as to litigants, including those in the present

action, against any possible pitfall that might by chance be lurking in the law.

Undoubtedly the intent of the Legislature in amending section 657 in 1939 was to make the procedure definite and certain, and it considered the change in the section to be of such importance that, for the first time, it provided that the presumption that the order granting a new trial was not based upon the ground of insufficiency of the evidence should be conclusive.

In my opinion the order granting the new trial should be reversed.

EDMONDS, J., concurred.

Rehearing denied; CURTIS and EDMONDS, JJ., dissenting.



61 Cal.App.2d 401

OTT v. COMMERCIAL DISCOUNT CO. et al.

Civ. 2870.

District Court of Appeal, Fourth District, California.

Nov. 18, 1943.

New trial ⇐163(1)

Where new trial is granted on ground of insufficiency of evidence to justify inadequate verdict, formal order, written and signed by trial judge and filed with clerk, as distinguished from mere written entry in minutes, is not required. Code Civ. Proc. § 657.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Marty Ott against the Commercial Discount Company, Robertson & Durlinger, a copartnership, Grover C. Tucker, and others for personal injuries, sustained as the result of being thrown off the running board of an automobile driven by defendant Tucker, and unlawful taking and conversion of such automobile. Judgment on a verdict for plaintiff against defendants Robertson and Durlinger only, and from an order granting plaintiff's motion for a new trial on ground of insufficiency of evidence to justify an inadequate verdict, defendants appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

Edward B. Patterson, of El Centro, for respondent.

GRIFFIN, Justice.

The complaint sets forth two causes of action. One count alleges that plaintiff was the owner of a 1937 Willys Sedan; that on July 2nd, 1940, while plaintiff was lawfully in possession of it in her garage defendant Tucker, acting as agent for the other named defendants, without her consent, wrongfully removed the sedan from her garage; that she pursued Tucker, overtook him, and demanded return of the car (Tucker was apparently repossessing the car for delinquent payments); that Tucker refused to return it; that plaintiff, in an effort to regain possession of her car, stepped on the running board; that Tucker started up the car suddenly and threw plaintiff off balance and that she fell to the ground, receiving bodily injuries for which she demanded $31,250. The second count restates the foregoing facts and alleges the unlawful taking and conversion of plaintiff's car to her damage in the sum of $200 (her claimed equity in it). Additional damage in the sum of $770 is claimed for loss of its use.

Defendants answered, alleged that Tucker was agent for defendant Robertson, and that plaintiff had executed a chattel mortgage on the car; that payments were delinquent; that Robertson had repossessed the automobile; that after it had been repossessed, plaintiff used force and violence upon Tucker; that plaintiff was not injured but her claimed injuries were feigned or were due to her own conduct. A jury trial was demanded. A verdict was returned as follows: "We, the jury in the above entitled action; find for the plaintiff, Marty Ott, and assess her damages in the sum of $300.00/100 and against these names John Robertson and Clyde Duringer, this 9th day of February, 1942."

Judgment was entered accordingly against Robertson and Duringer only. A motion for new trial was made on the

grounds of inadequate damages, insufficiency of the evidence to justify an inadequate verdict, and on other grounds set forth in section 657 of the Code of Civil Procedure. The trial court granted the motion for new trial on the grounds of the insufficiency of the evidence to justify an inadequate verdict.

The evidence discloses that the hospital and doctor bills alone exceeded the sum of $300. There was considerable medical evidence of injury to her person. She testified that she was unable to work for a period of nine or ten months.

It is conceded that the trial judge did not prepare and file with the clerk any signed order granting the new trial on the ground of insufficiency of the evidence. However, the record shows a written minute entry by the clerk granting a new trial as to all defendants "on the grounds of insufficiency of evidence in that the award is considered wholly inadequate."

Appellant contends that this court cannot consider that question because the order granting the new trial on the grounds of insufficiency of the evidence was not in writing, signed by the trial judge, and filed with the clerk, and cites Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, which case in effect so held. Respondent cites Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829, and Gossman v. Gossman, 52 Cal.App.2d 184, 126 P.2d 178, which hold to the contrary.

Since this appeal has been perfected and its merits argued, the Supreme Court in Dempsey v. Market Street Ry. Co., 142 P.2d 929, has held that under section 657 of the Code of Civil Procedure, a formal order written, signed, and filed, as distinguished from a mere written entry in the minutes, is not required when a new trial is granted on the ground of insufficiency of the evidence (overruling language to the contrary in Whitley v. Superior Court, supra.)

It will not, therefore, be necessary to consider many of the other claimed specified errors, which claims appear to be meritorious. These errors can be avoided on a new trial.

The order granting the new trial is affirmed.

BARNARD, P. J., and MARKS, J., concur.

61 Cal.App.2d 385

KROESEN et ux. v. GORDON.

Civ. 14297.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1943.

Venue ⇨81

Affidavits that plaintiff was well along in years and in very poor health, that it would be extremely dangerous for him to leave city of his residence, and that matter involved in action could not properly be presented in court without his presence, were sufficient to justify superior court of county to which case was transferred for trial from superior court of county of plaintiff's residence in concluding that venue should be changed back to county of such residence on plaintiff's motion.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by W. M. Kroesen and wife against James M. Gordon, individually and doing business as Gordon Distributors Company, to recover damages for fraud. From an order granting plaintiffs' motion for change of venue for trial, defendant appeals.

Affirmed.

Maurice Gordon, of Los Angeles, for appellant.

J. Maxwell Peyser, of San Francisco, for respondents.

PER CURIAM.

This is an appeal from an order granting respondents' motion "for a change of venue for trial" of the herein action to the County of Santa Cruz.

The statement of appellant as to the question involved is as follows: "Was it error for the trial court to grant a motion for a change of venue of an action for damages for fraud (a noncontractual action) from the county of residence of the appellant to the county of residence of respondents upon the ground of convenience of witnesses, (a) where it is not alleged by respondents that any witnesses would be called or used on behalf of respondents other than respondents them-

selves, and (b) where appellant alleges that he will call and use witnesses necessary to the presentation of his defense who reside in and have their places of business in the county from which the action is ordered transferred?"

However, the real question is as stated by respondents in their "restatement of question involved", to-wit: "Is it an abuse of discretion for a Court to grant a motion for a change of venue on the ground of convenience of witnesses and that the ends of justice will be promoted by keeping the place of trial in the county where the action was originally filed, and where it appears that the affidavits of the moving parties and the counteraffidavits contradict each other and there is a conflict of evidence concerning such facts?"

This case was originally filed in the County of Santa Cruz. The defendant-appellant moved to transfer the matter to the County of Los Angeles for trial, on the ground that he was a resident of the latter county, and an order was properly made by the Superior Court of Santa Cruz County transferring the case to Los Angeles County for trial. Thereupon, plaintiffs-respondents made their motion for a retransfer of the cause to the Superior Court in and for the County of Santa Cruz, on the grounds that (a) the various transactions stated in their complaint began and were completed in the City of Santa Cruz, County of Santa Cruz, State of California; and (b) upon the further ground of convenience of witnesses; and (c) that the ends of justice would be promoted by keeping the place of trial in the County of Santa Cruz where the action was originally filed.

Although there are some contradictions in the facts as stated in the affidavits, it does appear from the affidavit of respondent W. M. Kroesen that he is a man well along in years, in very poor health, and that he requires the constant attention of his wife, respondent Myrtle C. Kroesen. It further appears from affidavits on file that it would be extremely dangerous for respondent W. M. Kroesen to leave the City of Santa Cruz. Moreover, affidavits on file also show that the matter cannot properly be presented in court without the presence of the said respondent W. M. Kroesen.

Without going into detail as to the facts presented by the affidavits, there was sufficient showing made to the Superior Court of Los Angeles County to justify that court in concluding that it was necessary for the trial to be held in the County of Santa Cruz in order to promote the ends of justice. Hence, there was no showing of an abuse of discretion.

It appears to this court that the appeal is frivolous and absolutely without merit.

The order appealed from is affirmed.



61 Cal.App.2d 307

MARCHESE v. MARCHESE.

Civ. 12327.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1943.

1. Bills and notes ⇐527(1)

In action on note, testimony that debt had been paid sustained finding that note was paid in full.

2. Bills and notes ⇐499

The presumption is that a second note does not extinguish indebtedness evidenced by a prior note unless there is an express agreement to that effect.

3. Bills and notes ⇐499

There is a rebuttable presumption of nonpayment arising from payee's continued possession of a note.

4. Appeal and error ⇐1011(1)

Maker's explanation of circumstances under which payee was permitted to retain first note after maker executed second note, allegedly including loan evidenced by first note, merely created a conflict for trial court to decide on question whether first note was paid by execution of second note.

5. Novation ⇐1

Where it was maker's theory that after she had borrowed $1,200 evidenced by note sued on she borrowed $800 additional from plaintiff, her former husband, and that about two years after first note was executed plaintiff demanded of maker that she put whole indebtedness in one note and secure it by deed of trust covering her sep-

arate property, the defense of "novation" was not involved, and therefore was not required to be pleaded.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action by Innocenzio Marchese, also known as Innocenzio Marchesa, against Carmela Marchese, also known as Carmela Casella and Melia Casella, on a note, in which defendant claimed payment by execution of a subsequent note and a deed of trust. Judgment for defendant, and plaintiff appeals.

Affirmed.

Grattan, Kirby & Pasquinelli and Louis Pasquinelli, all of San Jose, for appellant.

James B. Peckham, of San Jose, for respondent.

NOURSE, Presiding Justice.

This cause comes to us under Rule 17(b) of the Rules on Appeal providing that when the respondent fails to file a brief within the time prescribed "the clerk of the reviewing court shall notify the parties by mail that the case may be submitted for decision on the record and on the appellant's opening brief unless the brief is filed within 30 days * * * (and) the court may accept as true the statement of facts in the appellant's opening brief. * * *" Pursuant to the rule, notice was duly given, and no brief having been filed by the respondent, the cause was ordered submitted.

Accepting appellant's statement of facts, we find that the parties were formerly husband and wife, but were divorced before this proceeding was begun. At the time of their marriage the wife was in debt upon an obligation of $2400 secured by a lien upon her separate property. In July, 1936, she executed an unsecured promissory note to plaintiff in the sum of $1200. In September, 1938, she executed another promissory note to plaintiff, secured by a deed of trust, and the previous loan upon the property was paid off. This note was executed in the office of defendant's attorney, and nothing was said at the time regarding the previous loan of $1200. After the parties were divorced plaintiff commenced this action upon the $1200 note, and defendant resisted upon the theory that the note of September, 1938, was intended as an evidence of all indebtedness owing from her and that the $1200 note was thereby paid and discharged. Her answer alleged that the note was paid in full before the commencement of the action, the trial court found that allegation to be true, and gave judgment for the defendant.

[1] The burden of plaintiff's appeal from the judgment is that the evidence is insufficient to support this finding. Appellant states that the only evidence is found in the testimony of respondent that all the money she had owed appellant was covered by the note of 1938, and that all the money she had "every borrowed from him was in that trust deed" and had been paid back. When we bear in mind that the respondent was foreign born and understood our language imperfectly, we are impelled to follow the judgment of the trial court and say that this meager evidence was sufficient to show that the old note was paid at the time the parties executed the new obligation. In support of this conclusion we find other testimony in the record tending to show that from the time of the marriage appellant took complete control of the family finances, that the wife earned approximately the same as the appellant, and that there were frequent disputes over these matters. The respondent testified that both notes were executed after the insistent demand of appellant, and that it was agreed and understood that each represented her existing indebtedness, that, after the execution of the first note, appellant advanced the sum of $800, and that the second note was executed upon appellant's assurance that it was necessary that the amount of the whole indebtedness be secured by a trust deed.

[2] Appellant relies strongly upon the presumption that a second note does not extinguish the indebtedness evidenced by a former note unless there is an express agreement to that effect, citing Dingley v. McDonald, 124 Cal. 90, 56 P. 790, and Anglo-California Trust Co. v. Wallace, 58 Cal.App. 625, 209 P. 78. But here a reasonable analysis of respondent's testimony is that such an express agreement was made when the parties agreed that the second note should represent all that she "ever borrowed from him."

[3, 4] Appellant also relies upon the presumption of nonpayment arising from the payee's continued possession of the

note. Like the former presumption this is merely some evidence, which may be rebutted, and the explanation of the circumstances given by the respondent merely created a conflict for the trial court to decide.

[5] Finally, it is argued that the defense of novation should not be considered because it was not pleaded. We do not understand that such defense is involved here. It is respondent's theory that, after she had borrowed from appellant $1200 and executed the note in suit, she borrowed $800 more, and that, some two years after the first note was executed, appellant demanded of her that she put the whole indebtedness in one note and secure it by a deed of trust covering her separate property. The effect of the findings is that when she later paid the full sum of $2000 she thereby paid off the old note. We are satisfied that such conclusion is fair and reasonable and supported by the evidence.

The judgment is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.



61 Cal.App.2d 394

PEOPLE v. WHEELER.

Cr. 484.

District Court of Appeal, Fourth District, California.

Nov. 17, 1943.

Sodomy ⇐6

Evidence sustained conviction of violation of the statute pertaining to sex perversion. Pen.Code, § 288a.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Robert C. Wheeler was convicted of violating the statute pertaining to sex perversion and he appeals.

Affirmed.

Crawford R. Bonter, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

A jury found the defendant guilty upon a charge of violation of Section 288a of the Penal Code and he appeals from the judgment and from an order denying his motion for a new trial.

The appeal is based solely on the ground that the evidence fails to show a violation of this section and is, therefore, not sufficient to sustain the verdict and judgment. The appellant relies on the case of People v. Angier, 44 Cal.App.2d 417, 112 P.2d 659, and argues that the evidence here shows only a "touching" of the parts in question and not a copulation as required by the statute. The case cited contains language, relied on by the appellant here, which was unnecessary to the decision in that case since it was there held that the evidence was entirely insufficient to support a conviction in any event.

Regardless of the language there used, and here relied upon by the appellant, we are here confronted with an entirely different set of facts which effectively distinguish this case from the one cited, even though the rule contended for by the appellant be accepted as the true rule.

It would serve no useful purpose to set forth the evidence here. The appellant's contention, in seeking to bring himself within the supposed rule of the Angier case, is based upon an obviously strained interpretation of the language used by the complaining witness in describing what occurred on the occasion in question. From the context and surrounding circumstances it is perfectly clear what the witness meant, and the meaning naturally and normally conveyed by the language used is that a violation of the statute had taken place. It is significant that the appellant's counsel did not go into the matter and did not reveal any doubts in this connection during his cross-examination of this witness. The interpretation now placed on this language by the appellant is not only unusual and strained, but the most that can be said is that it constitutes a possible inference which might be drawn from the testimony when it clearly appears that an entirely different inference is not only possible but much more reasonable. The jury was entitled to draw the more reasonable inference and assuming

that the other inference could have been drawn no more than a conflict appears.

In addition to the direct evidence, which was thus sufficient to sustain the verdict, the record contains corroborating evidence rather unusual in its amount and strength. This evidence, from disinterested witnesses, covers the outcry and commotion following the act in question, the physical situation found in the room, and the acts, conduct and even admissions of the appellant, all of which strongly corroborate the story told by the complaining witness. In our opinion, the verdict and judgment are amply sustained by the evidence.

The judgment and order appealed from are affirmed.

MARKS and GRIFFIN, JJ., concur.



LLOYD et al. v. MURPHY.
Civ. 14163.

District Court of Appeal, Second District, Division 1, California.
Nov. 10, 1943.

Rehearing Denied Nov. 30, 1943.
Hearing Granted Dec. 31, 1943.

1. Contracts ⇐309(2)

Under the "commercial frustration" doctrine where the parties from the beginning must have known that their contract could not be fulfilled unless some particular condition continues to exist, in the absence of any warranty that such thing or condition shall exist, the contract is subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without the fault of the parties. Civ. Code, § 1511, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration".

2. Landlord and tenant ⇐93
War ⇐10(2)

Where lease restricted use of demised premises to selling, servicing, and repairing new automobiles and occasionally selling used automobiles, and sale of new automobiles was ninety per cent of lessee's business, and federal wartime regulations restricted sale of new automobiles and lease contained no provision with regard to such contingency, under the "commercial frustration" doctrine, a condition was read into the lease that the parties were excused from performance. Civ.Code, §§ 1511, subd. 1, 1930.

"Commercial frustration" in theory amounts to no more than a condition or term of a contract which the law implies to take the place of a covenant that it is assumed would have been inserted by the parties had the contingency which arose occurred to them at the time they made the contract. Such implication is based on what is fair and reasonable in the light of the mutual interests involved, the ends of justice, and the main objects of the contract.

3. Landlord and tenant ⇐93

The "commercial frustration" doctrine may be resorted to wherever a governmental statute, decree, or regulation deprives a tenant of the beneficial use of the property, and when such a situation ensues, the lease is terminated although other incidental uses might still be made of the premises. Civ.Code, § 1511, subd. 1.

4. Contracts ⇐143

A court is not authorized to make a new contract for the parties.

5. Landlord and tenant ⇐93

When the primary purpose of a lease cannot be carried out because of governmental orders or decrees, the court should adjudge that the lease is terminated. Civ. Code, § 1511, subd. 1.

6. Evidence ⇐20(1)

It is common knowledge that the "new" automobile business and the "used" automobile business are entirely different.

7. Contracts ⇐316(1)

Under certain circumstances, the statute providing the method by which a written contract may be modified does not prevent a valid oral waiver of a written provision in a contract, but such provisions may be waived only by the party for whose benefit such provisions are inserted and a party may not write a new contract under the guise of declaring a waiver. Civ. Code, § 1698.

8. Landlord and tenant ⇐34(2), 93, 134(2) War ⇐10(2)

Lease provisions restricting use of demised premises to selling, servicing, and repairing new automobiles and occasionally selling used automobiles were not for lessors' benefit, and they could not waive such provisions, and hence where sale of new automobiles was ninety per cent of lessee's business and federal wartime regulations restricted sale of such automobiles, lessee was entitled to cancel lease. Civ. Code, §§ 1511, subd. 1, 1698.

9. Landlord and tenant ⇐34(2), 93, 134(2) War ⇐10(2)

Where lease restricted use of demised premises to selling, servicing, and repairing new automobiles and occasionally selling used automobiles and sale of new automobiles was ninety per cent of lessee's business and federal wartime regulations restricted sale of new automobiles, lessee was not precluded from cancelling lease under the "commercial frustration" doctrine because lease was made when restrictions on sale of automobiles, to lessee's knowledge, were imminent. Civ.Code, § 1511, subd. 1

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Caroline A. Lloyd and others against William J. Murphy for a declaration of rights under a lease and for rent. From an adverse judgment, defendant appeals.

Reversed and remanded with directions.

Chas. W. Rollinson, of Los Angeles, for appellant.

Albert W. Leeds, of Los Angeles, for respondents.

WHITE, Justice.

This appeal arises out of an action commenced by plaintiffs for declaratory relief and for a money judgment.

The factual background surrounding this litigation may be thus epitomized: On August 4, 1941, plaintiffs leased to the defendant for a period of five years commencing on September 15, 1941, certain premises described in the complaint and located at the corner of Almont Drive and Wilshire Boulevard, in the city of Beverly Hills, Los Angeles County. The premises in question are approximately 100x150 feet in area, the major portion thereof being paved with cement; equipped with six gasoline pumps, and in general being adapted to the maintenance and operation of an automobile service station. Fronting on Wilshire Boulevard the property is improved with a one-story, 40-foot storeroom suitable to be used for commercial or business purposes. In the rear of such storeroom is an L-shaped one-story building extending to the rear of the demised premises.

Contained in the lease is paragraph V thereof reading as follows:

"Use of Premises"

"The demised premises shall be used by lessee for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the written consent of lessor, provided, however, that lessee shall be privileged to make an occasional sale of a used automobile from said premises. Lessee agrees that he will at all times maintain and conduct his business in a lawful manner, and in strict compliance and observance of all governmental rules, regulations, ordinances and laws, and with all restrictions, covenants and conditions required to be observed by lessor upon the demised premises. Lessees shall during the term of this lease operate and keep said business and business establishment open during usual business hours of each business day." (Emphasis added.)

With reference to any assignment of or subletting under the lease, paragraph XIV contains the provision: "Lessee agrees not to use or allow the demised premises to be used for any purpose other than hereinbefore specified, and shall not sublet the same nor any part thereof, nor assign, mortgage or hypothecate this lease, or any part thereof, without first obtaining the written consent of the lessor. Lessee shall not commit, suffer, or allow any waste or misuse of the premises, or make or permit any alteration upon or addition to any part thereof, except as permitted by the original alterations contemplated by the terms hereof."

Paragraph XVIII of the lease empowers the lessor to consent to a waiver or compromise in connection with any of the provisions of the lease or with reference

to any breach or default thereunder, and limits the rights of the lessee when any such waiver or compromise is consented to by the lessor.

We think it may fairly be said that during occupancy of the demised premises by defendant lessee, the sale of new or unused automobiles constituted approximately 90% of the gross volume of his business. The remaining 10% consisted of gas and oil sales together with automobile servicing and repair work.

On January 1, 1942, following our country's entry into the present World War, the United States government issued its mandate prohibiting the sale of new automobiles and trucks. On January 8, 1942, this prohibition was modified to permit the sale of new automobiles and trucks for military needs and to others working directly on military projects and who obtained certification thereof from the Army or Navy officer in charge of such military projects. A federal regulation, dated January 20, 1942, confined the sale of unused automobiles and trucks to the Army, Navy, certain other federal agencies, and to all persons holding a certain preferential rating referred to as A–1–j or higher. Suffice it to say that at all times here pertinent, the sale of new automobiles was restricted to those who obtained from the authorized governmental agency a priority or authorization to purchase such motor vehicles.

Contending that the aforesaid governmental regulations and decrees deprived him of the beneficial use of the property for the primary and principal purpose to which he was restricted by the lease, viz., the sale of unused or new automobiles, the defendant lessee on March 10, 1942, called upon Edward W. Lloyd, one of the lessors, who claimed he was authorized to act for his co-lessors. Upon that occasion Mr. Lloyd orally waived all restrictions upon the type of business which defendant lessee might transact upon the premises, orally authorized subletting to any responsible sub-tenant, and suggested that if defendant lessee was still unable to conduct his business profitably, the lessors would be disposed to reduce the rent. This conference was followed by a written communication under date of March 26, 1942, confirming the offer theretofore orally made.

However, on March 15, 1942, defendant lessee vacated the leased premises, giving oral notice of repudiation of the lease. This was followed on March 24, 1942, with a written notice of cancellation and termination of the lessee's obligations under the lease.

Exercising their rights under the lease, plaintiffs thereupon leased the property to other tenants for the account of and in mitigation of the damages allegedly due from defendant lessee; and under date of May 11, 1942, instituted this action, one count of which was for declaratory relief to determine the rights of the respective parties pursuant to the lease, while the second count sought judgment for accumulated deficiencies in rent.

Following trial upon the merits, the court made findings of fact and rendered judgment declaring the lease to be still in effect and that plaintiffs recover for the accumulated deficiencies in rent, amounting to $2,000. From such judgment defendant prosecutes this appeal.

The first ground of appeal presents for consideration the doctrine commonly known and referred to as commercial frustration, which is apparently recognized by subdivision 1, section 1511 of our Civil Code. In this connection it is urged by appellant that because the lease restricted the use of the demised premises to a particular purpose, i.e., the sale of unused automobiles, and such use was rendered illegal by wartime governmental regulations, the lessee was thereby relieved from performance of the obligations of the lease assumed by him thereunder.

[1] While not new, the doctrine of commercial frustration came into greater prominence, its scope was widened, and its application was increased following the World War of 1914, when the impossibility of performance of contracts for the sale of certain materials or for the shipment on specified vessels to specified ports was affected by restrictions, occasioned by the war, declaring embargos upon and seizure of vessels named in particular contracts. The doctrine of frustration was thus stated in Straus v. Kazemekas, 100 Conn. 581, 124 A. 234, 238, cited with approval in Johnson v. Atkins, 53 Cal.App.2d 430, 431, 127 P.2d 1027: "Where from the nature of the contract and the surrounding circumstances the parties from the beginning must have known that it could not be fulfilled unless when the time for fulfillment arrived, some particular thing or condition

of things continued to exist so that they must be deemed, when entering into the contract, to have contemplated such continuing existence as the foundation of what was to be done; in the absence of any express or implied warranty that such thing or condition of things shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without default of either of the parties. 12 A.L.R. 1275."

While it may be conceded, as claimed by respondents, that the sale of unused cars is permitted to a restricted group of civilians who possess preference ratings and to the Army, Navy and certain other Federal agencies, nevertheless the evidence in the case at bar conclusively shows that approximately 90% of appellant's business conducted on the demised premises consisted of the sale of new automobiles. So far as servicing and repairing automobiles is concerned, the terms of the lease, heretofore quoted, absolutely limited such activities to unused automobiles that were sold by appellant and limited the sale of used automobiles to the making of "an occasional sale of a used automobile from said premises". It seems quite clear to us that when the lease here in question was executed, appellant lessee agreed not to use the premises for purposes other than those enumerated in the lease, and the lessor could refuse to permit any change to be made in such use while appellant was occupying the premises. The conditions of the lease now before us were certainly restrictive in character. Furthermore, section 1930 of the Civil Code provides that when a thing is let for a particular purpose the hirer may not use it for any other purpose. We think it must be conceded that the wartime Federal regulations made the performance of appellant's obligations under the lease "vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract" (6 Williston on Contracts, Revised Edition, p. 5411), because had the possibility of Federal wartime restrictive regulations on the sale of unused automobiles been contemplated by the parties to this lease it is altogether likely that they would have expressly provided therein that the lease should terminate on the day such restrictive regulations became effective, or otherwise made provision for such contingencies.

[2] When, therefore, those conditions, to-wit: the unrestricted sale of new automobiles, became impossible, without fault on the part of either party to the lease, and those considerations which, at its inception, made the lease desirable disappeared, and the lease contains no provisions with regard to the contingencies here considered, then the law reads into the lease that the parties thereto will be excused from performance. In the case at bar the main object which formed the basis of this lease contract was prohibited by Federal decrees. The right to sell unused automobiles was essential to the performance of the lease herein, and that contract must, therefore, be deemed subject to the implied condition that the parties would be excused in case, before breach, performance became impossible by reason of governmental regulations prohibiting the sale of new automobiles except under highly restricted and limited conditions. Commercial frustration in theory, therefore, amounts to no more than a condition or term of the contract which the law implies to take the place of a covenant that, it is assumed, would have been inserted by the parties to the contract, had the contingencies which arose occurred to them at the time they made the contract. Such implication is based on what is fair and reasonable in the light of the mutual interests involved, the ends of justice, and the main objects of the contract. Without taint of bad faith, appellant herein finds himself frustrated by governmental regulations, and thereby rendered unable to fulfill his obligations. Under such circumstances we are impressed that the weight of authority dictates that he should be relieved of such obligations by judicial decree.

[3-5] Respondents urge that the doctrine of frustration may not be taken advantage of because of legal prohibition of the use to which the premises may be put unless the lessee can show that such prohibition was complete and prevented the use of the premises for any purpose permitted by the lease. With this claim we do not agree. To us, the better rule, and the one supported by the weight of authority, is that the doctrine of frustration may be resorted to whenever a governmental statute, decree or regulation deprives the tenant of the beneficial use of the prop-

erty—that is—prevents him from using it for the primary and principal purpose for which it was rented. And when such a situation ensues the lease is terminated, although other incidental uses might still be made of the premises. Were we to say that the lease continued because the premises could be used for some other commercial activity, we would thereby be making a new contract for the parties. This a court is not authorized to do. When, as here, the primary purpose of the lease cannot be carried out because of governmental orders or decrees, the court should adjudge that the lease is terminated.

[6] In the case at bar it cannot be questioned that when the parties executed the lease here in question they contemplated and assumed that the primary and principal use to which the demised premises were to be put was the sale of new automobiles. That the other purposes were incidental to the main purpose is indicated by the language of the lease which restricted servicing and repair operations to the unused automobiles sold by the lessee, and limited the sale of used automobiles to "an occasional sale" thereof. In such a situation, to require its fulfillment, in effect, could mean only the execution of a new and different lease. It is a matter of common knowledge that the "new" car business and the "used" car business are entirely different.

[7, 8] Respondents urge that the court found that they waived the restrictive provisions of the lease and granted appellant the right to use the entire premises for any legitimate purposes, and to sublet the premises to any responsible party. Originally such waiver was oral, followed by a written confirmation thereof under date of March 26, 1942. The written waiver, it will be noted, was given some ten days after the lessee had declared the lease contract cancelled and had surrendered the demised premises to the lessors. Undoubtedly it is the law that under certain circumstances section 1698 of the Civil Code does not prevent a valid oral waiver of a written provision in a contract. Miller & Lux, Inc., v. Light & Power Corp., 120 Cal.App. 589, 608, 8 P.2d 560. It is equally well settled however, that the provisions in a contract may be waived only when such waiver is made by the party for whose benefit such provisions are inserted in the contract. *In other words, under the guise of declaring a waiver, a party to the contract may not write a new one.* We are not persuaded that the pertinent provision of the lease contract herein was in the nature of a covenant for the benefit of the lessors only, which they could and did waive. There is no showing that the lessee was fully able to profitably utilize the demised premises for any purpose other than primarily for the sale of new automobiles, while there is ample evidence to show that the sale of unused automobiles was the main and principal purpose for which appellant leased the premises. We do not feel justified in attempting to distinguish the several cases cited by respondent. They are not sufficient, in our judgment, to overturn the legal conclusions at which we have arrived that the restrictive clause in the lease was not one inserted therein for the sole benefit of respondents.

[9] Respondents' contention that appellant cannot avail himself of the doctrine of commercial frustration because the lease was made when restrictions on the sale of automobiles were imminent, and that because of a general and widespread anticipation of such restrictive regulations, appellant lessee as an experienced automobile dealer was fully aware of the situation, is answered by the statement that if the parties to this contract were apprehensive of the imposition of restrictive regulations, it cannot be doubted that at the time they made their contract they would have, as heretofore stated, in all probability expressly covenanted for modification or termination of the lease in the event such governmental restrictive regulations materialized and went into effect.

We are not unmindful of the cases cited by respondent wherein it is held that a change in the law during the term of a lease, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not relieve the tenant from his obligation to pay rent, but in all of such cases the leases did not, as does the one with which we are here concerned, contain a provision similar to the one herein which provides that the demised premises "shall be used by lessee for the sole purpose of conducting thereon the business of displaying and selling new automobiles". Under the circumstances here present, we are persuaded that it is firmly established in the law that the use of the premises being restricted to a particular

and specified purpose, which main and principal purpose is frustrated by governmental decrees or regulations, the subject matter of the contract is destroyed and the covenants of such lease will not be enforced against either party thereto.

For the foregoing reasons the judgment is reversed and the cause remanded with directions to the court below to enter judgment for the defendant.

YORK, P. J., and DORAN, J., concur.



61 Cal.App.2d 340

LANE (WILSON, Intervener) v. SMITH et al.

Civ. 14121.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1943.

1. Trial ⇐398

Generally, where trial court finds in favor of defendants with exception of a finding that certain material allegations in answer are untrue, such finding creates an irreconcilable conflict in findings on material issues and does not sustain judgment.

2. Appeal and error ⇐1026

To warrant a reversal, an error must be genuine and substantial at least to some extent.

3. Appeal and error ⇐1071(3)

Where lone finding in favor of appellant-intervener and against defendants was alleged to be erroneous, and there was no evidence to support the finding and evidence justified only a finding in favor of defendants, and it appeared that a reversal of judgment for inconsistent findings would result merely in a correction of the erroneous finding, judgment was affirmed. Code Civ.Proc. § 956a.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Action by Donald P. Lane, as special administrator of the estate of Edward N. Wilson, deceased, against Laurel Edward Smith and others, wherein Mary Ellen Wilson intervened as a party plaintiff to enjoin sale by defendants under certain trust deeds executed by decedent. Judgment for defendants, and intervener appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Newton M. Todd, of Long Beach, and Fred A. Watkins, of San Francisco, for respondents.

DORAN, Justice.

This is an appeal by intervener from an adverse judgment in an action by intervener to enjoin the sale of certain property by the trustee of a trust deed after default.

Briefly, the record reveals that Edward N. Wilson, a man 80 years of age, married Mary Ellen Wilson, intervener herein, December 10, 1938. A few days before, Wilson had taken his nephew Laurel Edward Smith to the office of Lane & Lane, attorneys for Wilson, where, at his, Wilson's, direction, the trust deeds in question were prepared. They were executed and acknowledged on December 12th and later recorded. One of the trust deeds secured a note in the sum of $11,341 payable to the estate of Emma Wilson Smith, deceased, sister of trustor, and was the renewal of a trust deed to secure a like amount executed in 1931. The other secured a note in the sum of $4,016 in favor of said Laurel Edward Smith. Both were due one year from date.

In March, 1939, Smith, in appropriate proceedings, was appointed guardian of the person and property of Wilson, who later was confined in a sanitarium. Thereafter, Smith petitioned the court to be relieved as guardian, which was granted, and Mary Ellen Wilson was appointed guardian of the person and estate of her husband Edward N. Wilson.

Upon learning of the contemplated sale under the trust deeds in question, appellant, as guardian, commenced an action to enjoin said sale on the grounds of fraud, undue influence and lack of consideration. The cause was set down for trial, and the day before the trial, Wilson died.

Lane, one of Wilson's attorneys, was appointed administrator of Wilson's estate,

whereupon leave was granted for appellant to intervene to litigate the issues raised by the original complaint and afterwards incorporated in the suit in intervention. With certain exceptions, defendants denied by answer generally and specifically the allegations contained in intervener's complaint and also set up separate defenses.

The trial court found in favor of defendants and against intervener on all issues but, in the last numbered finding of fact, to-wit, number thirteen, the court found as follows: "The Court finds that the allegations contained in Paragraphs I, III and IV of Defendants' Second and Separate Defense in Defendants' Answer to Plaintiff's Complaint, and each of them are *untrue*." (Italics added.)

Paragraph I of the defendants' separate and second defense admitted that, for a valuable consideration, the $11,341 note and trust deed was executed and delivered by Edward N. Wilson. Paragraph III alleged the default and paragraph IV alleged that at the time said note and deed of trust were executed, Wilson was sound in mind and body, and was in all respects competent to transact business.

[1] It is contended on appeal that the above finding causes an irreconcilable conflict in the findings on material issues and hence does not sustain the judgment. That such contention is supported by the general rule there can be no question.

Respondents, however, contend that the use of the word "untrue" instead of "true" in finding XIII was an error and hence should be corrected. In that connection respondents challenge appellant to point to any evidence in the record tending to support the alleged erroneous findings. Appellant answers the challenge as follows: "Appellant submits that she is not bound to go beyond her prima facie case, and review the entire record, pleadings, exhibits and testimony in an attempt to sustain the rule governing irreconcilable findings. Nor is the District Court bound to search the record for the purpose of determining whether or not there is conflicting evidence."

[2] The above reply is unavailing. The record reveals that the only offering by appellant in support of the alleged fraud, etc., was the cross examination of two witnesses under section 2055 of the Code of Civil Procedure. As contended by respondent, there is no evidence to support the erroneous finding. Moreover, there is no conflict in the evidence. The decisions relied on by appellant have no application to the situation here presented. Appellant points to no other error in the record and the error relied on is inadequate and trivial in the extreme. To warrant a reversal an error must be genuine and substantial, at least to some extent.

[3] It should be noted that a reversal of the judgment herein on the grounds of inconsistent findings, in the circumstances, would be to no purpose. In any event a new trial would not be ordered, but the cause remanded only for the purpose of correcting the error which the trial court was without jurisdiction to correct at the time when such error was discovered. Moreover, the finding could be modified or corrected by the judgment on appeal if necessary. Sec. 956a, Code Civ.Proc. The evidence justifies only one finding, namely, that the allegations contained in paragraphs I, III and IV of defendants' second and separate defense in defendants' answer to plaintiff's complaint, and each of them are *true*. In such circumstances no prejudice can result from the finding in question.

The following language in Cornblith v. Valentine, 211 Cal. 243, at page 246, 294 P. 1065, at page 1066, in part, is applicable here. "It is true that the trial court made a series of findings to the effect that no written agreement had been entered into, and that no escrow had been opened and that defendants had not cancelled the escrow instructions, and other preliminary and immaterial findings. It is likewise true that these findings are not supported by the evidence, being in fact contrary thereto, and obviously, through inadvertence, were copied from the answer and should not have been inserted, but as both sides necessarily rely upon the agreement of exchange and the court's judgment for either party must necessarily be based upon it, and its existence is conceded by the findings, no prejudice arises from the patent error." See, also, Thayer v. Tyler, 169 Cal. 671, 147 P. 979.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

61 Cal.App.2d 381

PEOPLE v. ZERVAS et al.

Cr. 2270.

District Court of Appeal, First District, Division 1, California.

Nov. 17, 1943.

1. Criminal law ⇐559

Although question of felonious intent is generally for trier of facts and may be inferred from circumstances, there must be some reasonable basis in the evidence for the inference.

2. Automobiles ⇐353

Although it is not incumbent upon prosecution to prove an intent to steal automobile in a prosecution for unlawful driving or taking of a vehicle without owner's consent, intent to deprive owner of possession of the automobile must be proved as a fact. Vehicle Code, § 503, St.1939, p. 1481.

3. Automobiles ⇐355(10)

Proof that one is riding as a passenger in a stolen automobile, even if unexplained, will not alone justify finding of required felonious intent so as to sustain conviction of unlawfully taking an automobile. Vehicle Code, § 503, St.1939, p. 1481.

4. Automobiles ⇐355(10)

Evidence showing only that defendants were riding in automobile taken without owner's consent with a driver who admitted that he had stolen the automobile was insufficient to support conviction of unlawful taking of a vehicle, regardless of whether defendants' explanations as to their presence in the automobile were accepted as true. Vehicle Code, § 503, St. 1939, p. 1481.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Lawrence Zervas and Joseph Rosales were convicted of unlawful taking of a vehicle not their own, and they appeal.

Reversed.

Walter H. Duane, of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Lawrence Zervas, Joseph Rosales and Theodore Evilsisor were charged, by information, with a violation of § 503 of the Vehicle Code, St.1939, p. 1481. That section provides in part that: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in any such driving or unauthorized taking or stealing is guilty of a felony, * * *." Zervas was also charged with a prior grand theft conviction, and Rosales was charged with two prior robbery convictions. Evilsisor pleaded guilty to the offense charged. Zervas and Rosales were tried by the court without a jury and found guilty. From the judgment of conviction, and from the order denying their motion for a new trial, Zervas and Rosales appeal.

The prosecution called but two witnesses. The first of these was Bert Rosenberg, owner of the car in question. He testified that at about 4:00 p. m. on March 17, 1943, he left his car in a parking lot on Ellis Street in San Francisco; that he left the ignition keys in the car; that when he returned to the lot at 10:00 p. m. the car was gone; that he had given no one his consent to take the car; that the police returned the car to him at about 4:20 a. m., March 18, 1943; that the car had not been damaged in any way.

The second witness was William Osterloh, the arresting officer. He testified that he was on duty in a radio car during the early morning of March 18, 1943; that he observed the car at about 3:50 a. m. and discovered it was a car that had been reported stolen; that Evilsisor was driving and Zervas and Rosales were riding in the back seat; that he and Officer Hallman followed the car two blocks when it stalled; that he and his associate arrested the three occupants; that when he took the three men to the police station he questioned them as to their past records, but

had no conversation with them about the possession of the car. The prosecution rested on this evidence.

Zervas testified that he lives in Marin City and works for Marinship; that he knew Rosales and Evilsisor; that on March 17, 1943, he came to San Francisco with Rosales; that they arrived at 7th and Mission Streets at about 10:00 p. m.; that they visited two penny arcades and a bowling alley; that they were intending to catch the 12:15 bus home; that while walking towards the bus depot he heard a horn from an automobile; that it was Evilsisor driving the car in question; that Evilsisor asked them where they were going, and, upon being informed, stated that he would drive them to the depot; that Evilsisor drove them to the depot; that it was then discovered that the bus would not leave for half an hour; that Evilsisor suggested that they take a ride; that they took a ride and the car stalled several times; that, as a result, they missed their bus; that thereafter they continued to ride around; that he asked Evilsisor where he got the car; that Evilsisor told him he had borrowed it; that he was not with Evilsisor when the latter got the car; that he thinks Evilsisor was working in a parking lot at this time. On cross-examination he admitted the prior felony conviction and testified that he first met Evilsisor in San Quentin; that since leaving San Quentin he had met Evilsisor but once before the night in question; that after they missed the bus they continued to ride around; that the car stalled frequently; that he did not think another bus went to Sausalito until 6:15 a. m.

Joseph Rosales testified that he was a plumber; that he lives in Mill Valley and works in San Rafael; that on the night in question he met Zervas in Mill Valley at the bus depot and that they came over on the bus together; that they wanted to bowl; that they visited two penny arcades and then went to a bowling alley, but it was too crowded and they could not get an alley; that upon leaving the bowling alley Evilsisor tooted at them and offered to drive them to the bus depot; that they were early and took a ride; that they missed the 12:15 bus and decided to ride around; that the car stalled several times. On cross-examination he admitted two prior felony convictions, and testified that Zervas asked Evilsisor where he got the car; that Evilsisor replied that he had borrowed it.

After these two defendants had testified, the court, with consent of counsel, called Evilsisor to the stand. He admitted two prior felony convictions and testified that he was working in a parking lot on the date in question; that he met Zervas and Rosales in prison; that he did not know the two men very well; that he had seen Zervas and Rosales only once or twice since leaving prison; that he took the car intending to ride around; that he took the car around 9:30 p. m.

[1, 2] No further evidence was introduced. The main contention of appellants is that the evidence is totally insufficient to sustain their conviction. With this contention we agree. The prosecution proved that the car was taken without the consent of the owner; that the two appellants were riding in the car with a driver who admits that he stole the car; and that the three men had been acquainted in San Quentin. No direct or circumstantial evidence sufficient to support a finding of felonious intent was introduced at all. While it is generally true that the question of felonious intent is for the trier of the fact, and may be inferred from all the circumstances (People v. Deininger, 36 Cal.App.2d 649, 98 P.2d 526; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770), there must be some reasonable basis in the evidence, for the inference. In prosecutions under § 503 of the Vehicle Code, while it is not incumbent upon the prosecution to prove an intent to steal the car, it is necessary to prove an intent to deprive the owner of the possession of the car. People v. Score, 48 Cal.App.2d 495, 120 P.2d 62. But that intent must be proved as a fact. The rule is thus stated in People v. Neal, 40 Cal. App.2d 115, at page 117, 104 P.2d 555, 557: "Under section 503 the crime is committed when the taking or driving of the vehicle is accompanied by a lack of consent from the owner and an intent to either permanently or temporarily deprive such owner of his title to or possession of such vehicle. The intent is made an affirmative element of the crime and consequently must be proved as a fact. The proof of intent as a fact was incumbent upon the prosecution and the taking and abandoning of the car by appellant did not necessarily furnish sufficient evidence

from which the presence of a specific intent may have been inferred by the jury. Section 503 is distinguished from section 499b of the Penal Code in that specific intent is not an element in the violation of this latter statute. Section 499b is the so-called 'Joyride' statute. There is a violation within the meaning of the provisions of this section when an individual without the permission of the owner takes any aircraft, motor vehicle, bicycle, etc., for the purpose of temporarily using or operating the same. The violation of section 499b is made a misdemeanor. The necessity of furnishing sufficient evidence of the specific intent required to constitute a violation of section 503 is readily apparent."

[3] There was no evidence at all from which it could be inferred that Zervas and Rosales participated in the unlawful act or aided or abetted Evilsisor in the perpetration of the unlawful act. People v. Terman, 4 Cal.App.2d 345, 40 P.2d 915. Certainly it cannot be reasonably inferred that because Zervas and Rosales were riding as passengers in a stolen car that they knew it was stolen and intended to deprive the owner unlawfully of his right to the possession of the car. Just as the mere possession of stolen property, unexplained by the defendant, is not sufficient to sustain a conviction of grand theft (People v. Haack, 86 Cal.App. 390, 260 P. 913), so riding as a passenger in a stolen car, even if unexplained, will not alone justify a finding of the required felonious intent under § 503 of the Vehicle Code. A contrary rule would mean that every passenger riding in a stolen car would be prima facie guilty of a violation of § 503 of the Vehicle Code. That is not the law.

[4] The two appellants attempted to explain their presence in the car. The trial court was, of course, not bound to believe their testimony. It is a story that could easily have been fabricated. Moreover, by reason of their prior convictions, appellants were impeached. § 2051, Code Civ.Proc. The trial court, for these reasons, could have disbelieved their story in its entirety. But if this were so, the only evidence before the trial court was that of Rosenberg and Osterloh. As already pointed out, from that evidence it cannot reasonably be inferred that the appellants had the requisite felonious intent. If the trial court believed their testimony, no felonious intent was present. In either event, the evidence, as a matter of law, is insufficient to sustain the convictions.

The judgment and order appealed from are reversed.

WARD, J., and DOOLING, Justice pro tem., concur.



61 Cal.App.2d 403

WARREN v. RITTER et al.
Civ. 2990.

District Court of Appeal, Fourth District, California.

Nov. 18, 1943.

1. Venue ⇐41

Because a codefendant appeared and neither joined in nor opposed defendant's motion for change of venue does not warrant denial of such motion.

2. Venue ⇐72

Amendments to complaint filed after service of notice of motion for change of venue could not be considered on decision of the motion.

3. Venue ⇐41

That some of defendants were sued under fictitious names had no bearing on question whether a defendant was entitled to change of venue, since rights of other defendants to change of venue could not be affected thereby until substitution of their true names.

4. Venue ⇐41

In transitory action, named defendants who had their residences outside of county where suit was brought had right to change of venue to county of their residences, notwithstanding allegation that corporate defendant had its principal place of business in county of suit, where there was nothing to show that corporation had designated location of its principal office in the state or that it had complied with statutory requirements. Civ.Code, § 405.

5. Venue ⇐41

When foreign corporation is made a defendant, mere fact that it is doing business in the state does not fix its residence in any particular county so as to defeat right of other defendants to change of venue to county of their residence. Civ.Code, § 405.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by William A. Warren against Charles P. Ritter, N. L. Rogers, and others wherein named defendants filed demurrers, and wherein first-named defendant filed a motion for change of venue. From an order denying his motion to change the venue, the first-named defendant appeals.

Order reversed.

Alfred T. Cluff and Cluff & Bullard, all of San Pedro, for appellant.

No appearance for respondent.

MARKS, Justice.

Plaintiff has filed no brief and has made no appearance before this court although the clerk notified his counsel of the default on July 27, 1943.

This action was filed against Charles P. Ritter, N. L. Rogers, State Corporation Commission, Automatic Self Leveling Ladder Company, a corporation, and various fictitious defendants. A money judgment was sought against Ritter and Rogers for breach of contract, misrepresentation and fraud; against the Commissioner of Corporations for the return of certain documents in his possession which had to do with the issuance and sale of stock by a corporation, and, against Automatic Self Leveling Ladder Company, (which we will refer to as the corporation) to determine its and plaintiff's rights and obligations under certain contracts.

It was alleged that the Commissioner of Corporations had one of his offices in Los Angeles and that the corporation was a foreign corporation organized under the laws of the State of Nevada with its principal place of business in the County of San Bernardino.

For the purpose of this opinion we will assume that plaintiff in his complaint, in good faith, sought to state a cause of action against each named defendant and that they are proper parties defendant.

Ritter appeared in the action by demurrer and sought to change the place of trial of the action to Los Angeles County, the place of residence of all named defendants except the corporation.

[1] Rogers also appeared by demurrer but he neither joined in nor opposed the motion for change of venue. Because he did appear, and did not join in the motion, does not seem to furnish sufficient ground for denial of the motion for change of venue. Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Lyons v. Brunswick-Balke-Collender Co., 20 Cal. 2d 579, 127 P.2d 924, 141 A.L.R. 1173.

The Commissioner of Corporations did not appear in the action and the record fails to show service of process on him.

[2] After the service of the notice of motion for change of venue, plaintiff filed amendments to his complaint. They cannot be considered as having any bearing on the decision of the motion. Buell v. Dodge, 57 Cal. 645; McClung v. Watt, 190 Cal. 155, 211 P. 17; Vickerson v. Wehr, 42 Cal. App.2d 678, 109 P.2d 743.

[3] Certain defendants were sued under fictitious names. That fact can have no bearing on the question before us as the rights of other defendants to change the place of trial cannot be affected thereby until the substitution of their true names. Bachman v. Cathry, 113 Cal. 498, 45 P. 814.

[4] As the action was transitory in its nature and as all named defendants except the corporation had their residences outside of the County of San Bernardino, they had the right to move the place of trial to the county of their residences unless the allegation that the corporation had its principal place of business in San Bernardino County be sufficient reason for retaining the case there.

There is nothing in the complaint nor in the affidavits used at the hearing of the motion indicating that the corporation had designated the location and address of its principal office in this State or that it had complied with any of the provisions of section 405 of the Civil Code.

In Hobson v. Metropolitan Casualty Ins. Co., 114 Cal.App. 349, 300 P. 87, 88, the defendant, a foreign corporation, sought to change the place of trial from Ventura County to Los Angeles County. In sup-

port of its motion it filed an affidavit in which it was stated that its principal place of business "was and now is in the county of Los Angeles, state of California". This was held to be insufficient proof of residence of the foreign corporation in that county to require the cause to be tried there.

[5] It has been held that when a foreign corporation is made a defendant, the mere fact that it is doing business in this State does not fix its residence in any particular county so as to defeat the right of the other defendants to move the place of trial of the action to the county of their residence. San Jose Hospital v. Etherton, 84 Cal.App. 516, 258 P. 611; Rowland v. Bruton, 125 Cal.App. 697, 14 P.2d 116; Waechter v. Atchison, etc., R. Co., 10 Cal. App. 70, 101 P. 41; Ryan v. Inyo Cerro Gordo Mining, etc., Co., 41 Cal.App. 770, 183 P. 250.

It follows that the order denying the motion to change the place of trial to Los Angeles County cannot be supported.

The order is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



61 Cal.App.2d 269

WATSON LAND CO. v. RIO GRANDE OIL CO. et al.

SAME v. HARSHMAN et al.

Civ. 13991, 13992.

District Court of Appeal, Second District, Division 3, California.

Nov. 5, 1943.

1. Customs and usages ⇐15(2)

The special meaning given to provision in oil lease authorizing suspension of drilling operations so long as oil of quality produced on property shall be less than 75 cents a barrel at the well by usage in oil industry would be followed in construing the provision, and evidence as to such usage was admissible. Civ. Code, § 1644; Code Civ.Proc. § 1870.

2. Customs and usages ⇐13, 15(2)

Generally, where there is a known usage of a trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears, and evidence of the usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary terms of the contract.

3. Customs and usages ⇐12(1)

Although it must appear that parties to a contract were aware of existence of custom before it can be given effect in construction of the contract, their awareness may appear from fact that the parties are engaged in the trade or industry where the usage is common.

4. Customs and usages ⇐18

Where issue as to oil industry's usage in construing oil lease was first raised by defendant's answer, plaintiff could introduce evidence concerning the usage without a prior pleading of it.

5. Mines and minerals ⇐78(7)

Where oil lease contained provision authorizing suspension of drilling operations so long as oil of quality produced on property should be less than 75 cents a barrel at the well, burden was upon lessees, seeking to establish that their rights under the lease had not been terminated by failure to continue drilling operations, of proving that their obligation to continue to drill new wells had been suspended.

6. Mines and minerals ⇐78(1)

The provision in oil lease authorizing suspension of drilling operations so long as oil of quality produced on property should be less than 75 cents a barrel at the well would be construed as referring to list of prices for field in which the property was situated, and not to lessees' ability to get a certain price for oil which they produced, in view of usage in oil industry.

7. Mines and minerals ⇐78(7)

Evidence was insufficient to support finding that lessees' obligation under oil lease to drill new wells had been suspended pursuant to provision in lease authorizing suspension of drilling operations so long as oil of quality produced on property should be less than 75 cents a barrel at well, so as to preclude termination of their rights under lease for failure to continue drilling operations.

8. Evidence ⇐117, 820

Testimony of corporate defendant's president that the oil his company was producing had a gravity of less than 14 had no probative value, in view of fact that, as revealed by his subsequent answers, he did not speak of his own knowledge, but based his statement on the "run tickets" of the refineries which bought product of his wells, and there was no showing of basis on which the "run tickets" were computed.

9. Mines and minerals ⇐68(2)

The usual rule that forfeitures of leases are not favored does not apply, where productive possibilities of plaintiff's property are blocked for a long term by defendant's lack of ability or desire to develop them.

Appeals from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Consolidated actions by Watson Land Company against Rio Grande Oil Company and others, and by the same plaintiff against Jessie B. Harshman, etc., and others, to quiet title to certain land in which defendants were claiming rights under an oil lease. From adverse portions of the judgments, the plaintiff appeals.

The portions of the judgments from which plaintiff appealed reversed.

O'Melveny & Myers, Pierce Works, and L. M. Wright, all of Los Angeles, for appellant.

Henry E. Carter, of Los Angeles, for respondent Ranger Petroleum Corporation.

BISHOP, Justice pro tem.

The plaintiff has appealed, in each action, from that part of the judgment which recognized that the defendants had rights under an oil lease on the west thirty of some fifty-seven acres to which plaintiff's title was otherwise quieted. It is plain, from the evidence and findings, that, except for very limited purposes, the rights of the defendants under the oil lease had terminated because there had not been a continued drilling of new wells on the demised property after the completion of the first well, unless the failure to drill the additional wells was excused, and the forfeiture of the lease escaped, by virtue of this provision of the lease: "Drilling and pumping operations shall be suspended * * * so long as oil of the quality produced on said property shall be less than seventy-five cents (75¢) a barrel at the well." The conclusion we have reached is that the evidence is insufficient to support the conclusion that the obligation to continue to drill new wells had been suspended.

The plaintiff and the defendant Ranger Petroleum Corporation (the only defendant to file a brief on appeal) disagreed at the trial and disagree now as to the meaning of the provision of the lease which we quoted. Plaintiff's position is that the proper meaning to be given the provision is that in which it is and has been used and understood by the oil industry in the Los Angeles Basin area. As established by the testimony of witness Wents, the provision bears this meaning in the oil industry: drilling operations shall be suspended so long as oil of the quality produced on said property shall be quoted at a price less than 75¢ a barrel in the list of prices posted by the Standard Oil Company of California for the Wilmington field, the field in which plaintiff's property is situated. The prices posted vary for different qualities of oil, the quality being measured by the gravity of the oil computed on the basis that it contains less than three per cent of water and bottom sediment. In other words, the lessee need not proceed to drill further wells so long as oil of the quality produced on the leased property is posted at less than 75¢ a barrel, it being understood that the posted price refers to oil with not to exceed three per cent water and bottom sediment, so that if the oil as produced contains a greater percentage than three per cent, the excess is eliminated in computing the quantity to be paid for at the posted price.

[1, 2] The attack upon this evidence was not and is not made upon the ground that the oil industry did not so understand and employ the terms of the quoted provision; there was no refutation of witness Wents' testimony. At the trial the objection was voiced to the admission of the industry's interpretation of the provision "on the ground that the technical meaning will not vary the plain wording of the contract" and "We just cannot see the object of going into the custom or understanding of somebody else." On this appeal it is still argued that because "There is no ambiguity or uncertainty in the suspension clause of the contract" the testimony as to the usage of the industry should not be considered. Defendants do not contend, and there is no basis for the contention, that there is any provision of the lease which

indicates an intent that the quoted provision shall not be understood as usage interprets it. This being so, the special meaning given to the words by usage must be followed, Civil Code, Sec. 1644, and evidence as to that usage is admissible, Code Civ.Proc. Sec. 1870, subd. 12. This statement in Hind v. Oriental Products Co., Inc., 1925, 195 Cal. 655, 667, 235 P. 438, 443, is followed by a list of authorities, including 6 Cal.Jur. 315 "and cases cited": "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage forms a part of the contract; and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract."

[3] Further objection is made that "[b]efore evidence of usage can be given any effect in the construction of a contract, it must appear that the parties thereto were aware of the existence of the custom." Their awareness may appear, however, from the fact that the parties are engaged in the trade or industry where the usage is common. It is so stated in the quotation appearing in the preceding paragraph, and aleso in Corey v. Struve, 1911, 16 Cal.App. 310, 320, 116 P. 975, and Latta v. Da Roza, 1929, 100 Cal.App. 606, 608, 280 P. 711, 281 P. 655. The original lessee in the lease with which we are now concerned was the Rio Grande Oil Company. There was no evidence that this concern was unaware of the meaning given to the quoted provision of the lease by the oil industry and that it was engaged in that industry is a matter of common knowledge.

[4] The defendant argues further that because the oil industry's usage was not pleaded by the plaintiff evidence concerning it was improperly received and may not be considered. Plaintiff's complaint was a simple one, suitable in an action to quiet title. By way of defense the Ranger Petroleum Corporation set up the lease, in legal effect, including the provision upon which it relies to protect it against forfeiture. If a plaintiff need ever plead a technical interpretation of a provision of an instrument in order to rely upon it, in the case before us that need did not arise until the defendant filed its answer setting up the lease. But by that time the pleadings by which issues of fact may be joined had ended; the plaintiff, under our system of pleading, had no opportunity to file a replication to the new matter set up in the defendants' pleading, and so it could proceed to prove its interpretation of the provision without a prior pleading of it. See Buford v. Florin Fruit Growers' Ass'n, 1930, 210 Cal. 84, 91, 291 P. 170; Hedlund v. Sutter Medical Service Co., 1942, 51 Cal. App.2d 327, 332, 124 P.2d 878.

[5, 6] From the recital of the pleadings it is furthermore apparent that the burden of proving its defense, that the obligation to continue to drill new wells had been suspended, was on the defendant Ranger Petroleum Company. Richter v. Adams, 1937, 19 Cal.App.2d 572, 576 and 579, 66 P.2d 226. In its endeavor to prove that it was excused, by the low price of oil, from fulfilling the drilling obligations of the lease, the defendant was handicapped by its erroneous interpretation of the provision upon which it relied. In substance, the theory on which the defendant offered its evidence was that it was excused from drilling so long as it was unable to obtain 75¢ per barrel for the oil it produced. So, over timely objection, it was successful in introducing evidence that it had never been offered or received as much as seventy-five cents a barrel for its oil. In explanation of its inability to receive as much as seventy-five cents a barrel for its oil the defendant brought out that there was no pipeline connection between its well and any of the oil companies who were controlled by the posted price, which only applied to oil delivered into pipe lines, and at best a hauling deduction of 5¢ from the price posted for oil of the quality it produced would reduce that price, to it, to 70¢ per barrel. Furthermore, its president testified, it produced such a small quantity of oil, with such a high water content, that the larger companies were not interested in buying it; it had to be sold to the smaller refineries. If this evidence was material, then the provision of the lease on which our interest is centered would have the practical effect of giving the defendant an option to drill new wells or not as it finds it to its advantage. If it desired not to drill more than the first well, all that it need do would be to fail to make it possible, or easy, for any oil refinery to gain access to such quantities of oil as it produced, with the result that the best price it could receive would necessarily be low. But this whole theory is based on the false premise that defendant's duty to drill is

dependent on its ability to get a certain price for the oil which it produces. Instead, as we have seen, the test is whether there is a posted price of at least seventy-five cents for oil of the quality produced by the defendant, not for that oil itself.

[7, 8] In view of the erroneous theory which the defendant urged throughout the trial, and upon which it was permitted to introduce evidence, we are hesitant to construe the court's finding with respect to the question as a finding on the actual issue involved. The finding, omitting an immaterial reference at the end, is this: "That the price of oil produced on said demised premises since the completion of said well has been less than 75 cents per barrel for oil of the quality produced on said demised premises * * *."

But if we read this finding as though it did not refer to the price received for the oil produced on the premises, but instead determined that the price of oil of the quality produced on the premises was less than 75¢ per barrel, then we find it unsupported by any substantial evidence. The prices posted for oil in the Wilmington field began with oil of a gravity of 14–14.9; the price was 75¢ per barrel. Plaintiff produced witnesses who testified that samples which they took from the ditch leading to defendant's sump run better than 14 gravity. If we accept defendant's criticism of this evidence and conclude that the trial judge may have disregarded it, that will not help the defendants discharge the burden of proof which was theirs. They produced one witness who had made a test of their oil and found it to be 13.6 gravity, but on cross-examination this proved to be wet gravity, and so not the gravity referred to in the posted prices. The dry gravity, the witness admitted, "could have been" higher. How much higher was left to speculation. The testimony of defendant's president, that the oil his company was producing had a gravity of less than 14, has no probative value in view of the facts that, as revealed by his subsequent answers, he did not speak of his own knowledge, but based his statement on the "run tickets" of the refineries which bought the product of his wells, and there was no showing of the basis on which the run tickets were computed. We note, furthermore, that there was evidence that as a matter of fact the three major oil companies, those who posted prices, were paying the same price, seventy-five cents per barrel, for oil of 13.6–14.0 gravity as they were for oil running between 14 and 14.9, and no evidence to the contrary.

[9] The usual rule that forfeitures are not favored does not apply to a case such as this, where the productive possibilities of plaintiff's property are blocked for a long term by defendant's lack of ability, or desire, to develop them. Slater v. Boyd, 1932, 120 Cal.App. 457, 460, 8 P.2d 182.

The portions of the judgments from which plaintiff appealed are reversed.

DESMOND, P. J., and SHINN, J., concur.



61 Cal.App.2d 359

STRICKLIN v. ROSEMEYER et al.

Civ. 12488.

District Court of Appeal, First District, Division 2, California.

Nov. 16, 1943.

1. Trial ⇐296(4)

Alleged error in instruction that person injured as proximate result of choosing a dangerous way of performing an act is guilty of contributory negligence was cured by instruction that standard of care required of plaintiff was ordinary care as defined in other instructions.

2. Negligence ⇐141(1)

An instruction that where person has choice of two ways of performing an act, one of which is safe and the other of which he knows or should know is subject to danger, and chooses dangerous way and as proximate result thereof is injured, such person is guilty of contributory negligence, was proper.

3. Evidence ⇐5(2)

It is common knowledge that sidewalks are maintained for safety of pedestrians, and are ordinarily less dangerous to pedestrians than traveled portion of vehicle highways.

4. Trial ⇐296(4)

In action for injuries to motorist who was struck by right front open door of

trolley bus while motorist was alighting from left door of parked automobile, an instruction on general rule that person choosing a dangerous way when safe one is available, and is injured as proximate result, is contributorily negligent was not erroneous where application of instruction to facts was tied in by admonition that use of the left door was not in itself negligence, and that motorist could be charged with negligence only if jury found that he had not used ordinary care.

5. Trial ⇐260(1)

Proposed instruction covered by instructions given was properly refused.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Charles D. Stricklin against James C. Rosemeyer and another for injuries sustained when plaintiff was struck by a trolley bus operated by defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Maurice C. Ryan, of San Francisco (John J. Taheny, of San Francisco, of counsel), for appellant.

Bronson, Bronson & McKinnon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiff has appealed from the second adverse verdict of a jury denying him damages for injuries. On the former appeal this court reversed the judgment for defendants mainly on the error arising from the introduction of a San Francisco traffic ordinance which the Supreme Court in another matter held to be invalid after the trial of the case. Stricklin v. Rosemeyer, 52 Cal.App.2d 558, 126 P.2d 665.

The evidence upon which the verdict rests is that plaintiff parked his automobile near the curb in front of his home with the left side of the vehicle facing the street. He opened the left front door, put his feet upon the running board, and with his head and shoulders protruding, looked to the rear and saw a passenger bus approaching which was operated by defendants. The bus was then from twelve to twenty feet to the rear of plaintiff's car, and was travelling about fifteen miles an hour. The plaintiff then threw the door of his car farther open and prepared to alight into the street. The right door of the bus had been left open while the driver was collecting a fare and this door struck the door of plaintiff's car with such force that it rebounded and injured plaintiff. The collision caused the bus to swerve so that the left rear fender of plaintiff's car was scratched by some portion of the rear of the bus. The appeal rests upon two grounds, the plaintiff claiming error in the giving of an instruction and in refusing one proposed by him.

At the request of respondents the trial court gave this instruction:

"Now I will read you some instructions that have been submitted by the defendant.

"I instruct you that where a person has a choice of two ways of performing an act, one of which is safe and the other of which he knows (or in the exercise of reasonable care should know) is subject to danger; and such person chooses the dangerous way of performing the act and as a direct proximate result thereof is injured, such person is guilty of contributory negligence and is not entitled to recover damages from another on account of his injuries so received."

At the request of appellant the trial court gave this instruction: "The plaintiff, Charles Stricklin, is not to be charged with negligence merely because he alighted by the northerly door of his automobile. I instruct you that the standard of care required of the plaintiff in this action is ordinary care as defined in these instructions. It is the care an ordinary person of ordinary prudence would use under all the circumstances of the situation, and if you find that the plaintiff did use ordinary care in alighting from his automobile, I instruct you that the plaintiff had a right to alight therefrom by the northerly door."

[1, 2] If there was any error in the first instruction it was certainly cured by the second. But that instruction is a correct statement of the law. It was so held in Douglas v. Southern Pacific Co., 151 Cal. 242, 251, 90 P. 538; and Hontz v. San Pedro, etc., R. R. Co., 173 Cal. 750, 757, 161 P. 971. The rule is accurately stated in 38 Am.Jur. p. 873, as follows: "One having a choice between methods of doing an act which are equally available, who chooses the more dangerous of the methods, is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril, or other circumstance

justifying such choice. The fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly encountering the peril." The exceptions to the application of the rule are also noted, but no one is pertinent here.

[3] On the application of the rule it has been frequently stated that the "question" is whether the plaintiff knew that one way was safe and the other dangerous and chose the latter with full knowledge of those conditions. Here the appellant concedes that he had such knowledge and that the chosen way was in fact dangerous. It is a matter of common knowledge that sidewalks are maintained for the safety of pedestrians and that they are ordinarily less dangerous to the pedestrian than the travelled portion of vehicle highways.

[4] The instruction complained of was but a generalization of this well settled rule. Its application to the facts of this case was carefully tied in by the admonition that the use of the left door was not in itself negligence but that the plaintiff "had a right to alight therefrom" and could be charged with negligence by reason of that act only if the jury found that he had not used "ordinary care as defined in these instructions." It is a rational conclusion from the case as a whole that the jury denied appellant relief because it believed that he did not use "ordinary care" in continuing to expose himself to the known danger of the travelled portion of the highway after he saw the bus approaching.

[5] The failure to give the instruction proposed by appellant was not error because the same matter was covered by the instructions actually given. The proposed instruction was to the effect that even though plaintiff was negligent, his negligence would not bar a recovery by him if by the exercise of ordinary care on his part "the consequences of defendant's negligence would not have been avoided." This was but a repetition of what the trial court covered as will be seen from the following instructions which were given:

"The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces that event and *without which that event would not have occurred.* * * *

"Now in regard to contributory negligence you are instructed that when the negligence of the injured party *contributes proximately* to the injuries complained of, the law will afford no redress. If, therefore, you find in this case that the plaintiff was negligent, and such negligence *contributed proximately* to the resulting accident, I instruct you that plaintiff cannot recover against defendant. * * *

"Unless it is shown by, or may be inferred from, the evidence offered by plaintiff, such negligence is a matter of defense, to be proved affirmatively by defendants.

"It is not incumbent upon the plaintiff to prove that he was free from contributory negligence." (Emphasis ours.)

Taking these instructions together, the jury was informed that unless it was proved affirmatively that the plaintiff was negligent, and that without such negligence the accident would not have occurred, he would not be barred from recovery by contributory negligence. The proposed instruction was merely a restatement of the same matter in another form, but it was framed in such a manner that it would have tended to confuse the minds of the jurors.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.



61 Cal.App.2d 286

BURCH v. ATCHISON, T. & S. F. RY. CO.

Civ. 3231.

District Court of Appeal, Fourth District, California.

Nov. 8, 1943.

Hearing Denied Dec. 31, 1943.

1. Master and servant ⇐278(6), 286(13)

In action under the Federal Safety Appliance Act for injuries to brakeman caused by a fall at night after catching his foot on a raised bolt on a running board on a moving damaged freight car, brakeman's testimony that he did not know the precise nature of the object upon which he had caught his foot did not destroy his positive and direct testimony that he had caught his

foot on something, and whether this was true was for jury. Safety Appliance Act § 2, 45 U.S.C.A. § 11.

2. Master and servant ⇐286(13)

In action under the Federal Safety Appliance Act for injuries to brakeman caused by a fall at night after catching his foot on a raised bolt on a running board on a moving damaged freight car, evidence was sufficient to take case to jury on issue whether the board was insecure. Safety Appliance Act § 2, 45 U.S.C.A. § 11.

3. Evidence ⇐359(1)

In action under the Federal Safety Appliance Act for injuries to brakeman caused by a fall at night after catching his foot on a raised bolt on a running board on a moving damaged freight car, an enlarged photograph indicating that several bolts near the end of the board were not exactly flush with the surface thereof was admissible on issue whether running board was secure. Safety Appliance Act § 2, 45 U.S.C. A. § 11.

4. Master and servant ⇐278(3)

Under the Federal Safety Appliance Act, the particular defect in the appliance which caused the injury need not be pointed out by the evidence. Safety Appliance Act § 2, 45 U.S.C.A. § 11.

5. Master and servant ⇐286(13)

In action under the Federal Safety Appliance Act for injuries to brakeman caused by a fall at night after catching his foot on a raised bolt on a running board on a moving damaged freight car, evidence that the board was used in a normal and usual manner and failed to work was sufficient for jury on issue as to whether board was secure. Safety Appliance Act § 2, 45 U.S.C.A. §.11.

6. Trial ⇐139(1)

Where there was substantial evidence in the record which, if accepted by the jury, would have supported a judgment for plaintiff, a question of fact was presented, and it was error to direct a verdict for defendant, notwithstanding that much of the evidence strongly supported defendant's contentions.

Appeal from Superior Court, City and County of San Bernardino; F. A. Leonard, Judge.

Personal injury action by Leonard C. Burch against the Atchison, Topeka & Santa Fe Railway Company. From a judgment on a directed verdict for defendant plaintiff appeals.

Reversed.

Hildebrand & Bills, of Oakland, and Martin & Downey, of Los Angeles, for appellant.

J. C. Gibson, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, and Jesse Curtis, Jr., of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages brought by an employee against a common carrier engaged in interstate commerce, being based upon an alleged violation of Section 2 of the Federal Safety Appliance Act, 45 U.S.C.A. § 11. That section provides, in part, that: "All cars requiring * * * secure running boards shall be equipped with such * * * running boards." The plaintiff appeals from a judgment which was entered after the court directed a verdict in favor of the defendant. The sole question presented is whether or not there was any substantial evidence tending to prove that the running board on top of a certain freight car was insecure within the meaning of the provision to which we have referred.

About 1:15 A.M. on the morning of February 22, 1942, the appellant was engaged in switching freight cars in the respondent's yards at Barstow. The car in question was an ordinary freight car, equipped with a running board along its top consisting of planks laid end to end and three planks wide, the planks being bolted at frequent intervals to crosspieces, with bolts having screw heads and with nuts on the other end. Apparently, the heads of these bolts had originally been countersunk so that they were flush with the surface of the running board. This particular car had been sideswiped at Needles a short time before and was being taken to San Bernardino for repairs, with a tag upon it indicating that it was in bad order but that it could be moved.

At the time in question this car had just been "kicked" onto a side track and was rolling in a westerly direction. It was the appellant's duty to ride the car "into the clear" and then to stop the car by means of a hand brake. The appellant boarded the car at its westerly end, carrying an electric

lantern, and then proceeded along the running board in a direction opposite to that in which the car was moving in order to reach the hand brake which was at the easterly end of the car. As he neared that end of the car he fell, his body being thrown over the end of the car and down to the track below, with resulting serious injuries. He had not set the brake and the car was stopped by running into another car. It is appellant's contention that he caught his foot on a raised bolt or screw on this runway, which caused his fall.

The appellant testified that he was walking along this runway at "a pretty fair clip"; that as he neared the east end of the car he tripped either on a screw or a raised joint in the boards, but he thought it was a screw; that he was just walking and tripped; that he was so near the end of the car that when he fell he went over the end; that he did not take any steps after he tripped as "my foot was tied"; that "It just seemed hung, just the same as if it had been tied." When asked to explain this more fully he replied: "Here is the foot, and here comes the right one, and of course my body is going forward, and when it gets here it hooks on something, seemed as though it had gone under something, or probably the sole had gone under something, and it was tied, absolutely hung there. There was no releasing it, and of course, going forward, the weight of my body going forward, when my foot was tied, naturally I fell." Again he testified: "Well, I went on top of the car to set the brake, and in going from one end of the car to the other, I hung my foot on a screw, or a nut on the running board, causing me to lose my balance, over the end of the car to the ground."

The respondent concedes that this part of the appellant's testimony, if it stood alone, would probably be sufficient to support a verdict in his favor. It is contended, however, that the effect of this evidence is destroyed by his testimony on cross examination and by other evidence showing that this running board was in good condition, with the result that when the evidence is viewed as a whole it discloses no substantial evidence which would have supported a verdict for the appellant.

[1] On cross examination, the appellant testified that due to the darkness he did not see what it was he stumbled on; that he did not see that he stumbled on a screw; and that he did not see that he stumbled on a board. He was also asked: "Then you do not have any knowledge of what it was that you stumbled on. That is true, isn't it?", and he replied in the affirmative. We are unable to see how these admissions can be said to destroy the effect of his previous testimony that his foot had caught on something to the extent that he was unable to move it. It was dark, the car was moving and he was hurrying to reach the brake. Under such circumstances, it is hardly to be expected that he would have seen such a thing as a slightly raised bolt and it is not surprising that after a sudden fall he would not know the precise nature of the object upon which he had caught his foot. The fact that he did not see the object or know what it was may have a bearing on the weight of his evidence but does not destroy his previous testimony which was direct and positive to the effect that he caught his foot on something. Whether this was true was a question of fact for the jury, and the evidence given by the appellant cannot be said to be entirely lacking in substantiality.

[2] The respondent further contends that the other evidence introduced not only fails to substantiate the appellant's claim that the running board was insecure but also demonstrates that this running board was in good condition. Another witness for the appellant testified that he went up and looked at this running board about an hour and a half after the accident, and that he did not see any bolts protruding above the level of the running board. He was asked by a juror "Were those bolts sticking up above the surface of the running board or were they flush—even?". He replied: "That is what I couldn't say for sure, whether they were sticking up, or whether they were not. They could have been sticking up, or they could have been imbedded." Two or three witnesses for the respondent testified that they went up and looked at this running board shortly after the accident and that they found no bolts sticking up and no raised joint in the boards, and that the running board was in good condition. There is an obvious weakness in this evidence, however, in that each of these witnesses testified that he made no examination other than to look at the running board "visually", and that he made no attempt either with an instrument or with his fingers to investigate as to whether any of the bolts were loose. This might well be important, particularly since this car had been damaged and was known to be in

bad order. It is not impossible that one of these bolts was loose. In that event it might have been protruding above the surface of the running board to a sufficient extent to catch the appellant's foot, and it might later have been jarred back into place when the car stopped by running into another car. This might well have been argued to the jury in support of the plaintiff's testimony and in explanation of what occurred.

[3] An enlargement of a photograph showing the easterly end of this running board was introduced in evidence by the respondent. It was taken on the afternoon of the second day after the accident. Several witnesses for the respondent who examined the running board after the accident testified that it correctly portrayed the area in question as they observed it. This picture, which is before us, rather indicates that several of the bolts which were near the easterly end of this running board were not exactly flush with the surface thereof. On two or three of these bolts the side of the head which is farthest away from the brake end of this car seems to be perceptibly higher than the side which is toward that end of the car. In the case of other bolts, there are shadows in the picture which might indicate that the heads of these bolts were slightly raised from the surface of the runway. While a witness for the respondent testified that these shadows were caused by depressions in the board where the bolts were countersunk a contrary inference might be drawn from the picture. This picture suggests matters which could have been argued to the jury, and it has a definite bearing upon the main issue which should have been considered.

[4-6] In Newkirk v. Los Angeles Junction Ry. Co., 21 Cal.2d 308, 131 P.2d 535, 539, a somewhat similar case was considered, involving another clause of Section 11 of the Safety Appliance Act which requires that cars be equipped with efficient hand brakes. It was there held that under the Safety Appliance Act the particular defect in the appliance which caused the injury need not be pointed out by the evidence and that: "Evidence that the brake is used in the normal and usual manner and fails to work is sufficient evidence of the inefficiency of the brake to make the issue one for the jury." While a different instrument or appliance is involved in the instant case the same rule of law could well be applied here. While much of the evidence strongly supports respondent's contentions at the trial, there is substantial evidence in the record which, if accepted by the jury, would have supported a judgment for the plaintiff. It follows, under well established rules, that a question of fact was presented and that it was error to direct a verdict for the respondent.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CURTIS, J., not participating.



61 Cal.App.2d 413

BALKINS et al. v. NORRBY et al.

Civ. 14262.

District Court of Appeal, Second District, Division 3, California.

Nov. 19, 1943.

1. Appeal and error ⇐417(2)

An appeal from order confirming sale of land under partition decree was not ineffective because notice of appeal failed to make purchaser at such sale a party respondent, as notice of appeal does not determine who are respondents and law does not require that such notice be addressed to opposite party.

2. Appeal and error ⇐339(2)

A notice of appeal, filed over year after entry of interlocutory partition sale decree and all subsequent orders in partition suit, except order confirming sale, was too late as to all appealable matters other than order of confirmation. Code Civ.Proc. § 939.

3. Appeal and error ⇐419(1)

A notice of appeal from interlocutory partition sale decree and all subsequent proceedings in partition suit, including final decree and sale order of distribution, was insufficient for failure to specify what judgments or orders, other than interlocutory decree, were appealed from, except as to appeal from order confirming sale, to which order such notice might fairly be interpreted to refer.

4. Appeal and error ⇐419(1)

Notices of appeal are liberally construed to preserve right of review, unless it appears that respondent has been misled by misdescription of judgments or orders appealed from.

5. Appeal and error ⇐713(1)

Where trial court's transcript contained stipulation, signed by counsel for appellant and respondents, that it was full and fair transcript of all papers and evidence used in determination of matters appealed from, and judges' certificate was to same effect, questions presented by appeal from order confirming sale of land under interlocutory partition decree were supported by record, though transcript certified by judges who rendered such decree and made order of confirmation was included with clerk's transcript under cover labeled "Clerk's Transcript".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt and Joseph W. Vickers, Judges.

Action by Lester Balkins and another against Alvin L. Norrby, as executor of the estate of Mary Dargit Trowbridge, deceased, and others, to partition a parcel of land. From an interlocutory decree for sale of the land and distribution of the proceeds and all subsequent proceedings, including an order confirming the sale, named defendant appeals. On plaintiff's motion to dismiss the appeal or affirm the decree and orders appealed from.

Motion denied as to appeal from order of confirmation, and appeals from interlocutory decree and other proceedings or orders dismissed.

M. J. Gordon and C. S. Mauk, both of Los Angeles, for appellant.

Henry P. Leavitt and Robert E. Austin, both of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The questions now to be answered in this case arise out of plaintiffs' motion to dismiss the appeal of the defendant Alvin L. Norrby, appearing as executor of the estate of Mary Dargit Trowbridge, or to affirm the matters appealed from. The action is one to partition a parcel of land. The complaint alleges that the plaintiff is the owner of a one-third interest in the lot and house, which constitutes the parcel, and that the estate of Mary Dargit Trowbridge has a two-thirds interest in the property, subject to a mortgage of the two-thirds interest to Los Angeles County. The complaint further alleges a tax sale of the property to the defendant Cleon E. Balkins, but claims that the sale was defective, a claim disputed by Balkins in his answer.

An interlocutory decree was entered, providing for the sale of the property by a referee appointed for the purpose, and for the distribution of the proceeds of the sale as follows: (1) Pay referee's fees and costs and city and county taxes; (2) pay $406.36, with interest, to Cleon E. Balkins; (3) pay one-third of the remainder to the plaintiffs; (4) pay to the County of Los Angeles, out of what is left, such amount as the county and the estate agree upon, in settlement of the county's mortgage; (5) pay the residue to the estate. Following the entry of this decree the property was advertised for sale and sold, according to a report filed by the referee; a motion was noticed and made to confirm the sale; a motion was noticed and made to set the sale aside; an order was made setting the sale aside; again the referee advertised and sold and so reported; again motions were made to confirm and to set aside the sale, followed by an order filed March 22, 1943, entitled: "Order of Court Denying Motion to Set Aside Sale and Vacate Referee's Report, and Confirming Sale and Approving Referee's Report and Allowing Fees and Compensation to the Referee."

So much detail appears necessary to evaluate the objections raised to the notice of appeal, which is in the following words (omitting title of court and cause):

"To Clerk of the Superior Court of the Above Named County, and to the Plaintiffs.

"You and each of you will please take notice the the defendant Alvin L. Norrby, as executor of the estate of Mary Dargit Trowbridge, deceased, hereby appeal—to the Supreme Court of the State of California from the Interlocutory decree, and all the proceedings subsequent thereto, including the final decree and sale order of distribution and all other orders subsequent to and including the interlocutory decree.

"Dated May 17, 1943.

"M. J. Gordon

"C. S. Mauk

"Attorneys for Executor."

[This appeal was transferred to this court by the Supreme Court.]

[1] The argument that the appeal is ineffective "because it fails to make the defendant, Cleon E. Balkins, a party," is not a sound one, for it is based on the false premise that the notice of appeal determines who are party respondents. As pointed out in Re Guardianship of Copsey, 1936, 7 Cal.2d 199, 200, 60 P.2d 121, 122, "there is no provision of law requiring the notice of appeal to be addressed to the opposite party."

[2] The notice of appeal was filed May 17, 1943. By virtue of the provisions of section 939, Code of Civil Procedure, it is timely only as to the judgments and orders entered on or after March 18, 1943. With the exception of the order which was filed March 22, 1943, all actions taken by the court or its referee antedate March 18, 1943; the interlocutory decree was entered September 22, 1942. Because of the lapse of time the appeal is too late as to all appealable matters other than the order of March 22.

[3, 4] One of the grounds of the motion to dismiss is the failure of the notice of appeal to specify what judgment or order, other than the interlocutory decree, is appealed from. Undoubtedly this is true, with the one exception to be noted, and because of it an additional ground exists which warrants the dismissal of the appeal from the various "proceedings" that were had prior to the order of March 22. Brooks v. Johnson, 1937, 22 Cal.App.2d 618, 622, 72 P.2d 194. The exception we note is the special reference in the notice of appeal to "the final decree and sale order of distribution." It is established as the rule in this state that "notices of appeal are liberally construed to preserve the right of review unless it appears that the respondent has been misled by the misdescription." Kellett v. Marvel, 1936, 6 Cal.2d 464, 471, 58 P.2d 649, 653. In spite of its unhappy choice of words, the notice of appeal may fairly be interpreted to refer to the order of March 22, and that the plaintiffs have not been misled by the wording of the notice is evidenced by the fact that one of the grounds advanced in support of their motion to affirm, if the appeal is not dismissed, is: "that there is no record before the Court from which the Court can determine that the order of March 22nd, 1943, is incorrect."

[5] In their Points and Authorities, offered to support their motion, the plaintiffs open with this sentence: "Nothing is before the Court in this case but the Clerk's Transcript and Appellant's Opening Brief." Plaintiffs were misled into making this statement, doubtless, by the fact that a transcript, certified by the judge who rendered the interlocutory judgment and by the judge who made the order of March 22, is included with the clerk's transcript under a cover bearing the label of "Clark's Transcript." The court's transcript, we note, contains a stipulation, apparently signed by counsel for the appellant and the plaintiffs-respondents, that it is a full and fair transcript "of the papers, and all of the papers and evidence used or considered in the determination of the matters appealed from herein." The judges' certificate is to the same effect. In the premises, the questions which may be presented by the appeal from the order of March 22 are not without a supporting record and are not so unsubstantial that the order should be affirmed on motion.

The motion to affirm, or to dismiss the appeal from, the order of March 22, 1943, is denied; the appeals from the interlocutory judgment and from the other proceedings or orders are dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.



61 Cal.App.2d Supp. 844

PEOPLE v. SIPPER.

Cr. A. 1981.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 8, 1943.

1. Criminal law ⇐1134(2), 1144(13)

On appeal, Superior Court must view evidence most favorably to respondent and disregard conflicting testimony.

2. Attorney and client ⇐11

In prosecution of real estate broker for practicing law without being active member of state bar, evidence justified jury's finding that defendant advised persons borrowing money from another to pay

indebtedness on their realty as to kind of legal document they should execute to secure loan. St.1939, p. 359, § 6125.

3. Attorney and client ⇐11

A real estate broker, advising persons borrowing money from another to pay indebtedness on their realty that they should execute trust deed to secure loan, "practiced law" without being active member of state bar in violation of statute. St.1939, p. 359, § 6125.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice Law".

4. Attorney and client ⇐11

The term "practice law" or "practice of the law," as generally understood, is the doing and performing of services in court of justice in any matter pending therein, throughout its various stages, in conformity to adopted rules of procedure, but in larger sense includes legal advice and counsel and preparation of legal instruments and contracts by which legal rights are secured, though such matters may not be pending in court.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice of Law".

5. Constitutional law ⇐250

In prosecution of real estate broker for unlawfully practicing law by advising persons borrowing money from another to execute trust deed, prepared by defendant, as security for loan, evidence that certain institutions' escrow clerks, to whom statute alleged to have been violated did not apply, filled out forms of such documents and information furnished by parties thereto, was insufficient foundation for defense of denial of "equal protection of law," in absence of showing that such clerks furnished legal advice. St.1939, p. 359, § 6125; Const.Cal. art. 1, § 11; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of Law".

6. Constitutional law ⇐250

The principle that public administration of law so as practically to make unjust and illegal discriminations between persons in similar circumstances denies "equal protection of law," though law itself is fair on its face and impartial in appliance, is inapplicable in prosecution of real estate broker for unlawfully practicing law, since a person is not entitled to protection of law to enable him to commit crime on basis of equality with other persons. St.1939, p. 359, § 6125; Const.Cal. art. 1, § 11; U.S.C.A.Const. Amend. 14.

7. Attorney and client ⇐11

To "practice law" within statute providing that no person shall practice law unless he is active member of state bar does not require doing of more than single act or imply a course of conduct. St.1939, p. 359, § 6125.

Appeal from Municipal Court of Los Angeles; Leo Aggeler, Judge.

Albert A. Sipper was convicted of practicing law without being an active member of the State Bar, and he appeals.

Affirmed.

Harry E. Weiss and Maurice J. Hindin both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., of Los Angeles, Donald M. Redwine, Asst. City Atty., of Hollywood, and John L. Bland, Deputy City Atty., of Los Angeles, for respondent.

FOX, Acting Presiding Judge.

Defendant was charged with a violation of section 6125 of the Business and Professions Code of the State of California, St. 1939, p. 359, which provides, that "No person shall practice law in this State unless he is an active member of the State Bar." A verdict of guilty was returned by the jury. From the ensuing judgment and order denying his motion for a new trial, defendant appeals.

[1] Viewing the evidence, as we must on an appeal, most favorably to respondent, and disregarding conflicting testimony (Patten & Davies Lbr. Co. v. McConville, 1933, 219 Cal. 161, 164, 25 P.2d 429; People v. Alexander, 1940, 41 Cal.App.2d 275, 283, 106 P.2d 450, 916), the transaction here involved may be summarized as follows: A Mr. and Mrs. Tirheimer had borrowed $700 from a Mrs. Hetman to pay off the indebtedness on their real property. On seeing a sign, "Real Estate Office and Notary Public," they entered the place of business and for the first time met the defendant, a real estate broker, and asked him "to make out a paper to protect Mrs. Hetman for the money." The loan was to be secured by the property. The Tirheimers were inexperienced in such matters. They gave

defendant the terms of the loan but they did not tell him what kind of an instrument they wanted drawn up. In this connection, Mrs. Tirheimer testified as follows:

"Q. Did you at any time tell him you wanted a trust deed? A. No, we did not.

"Q. Did you at any time tell him you wanted a mortgage? A. No.

"Q. What did you tell him? A. We told him we wanted a paper—we didn't know just exactly what kind but would leave it up to him, what ever he thought was the best."

Defendant said he would make out the papers. On the following Sunday, defendant, with a notary public, came to the Tirheimer home with a trust deed, which the Tirheimers signed before the notary, to whom they paid a dollar. Defendant then telephoned Mrs. Hetman (the lender), whom he had not contacted before, and asked her to pick up the papers that he had prepared for the Tirheimers. Defendant sought to collect from the parties to the transaction $15 for his services. This charge, however, was later reduced to $10. The county recorder would not accept for record the trust deed which defendant had prepared. He then drew up a mortgage for the parties, to cover the transaction. Defendant was not admitted to practice law and was therefore not "an active member of the State Bar."

[2] From the foregoing testimony, the jury was justified in concluding that defendant undertook to, and did, advise the Tirheimers as to the kind of a legal document they should execute in order to secure the loan. This conclusion is strengthened by the amount of the charge which defendant made. It clearly indicates that he considered he was called upon to do something more than the mere clerical work of typing in certain furnished information in a blank form. Such a fee would be out of all reason for such clerical services.

[3] The question is then, Does this constitute practicing law, in violation of section 6125 of the Business and Professions Code? The answer is clearly in the affirmative.

[4] The term "practice law," or its equivalent, "the practice of the law," has been repeatedly defined by our reviewing courts. They have uniformly said that "as the term is generally understood, the practice of the law is the doing and performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." People v. Merchants' Protective Corp., 1922, 189 Cal. 531, 535, 209 P. 363, 365; State Bar v. Superior Court, 1929, 207 Cal. 323, 335, 278 P. 432; Smallberg v. State Bar, 1931, 212 Cal. 113, 119, 297 P. 916; Gray v. Justice's Court, 1937, 18 Cal.App.2d 420, 63 P.2d 1160. It is apparent that what defendant did comes squarely within this definition.

If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license. Eley v. Miller, 1893, 7 Ind.App. 529, 535, 34 N.E. 836, 837; State ex rel. Wright v. Barlow, 1936, 131 Neb. 294, 268 N.W. 95; In re Matthews, 1938, 58 Idaho 772, 79 P. 2d 535, 537; Gustafson v. V. C. Taylor & Sons, 1941, 138 Ohio St. 392, 35 N.E.2d 435. But the record supports the conclusion that he went further—that he determined for the parties the kind of a legal document they should execute in order to effectuate their purpose. This constituted the practice of law. Clark v. Reardon, 1937, 231 Mo.App. 666, 104 S.W.2d 407; People v. Alfani, 1919, 227 N.Y. 334, 125 N.E. 671; Grand Rapids Bar Ass'n v. Denkema, 1938, 290 Mich. 56, 287 N.W. 377, 381.

[5] Defendant argues that the court erred in refusing to instruct the jury, in effect, that if certain companies employed persons, unlicensed to practice law, to prepare such documents as defendant prepared, and if the law was not made to apply to such employees, then the law did not have uniform operation, and they should find for defendant. His basis for requesting such an instruction was: (1) the evidence touching the practice of the escrow clerks of certain Los Angeles institutions, and (2) the case of Yick Wo v. Hopkins, 1885, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. From these premises, defendant argues that he was denied that equal protection of the law which is guaranteed by the Fourteenth

Amendment to the Constitution of the United States, and by Article I, Section 11, of the Constitution of the State of California.

The simple answer to the first premise is that no sufficient foundation for such a defense was established in the evidence. The effect of the testimony directed to that point was merely to show that escrow clerks fill out forms with information furnished by the parties to the transaction. It does not appear from the record before us that these clerks furnished legal advice.

[6] As to the Yick Wo case, counsel for defendant emphasizes the statement of the court, that (page 373 of 118 U.S., page 1073 of 6 S.Ct., 30 L.Ed. 220) "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. * * * The discrimination [in that case] is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution." While this principle has since been frequently reiterated (see Williams v. Mississippi, 1898, 170 U. S. 213, 224, 18 S.Ct. 583, 42 L.Ed. 1012; Ah Sin v. Wittman, 1904, 198 U.S. 500, 507, 25 S.Ct. 756, 49 L.Ed. 1142; and Mackay Telegraph & Cable Co. v. Little Rock, 1918, 250 U.S. 94, 100, 39 S.Ct. 428, 63 L.Ed. 863; Norris v. Alabama, 1934, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074), defendant misconstrues and erroneously applies it in this case. As was pointed out in People v. Montgomery, 1941, 47 Cal.App.2d 1, 14, 117 P.2d 437, 446, "It should be borne in mind that in the Yick Wo case the equal protection of the law was extended to persons of a particular race to enable them to engage in a lawful business on a basis of equality with all other persons. Appellant now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society. * * * Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime." It is, therefore, clear that the court was correct in refusing the requested instruction.

[7] Finally, defendant contends that to "practice law" requires the doing of more than a single act; that it implies a course of conduct. This court has passed upon this precise point adversely to defendant's contention, in People v. Ring, 1937, 26 Cal. App.Supp.2d 768, 771, 70 P.2d 281. We see no reason for departing from that decision.

We are not called upon in this case to pass upon the right of a licensed real estate broker or salesman to make out a deed, mortgage or trust deed as an incident to the completion of a sale or other transaction which he has effected as the representative of one of the parties.

The judgment and order denying motion for a new trial are affirmed.

KINCAID and SWAIN, JJ., concur.



61 Cal.App.2d Supp. 834

CREDIT BUREAU OF SAN DIEGO, Inc., v. JOHNSON et ux.

No. 115560.

Appellate Department, Superior Court, San Diego County, California.

Nov. 1, 1943.

1. Workmen's compensation ⇐2084

The Workmen's Compensation Act affords a complete and exclusive manner of adjusting all controversies as between an injured employee and his employer or insurance carrier. St.1937, p. 292, § 5304.

2. Constitutional law ⇐276

The right to make lawful contracts are rights enjoyed by the citizens under the protection of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

3. Constitutional law ⇐48

If two theories may reasonably proceed from the wording of an act, one in harmony with organic law as expressed in the Constitution, and the other in conflict therewith, the court must assume that the Legislature intended the theory in harmony rather than the one in conflict.

4. Workmen's compensation ⇐986

A contract between a physician and an injured person to pay a fixed amount for surgical operation made necessary by injury sustained in course of employment, which fee was in excess of the fee chargeable under the act, was not rendered invalid by the Workmen's Compensation Act so as to prevent recovery of the agreed fee from the injured party. St.1937, pp. 282, 292, §§ 4605, 5304.

5. Workmen's compensation ⇐993

Under statute, where injured employee provides either a consulting physician or attending physician at his own expense, the Industrial Accident Commission does not have exclusive jurisdiction over controversy between such physician and employee, and municipal court has jurisdiction of surgeon's action against injured employee to recover surgical fee agreed upon. St. 1937, pp. 282, 292, §§ 4605, 5304

6. Husband and wife ⇐151(7)

A debt contracted for an operation performed on husband was a debt contracted for one of the "necessaries" of life for which the separate property of the wife was liable. Civ.Code, § 171.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary".

7. Husband and wife ⇐221

In order to subject the wife to the liability created by statute for debts incurred for necessaries of life, it is necessary to join her as a party defendant with her husband. Civ.Code, § 171.

8. Witnesses ⇐28(2)

Evidence that a surgeon testified for injured person, in an action against a third party, with the expectation that he would be paid customary fee of $50 for so testifying, was insufficient to justify recovery of such fee on ground that a contract for the payment of $50 had been made. Civ.Code, § 171; Pol.Code, §§ 4300g, 4300*l*.

9. Witnesses ⇐27

Statutory provisions as to witness fees recoverable are exclusive in the absence of express agreement. Pol.Code, §§ 4300g, 4300*l*.

Appeal from Municipal Court of San Diego; Joe L. Shell, Judge.

Action by Credit Bureau of San Diego, Inc., a corporation, against Walter Johnson and wife to recover balance due for professional services rendered to defendants by plaintiff's assignor. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Rorick & Cottingham, of Oceanside, and Monroe & McInnis, of San Diego, for appellants.

Liggett & Liggett, of San Diego, for appellee.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, Cal., for Industrial Accident Commission, amicus curiae for appellants.

KELLY, Judge.

On June 10, 1940, defendant and appellant Walter Johnson, then being Fire Chief of the City of Oceanside, while in the course of his duties as such, responding to a fire call, suffered in a collision a fracture of the skull. The City of Oceanside carried, at the time, compensation insurance, and the carrier accepted liability so that no proceedings for the adjustment of any claim for the same were had before the Industrial Accident Commission. The accident was witnessed by a Dr. Hoskins who happened to be the family physician of appellants and who at once took the matter in charge, diagnosed the case as a skull fracture and called respondent's assignor, Dr. Werden, a specialist in brain surgery, to come from San Diego and deal with the case. Although partially conscious immediately after the accident, Mr. Johnson soon lapsed into unconsciousness and was in that condition when Dr. Werden arrived, and did not regain consciousness for some weeks thereafter. Dr. Werden advised that an immediate operation was necessary which, with Mrs. Johnson's consent and the assistance of Dr. Hoskins, he proceeded to perform and thereafter he cared for Mr. Johnson, who made a good recovery. The seriousness of the injuries

and the entire efficiency of Dr. Werden's work are not questioned.

Dr. Werden testified that, on his arrival at Oceanside, he was told by Dr. Hoskins that the case was not a compensable one and that he was being called to care for it as a private employment and that after he had examined the patient and told Mrs. Johnson of his condition "Mrs. Johnson said I was to take care of Mr. Johnson as a private case and that they would take care—she and Mr. Johnson would see to it that I was paid accordingly."

Dr. Hoskins recollects no such conversation and Mrs. Johnson's testimony is to the effect that she merely assented to Dr. Hoskins' suggestion that Dr. Werden be called in, and did not herself see Dr. Werden before the operation nor make any arrangement at all about his compensation. In the absence of findings, however, it must necessarily be assumed that the trial court accepted Dr. Werden's account of the matter.

There is, however, no question that some weeks after the accident and after Mr. Johnson had so far recovered as to be able to discuss the case with Dr. Werden, there was a conversation between them in which the doctor expressed the opinion that in view of the nature of the injury and the type of operation required, a fee of "approximately one thousand dollars" would be reasonable, and in which Mr. Johnson in substance said that such a charge would in his opinion be reasonable and would be satisfactory to him. They discussed the schedule of fees allowed by the Industrial Accident Commission and mutally agreed that for this case they were too low, and after they had agreed that the fee ought to be approximately $1,000, Mr. Johnson said in substance that he would see this paid. It would seem from the record that Dr. Werden's attention to the case continued for some time after this conversation was had.

According to Dr. Werden, he was asked by the Industrial Accident Commission for a report upon the case about three weeks after the time of the accident, and made them some sort of a report. He also caused to be entered on a ledger card charges for all of his services in the case in accordance with the scale allowed by the Industrial Accident Commission, and collected from the insurance carrier the amounts so charged, aggregating $481.48 "plus apparently ten dollars more paid several months thereafter." In October 1942 he wrote Mr. Johnson asking the latter to "pay up the balance due from you on your account with me as per arrangements previously made." Mr. Johnson failed to reply until January 11, 1943, at which time he sent the doctor a check for $200 which has been applied on the claim, but prior to its receipt Dr. Werden had assigned the claim to the plaintiff corporation which, on January 8, 1943, commenced against both Mr. and Mrs. Johnson the present action, to recover $568.52, consisting, as we take it, of the balance of the said $1,000 after crediting thereon the above mentioned $481.48, plus $50 claimed by Dr. Werden for attendance as an expert witness in an action brought by Mr. Johnson against the operator of the vehicle which collided with him.

Judgment was by the Municipal Court given in the plaintiff's favor for $358.52, with interest and costs, altogether amounting to $494.88, and from this judgment the present appeal is prosecuted.

The appellants contend that the claim of the respondent, pursuant to the contract of its assignor with the appellants, is against public policy and void, in that the Workmen's Compensation Act and the constitutional amendment supporting the same affords a complete and exclusive manner and procedure of adjusting all controversies as between an injured employee and his attending physician.

[1] There can be no doubt that, as between an injured employee and his employer or insurance carrier, the theory of the appellants is sound.

"It is well settled that the Workmen's Compensation Act provides substantially that, where the specified conditions exist, the right to recover compensation in a proceeding before the Industrial Accident Commission shall be, as against the employer, the exclusive remedy of the employee." Nelson v. Associated Indemnity Corporation, 19 Cal.App.2d 564, 566, 66 P. 2d 184, 185.

"The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. * * * When the specified conditions exist, the remedy provided by

the act is exclusive of all other statutory or common-law remedies." Alaska Packers' Ass'n v. Industrial Acc. Commission, 200 Cal. 579, 583, 253 P. 926, 928.

[2] In the event, however, that a claim is presented by a physician or surgeon for treatment rendered or prescribed for an injured employee and it appears that such physician or surgeon was employed independently of procedure by the Industrial Accident Commission, the problem becomes far more complicated. The right to make lawful contracts are rights enjoyed by the citizens under the protection of the Fourteenth Amendment of the Constitution of the United States. 12 C.J. 1122, Section 841; 16 C.J.S., Constitutional Law, § 473.

[3] In the instant case it is apparent that Dr. Werden having been called in by the attending physician, with the knowledge and approval of the wife of the injured employee, was by implication, if not indeed by express terms, proceeding under contract with the appellants. Can it be said that the Employer's Liability Act and the provisions of the State Constitution authorizing the statute was intended to abrogate the constitutional right of the parties to so contract? In approaching this problem we cannot assume that the Legislature either wilfully or ignorantly intended to violate the organic law of the United States. If two theories may reasonably proceed from the wording of the Act, one in harmony with our organic law as expressed in the Federal Constitution, and the other in conflict therewith, we must assume that the Legislature intended the theory in harmony rather than the one in conflict.

[4] After the partial recovery of the male appellant, and when he was in a mental condition to contract, he agreed with Dr. Werden that the schedule of fees provided by the Industrial Accident Fund were inadequate to compensate him for the services rendered, and that his fee should be approximately $1,000. It is immaterial that this contract was entered into after the operation was performed rather than before. If, prior to the treatment the patient was mentally able to contract, the contract would have been bilateral. After the services rendered the contract was unilateral. In either event the consideration was sufficient and the agreement binding. We cannot say it is contrary to public policy, but on the contrary, in harmony with the constitutional rights of the parties to enter into a lawful contract. We do not regard the circumstance that Dr. Werden in fact got part of his compensation from the insurance carrier as changing the situation.

[5] The appellants next contend that the Industrial Accident Commission had full and complete jurisdiction of the claim of the respondent's assignor, excluding the jurisdiction of the Municipal Court. Section 4605 of the Labor Code, St.1937, p. 282, provides: "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires." The appellants, however, contend that the section merely provides for a consulting physician and that any controversy between such physician and the employee can be determined only by the Industrial Accident Commission, and relies on Labor Code Section 5304, St.1937, p. 292. We cannot agree with either conclusion of the appellants. Unquestionably, pursuant to Section 4605 of the Labor Code, an injured employee has the right to retain either a consulting physician or, in the alternative, any attending physician, the sole condition being that such physician must be retained at the expense of the injured employee. The section states the right of the employee in the disjunctive. It is true that it is the duty of the employer of an injured employee to provide medical attention as well as surgical supplies, crutches, apparatus, nurses and medicines. It is, however, the right of the injured employee to refuse the assistance of a physician so supplied and to independently contract for a physician of his own choice and at his own expense. Turning to Section 5304 of the Labor Code, we find that it reads: "The commission has jurisdiction over any controversy relating to or arising out of sections 4600 to 4605, inclusive, unless an express agreement fixing the amounts to be paid for medical, surgical or hospital treatment as such treatment is described in those sections has been made between the persons or institutions rendering such treatment and the employer or insurer."

We think that a reasonable interpretation of this section vests the Industrial Accident Commission with the exclusive power to hear and determine any issue growing out of a controversy as to whether or not the physician was supplied by the

employer or chosen by the employee at his own expense. Such view is supported by the last clause of Section 5304, excepting from the provisions thereof an agreement fixing the amount to be paid for medical, surgical or hospital treatment where it has been made between the *"persons or institutions rendering such treatment and the employer or insurer."* (Italics added.) It is quite apparent that the Legislature in enacting such section did not have in mind a contract entered into between the injured employee and a physician of his own choice and at his own expense. Any other view of the provisions of the sections under scrutiny would vest in the Industrial Accident Commission the right to abrogate or modify any contract entered into between the employee and his physician and would nullify the rights of the parties as guaranteed by the 14th amendment to the Federal Constitution. This view finds support in the case of Independence Indemnity Co. v. Industrial Accident Commission, 2 Cal.2d 397, 41 P. 2d 320, 324, wherein it is said: "There is no escape from the conclusion, therefore, that the commission has exclusive jurisdiction over all claims for compensation against an employer or insurance carrier involving medical, surgical, and hospital treatment to injured employees, in the absence of an *express agreement between such parties.* (Italics added.)

In Foulkes v. McGibbon, 10 Industrial Accident Commission Reports, 89, it is said: "Upon proceedings regularly had, the applicant was awarded disability indemnity against the insurance carrier of his employer by reason of an industrial injury, but was denied his claim for medical expenses on the ground that upon procuring his own physician, the defendant, Dr. McGibbon, for the operation required by the injury, the employer and the insurance carrier were not notified and had no opportunity to furnish medical or surgical treatment until after the performance of the operation. Applicant later brought against the said defendant a claim for a decision by the Commission determining the reasonable value of this physician's services. The Commission denied the claim on the ground of want of jurisdiction over any controversy relating to the value of medical services as between the injured employee and his own physician, where the insurance carrier and employer had been relieved from liability. It was held that Section 17(b) of the Compensation Act reposing jurisdiction in the Commission over controversies arising out of medical treatment relates only to controversies between person rendering the treatment and the employer or the insurance carrier."

We hold, therefore, that the Municipal Court had jurisdiction.

[6] The appellants further contend that the facts of the case do not warrant a liability on the part of Mrs. Johnson, wife of the injured employee. Civil Code, Section 171, provides that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together. That the services rendered by the respondent's assignor were necessaries of life cannot be disputed. The saving of the life of Mr. Johnson was as vital to his wife as to himself.

In Evans v. Noonan, 20 Cal.App. 288, at page 293, 128 P. 794, at page 795, the Court, in considering what constituted necessaries of life states: "In the present case, however, there is nothing which requires us to go further than to say that, under our law, it most certainly at the least means the common necessaries of life, or such things as are proper and requisite for the sustenance of man. With equal certainty these include, besides food, clothing, and shelter, such medical attentions in cases of illness as are absolutely requisite to relieve physical suffering and pain and to overcome or conquer disease, if by such attentions it can be done."

[7] In order to subject the wife to the liability created by Section 171 of the Civil Code, it is necessary to join her as a party defendant with her husband. Evans v. Noonan, supra, Wisnom v. McCarthy, 48 Cal.App. 697, 192 P. 337.

[8, 9] The appellants further challenge an item of $50 included in the judgment as a witness fee on the part of Dr. Werden, the plaintiff's assignor, during the trial of a case. The record does not disclose in what court the testimony was given. We think it fair to assume that it was either in the Municipal Court or Superior Court. Section 4300*l* of the Political Code provides for witnesses' fees for witnesses who testify in the Municipal Courts and reads in such respect as follows: "Witnesses in municipal courts, except as otherwise provided by law, shall be paid the fees pro-

vided to be paid to witnesses in the superior court in the county or city and county in which such municipal court is situated." Section 4300g of the Political Code provides for witness fees and mileage in the Superior Court and in this respect reads: "Witness' fees, except as in this title otherwise provided: For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases * * * mileage actually traveled, one way only, per mile, ten cents." These statutory provisions are exclusive in the absence of an express agreement. 27 C.J. 187; 37 C.J. S., Frauds, Statute of, § 62. The testimony of Dr. Werden in this respect, appears on page 27, line 10, et seq. of the transcript:

"Q. There was no financial arrangement made about that? A. What I mean is did they promise to pay me $50.00? Do you mean that?

"Q. Yes. A. I can't recall whether there was an arrangement made about that or not. Such services are usually paid for.

"Q. That is what I was getting at. You were asked to come and you did come. A. Yes, I did come.

"Q. Expecting to be paid. A. Sure."

Under the circumstances the charge must be reduced to the statutory fee of $2 plus mileage which we cannot determine from the evidence. We will assume that it was one mile and order the judgment reduced to the extent of $47.90.

The judgment is, therefore, modified by reducing the amount to $446.98 and, as so modified, is affirmed; the parties respectively to pay their own costs on appeal.

HAINES, P. J., and THOMPSON, J., concur.



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